Human Rights for Precarious Workers: 
The Legislative Precariousness of Domestic Labour

Virginia Mantouvalou (UCL)
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1. 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 characterised 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 influential and effective mechanism of protection, the third part of the article 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’. 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? The fourth part of the paper considers how human rights practice in Europe sheds light on the interplay between human rights and labour 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.

* Co-director of the Institute for Human Rights and Lecturer in Law, University College London (UCL). An earlier version was presented at the international symposium on ‘Precarious Work and Human Rights’, at the Minerva Centre for Human Rights, Hebrew University, Jerusalem, in May 2011. I am grateful to Einat Albin for her feedback, and to all participants for very helpful comments and discussions. Many thanks are also due to Bridget Anderson, Mark Bell, Hugh Collins, George Letsas and Bernard Ryan for comments on an earlier version. I have benefited from discussions with Nicola Countouris, Colm O’Cinneide and John Tasioulas. Finally, I am very grateful to Karan Singh for excellent research assistance.

as to the normative foundation of the two bodies of rules (human rights and labour rights). These involve their shared theoretical justifications: dignity as non-commodification, liberty and distributive justice. At a normative level, then, this final part of the article finds that the human rights and labour rights of precarious workers have much in common. The employment relationship is commonly described as one of submission and subordination, and labour 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.

2. 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’. As early as 1961, Sylos Labini was writing that those who are precariously employed ‘have no definite prospects of improvement: that not only their economic, but also their social, position is unstable and insecure’. Later on 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’. 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. These have mainly emerged in the context of the effort to make the labour 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. Part-time workers, casual workers, agency workers, home workers and temporary workers, are all non-standard workers, as she explains, who are in a precarious position for this reason.

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

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7 See Fredman, as above, p 177.
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). On this analysis, 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-time job of a factory worker, which would not be characterised 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 categorised 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, non-nationals’ 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 non-standard 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. Hence human rights law, which encapsulates human rights as moral standards, does not capture all non-standard 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 (like agricultural workers, for instance). This term ought to be distinguished from the more general ‘employment status’ precariousness, which excludes those that are not employees or workers from labour law more generally. Legislative precariousness is specific to the particularities of the domestic labour relation, and is due to the fact that the law in many jurisdictions treats domestic labour as ‘work like no other’, which gives rise to several problems, such as the question who falls in the category of a domestic worker (and should therefore be excluded or specifically regulated). Legislative precariousness leads to special vulnerability. It places domestic

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10 See Countouris, as above n 6.
workers at disadvantage if compared to other groups of workers, and re-enforces the relationship of submission and subordination that typically characterises the employment relation. This piece 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.

**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’). This type of work is gendered, and most of the times done by women. 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-life, which resulted, among other things, in an increasing need for domestic labour.

The positive effect of paid domestic work for contemporary society cannot be underestimated. With changes happening in the labour 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 setting, domestic work is vital for the sustainability and function of the economy outside the household. Domestic labour can also be a desirable job for workers who are not highly skilled and might not easily be employable in other occupations. Domestic workers are not always low-skilled, though; they are sometimes educated, and migrate to work in the domestic labour sector in order to send income back to their home countries. Like other jobs, domestic work can be fulfilling: the worker develops 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 labour 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 characterises 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 characterised by a difference of status that the latter is

domestic labour as ‘work like no other’, based on the historical evolution of the regulation of domestic labour in the UK, see E Albin, ‘From Domestic Servant to Domestic Worker’, in Fudge, McCrystal, Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation*, Hart, 2012, p 231.


often keen to maintain.\textsuperscript{16} 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 labour 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 labour also has a stigma attached to it, because it is the poorest and neediest that are occupied in it, and due to the tasks required from the workers, which are gendered and undervalued.\textsuperscript{17} 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 analyses them.\textsuperscript{18} In terms of numbers, a recent report by Kalayaan, an NGO working on migrant domestic workers in the UK, for instance, 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% 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’ 24 hours, 48% worked at least 16 hours a day, 56% received a weekly salary of £50 or less.\textsuperscript{19}

The regulation of domestic labour 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 labour suffers from a strong element of legislative precariousness. The sections that follow present several examples of the legislative precariousness of domestic workers.

\textbf{Working conditions and union representation}

In many jurisdictions, labour legislation on working conditions and union representation differentiates the treatment of domestic workers from other workers, a point that has frequently been highlighted.\textsuperscript{20} In the UK, 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.\textsuperscript{21} Jurisprudence of courts tends to extend the exclusions.\textsuperscript{22} These examples are by no means exceptional.


\textsuperscript{17} M Nussbaum, \textit{Sex and Social Justice}, OUP, 1999, p 282.

\textsuperscript{18} See, for example, Anderson, \textit{Doing the Dirty Work}?

\textsuperscript{19} M Lalani, \textit{Ending the Abuse}, Kalayaan, 2011, p 10.


\textsuperscript{21} See Ι Ληξουρίωτης, Ατομικές Συμβάσεις Εργασίας, Νομική Βιβλιοθήκη, 2005, σελ. 204-206; ΙΔ Κουκιάδης, Εργατικό Δίκαιο – Ατομικές Εργασιακές Σχέσεις, Εκδόσεις Σάκκουλα, 1995, σελ. 251 επ.

\textsuperscript{22} As above.
Working time exclusions are found in almost half of the countries surveyed in a Report of the ILO, while at the same time the majority of the countries examined (83 per cent) do not impose a limit on night work of domestic workers.

On minimum wage, the UK 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. Canada, Finland, Japan and Switzerland offer further examples of such exclusion from minimum wage legislation. 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. Similar exclusions are to be found in other countries too.

Legislative precariousness is created not only through the exclusion of domestic workers from labour standards, but also through their exemption from, or special regulation of, monitoring through labour 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. Section 51 of the UK 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. 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. A particularly interesting example that reflects the complexities of domestic workers’ unionisation is the legislation of Ontario, Canada. Domestic workers’ trade union rights were at some point recognised in legislation, only to be repealed a few years later by a conservative government. This provides another

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23 See ILO Report ‘Decent Work for Domestic Workers’, p 49.
27 There is critical academic literature on this. See, for instance, Μ Τσολάκη, “Συλλογικές Συμβάσεις Εργασίας – Διαιτητικές Αποφάσεις”, Ι Ληξουριώτης (επ), Εφαρμογές Εργατικού Δικαίου, Νομική Βιβλιοθήκη, 2008, σελ 778-779; Δ Ζερδελής, Εργατικό Λικαίο – Ατομικές Εργασιακές Σχέσεις, 2006, τόμος 1, σελ 55.
29 I am grateful to Bernard Ryan for this suggestion.
30 As above, Ramirez-Machado, n 20, p 63.
32 Ontario, s 3(a) of the Labour Relations Act 1995. See the discussion in J Fudge, ‘Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario’, in Not One of
example of the legislative precariousness of domestic workers, which is very worrying, given that collective organisation could have crucial effects for workers who are migrant and work in a household, such as a feeling of membership and inclusion in society.\textsuperscript{33}

**Immigration law**

Apart from labour 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 UK in the past, for example, 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.\textsuperscript{34} This situation changed, with immigration rules allowing domestic workers to change employers (but not work sector). In 2012, the UK Government decided to reintroduce a very restrictive visa regime,\textsuperscript{35} which does not permit domestic workers to change employer, despite strong opposition voiced by domestic workers and organisations, such as Kalayaan and Anti-Slavery International. Similar programmes exist in other jurisdictions, like Canada.\textsuperscript{36}

Domestic workers are sometimes irregular residents in a country.\textsuperscript{37} They may have entered with no visa, or on a tourist visa or temporary work 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 UK, 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),\textsuperscript{38} where a migrant domestic worker, Ms Hounga, who overstayed her tourist visa and kept on working as a domestic worker, was seriously ill-treated and eventually dismissed. Because of her irregular status in the UK, 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’.\textsuperscript{39} On the view of the tribunal, Ms Hounga never had the right to work, so she could not claim loss of earnings because of her discriminatory

\textsuperscript{35} See Immigration Rules, 159A-159H, available at \url{http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part5/}.
\textsuperscript{38} Allen (Nee Aboyade-Cole) v Hounga, [2011] UKEAT 0326_10_3103.
\textsuperscript{39} As above, para 37.
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.40  

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,41 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 UK, the relevant legislation is the State Immunity Act 1978 that incorporates these immunities and makes special mention of employment disputes.42 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 so as to exclude all offences committed in private life.43 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.44  

Martin Salter MP emphasized the gravity of this problem of diplomatic immunity in UK 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.’45  

In a 2012 UK case, it was 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’.46 Similar developments in the US may reflect a change in the approach of the courts to the diplomatic immunity defence in cases of abuse of domestic workers.47  

**European Union**

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41 For an example see BBC, Radio 4 programme on ‘Domestic Servitude’, 22 June 2010. See also the campaign on this issue of the NGO Kalayaan, at [http://www.kalayaan.org.uk/](http://www.kalayaan.org.uk/).
43 Council of Europe, Parliamentary Assembly, Recommendation 1523(2001), para 10(iv).
45 Martin Salter MP, Hansard, 17 Mar 2010: Column 251WH.
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’. As a result, all health and 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 categorised as ‘workers’. The European Parliament has specifically addressed domestic labour in the non-binding Resolution ‘Regulating Domestic Work’ of 30 November 2000, highlighting the problems associated with migrant domestic labour. This resolution recommends, among other issues, the creation of specialised reception centres 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 labour, and in 2012 the European Commission published a strategy for 2012-2016 to eradicate trafficking in human beings.

International Labour Organisation

Several ILO instruments, finally, permit the exclusion of domestic workers from their scope through the so-called ‘flexibility clauses’. 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 organisations 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.

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. This was a landmark moment for domestic workers whose participation in the paid labour market and specific working conditions were recognised for the first time in a holistic manner within a legal document. The Convention contains detailed provisions on the rights 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 (Article 1). This results in the exclusion of those who come on a casual basis (something which is specifically mentioned in sub-section 3 of that Article). The Convention protects the Fundamental Principles and Rights at Work of the ILO (Article 22, ILO Constitution).

51 See the ILO Report ‘Decent Work for Domestic Workers’, p 20 ff.
52 For analysis of the Convention, see Albin, Mantouvalou, above n 13.
3). It recognises that domestic work is undervalued and invisible and is mainly carried out by women and girls (Preamble). 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 (Article 6), enjoy minimum wage coverage (Article 11) and be paid directly in cash (Article 12). Requirement is made that Members set a minimum age for domestic workers (Article 4), ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence (Article 5), has the right to a safe and healthy work environment (Article 13), and of social security protection, especially in respect to maternity (Article 14).

Does the Convention address the legislative precariousness of domestic workers? Article 2 of the Convention states that it ‘applies to all domestic workers’. Yet it also permits exclusions: it, first, 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’. 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 have different rationales. They attempt to maintain low costs for employers, for example, and avoid complexities in monitoring domestic labour by the state, which could also be costly. The exclusions may be explained, but can they be justified under human rights law?

3. European human rights and precarious work

This section 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 organisation with 47 member states that serves as a paradigm for other national and supranational orders. The EU has also addressed aspects of the problem presented here, and will be discussed later on. 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 organisations 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, this organisation separated civil, political, economic and social rights in two documents: the


55 The EU has 27 Member States. Each of these is also a Member of the Council of Europe.

56 See, for instance, the division between the United Nations 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.
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) that issues periodic reports and also hears collective complaints. Both documents have dealt with the rights of workers, and as it emerges below, the legislative precariousness of domestic workers.

The EU adopted the EU Charter of Fundamental Rights (EUCFR) only in 2000 as a non-binding document. In 2009 it incorporated it in the Treaty of Lisbon, giving it a legally binding status. 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, addressed the legislative precariousness of domestic workers in a Report that will be discussed later on.

i. European Social Charter

The ESC protects rights such as the right to work (article 1), the right to just conditions of work (article 2), the right to organise (article 5), the right to benefit from social welfare services (article 14), the right of migrant workers to protection and assistance (article 19). 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 labour 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 recognises a right to submit complaints for non-compliance against a contracting state to some international organisations of employers and employees, national representative organisations of employers and employees and some international non-governmental organisations.

The ECSR has in several circumstances examined the compatibility of legislation that excludes domestic labour from its scope with the provisions of the Charter. It has ruled, for instance, that the complete exclusion of domestic workers from health and safety legislation is contrary to article 3 of the Charter that protects health and safety at

57 Formerly known as Committee of Independent Experts.
59 For an introductory account on human rights in the EU, see G De Burca, P Craig, EU Law, 5th edition, 2011, Chapter 11.
60 See Regulation 168/2007 establishing the Fundamental Rights Agency.
61 An overview of the case law of the ESC is to be found in I Samuel, Fundamental Social Rights: Case Law of the European Social Charter, 2nd edition, Council of Europe Publishing, 2002. It is also significant to note that the Committee is dealing specifically with questions of domestic labour in its next cycle of supervision.
work. The Committee has examined the problem of the exclusion of private homes from labour inspections, and said that "for the purposes of Article 3§2, inspectors must be authorised 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." 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. 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 15 to be employed in domestic work breaches the Charter.

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. 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. 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. Article 8 also provides for post-natal time off, and the Committee has examined state compliance with respect to domestic workers.

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 'it 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'. There is a duty to actively promote the rights of migrant workers, and this is particularly evident in the 6th paragraph of the provision, which states that they have to 'facilitate as far as possible the reunion of the

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63 Conclusions XVI-2, p 137, Czech Republic.
64 See, for instance, Conclusions XIV-2, p 227, Finland; and p 772, UK.
65 See Conclusions XV-2, pp 291-292, Italy.
66 See Conclusions XIII-4, pp 93-94, Austria, and pp 83, 96-97 Italy; and Conclusions XV-2, p 345, Netherlands.
67 Conclusions XIII-4, pp 86-87; Conclusions XV-2, p 346-347.
68 Conclusions XIII-2, p 213; Conclusions XIII-4, p 83. The same was said with respect to Spanish and Austrian legislation permitting dismissal of domestic workers during pregnancy: Conclusions XV-2, p 253, Spain; Conclusions III, p 49, Austria; Conclusions XIII-4, pp 93-94, Austria.
69 Conclusions XIII-4, p 101, France; p 103, Netherlands; Conclusions XV-2, pp 299-300 Italy. 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.
70 Conclusions I, p 81.
family of a foreign worker’.\textsuperscript{71} The UK has repeatedly been criticised for the treatment of domestic workers on the basis of this provision.\textsuperscript{72}

The ECSR has questioned and criticised 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.

‘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:

‘persons 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 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’\textsuperscript{73}

The ECSR has attempted to address the shortcoming of the personal scope of the ESC in the collective complaint \textit{International Federation of Human Rights Leagues (FIDH) v France.}\textsuperscript{74} 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.\textsuperscript{75}

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

\textsuperscript{71} As above.
\textsuperscript{72} Conclusions III, p 97. See also Conclusions IX-1, p 110 and Conclusions X-1, p 152.
\textsuperscript{73} Gibney, as above n 1, p 2.
\textsuperscript{74} \textit{International Federation of Human Rights Leagues (FIDH) v France}, Complaint No 14/2003, Decision of 8 September 2004.
\textsuperscript{75} \textit{Defence for Children International (DCI) v Netherlands}, Complaint No 47/2008, Decision of 20 October 2009.
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?

ii. ECHR

The ECHR protects civil and political rights, such as the right to privacy (article 8), and two labour rights: the right to form and join a trade union (article 11) and the prohibition of slavery, servitude, forced and compulsory labour (article 4). Is it relevant to precarious domestic workers and (the most precarious among them) precarious residents? Unlike the ESC, the rights of the Convention are recognised to everyone within Contracting States’ jurisdiction (article 1), so the status of someone as a lawful or unlawful resident does not affect the applicability of the guarantees.

‘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 labour), Siliadin v France. 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”’. 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.’ She was almost never free to leave the house, nor did she have any free time. Even though she 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 criminalise private conduct that is classified as falling in the scope of article 4. Lack of criminal legislation penalising grave labour exploitation of a migrant domestic worker, in other words, is incompatible with the ECHR.


77 Siliadin, para 123.

78 Siliadin, para 126.
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 UK criminalising ‘modern slavery’. It was also discussed in the context of the drafting of the ILO Convention on Domestic Workers, and in other documents too.

*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*. 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 artiste 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’. *Rantseva* received a temporary work and residence permit, and worked at a cabaret for 3 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).

The Court examined whether human trafficking for sexual exploitation is covered by the Convention. On this issue, it ruled that ‘trafficking 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 […].’

The Court was satisfied that the ban on labour exploitation, which constitutes the principle underlying article 4, covers human trafficking too, even though such behaviour could not have been envisaged by the drafters of the provision in the late 1940s.

Having reaffirmed that the Convention imposes positive obligations, the Court ruled that

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80 ILO Report, paras 22 and 226.
83 *Rantsev*, para 113.
84 *Rantsev*, para 281.
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 co-operate with authorities of other states concerned in the investigation of acts that took place in their territories.  

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 artiste visa scheme rendered the individuals vulnerable to traffickers, as both the Council of Europe Human Rights Commissioner and the Cypriot Ombudsman had stressed. 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.

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 characterised 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. 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 labour. The prohibition of slavery in international law is a rule of jus cogens, which is ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’. 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 criticised for holding that activities performed in an official capacity by a former Minister are

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86 Rantsev, paras 283-289.
87 Rantsev, paras 89, 91, 94, 100.
88 Pending cases on trafficking and forced labour are the following: Elízabeth Kawogo v United Kingdom, App No 56921/09; 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; and Ljiljana Sazhikovna Milanova and Others v Italy and Bulgaria, App No 40020/03.
covered.\textsuperscript{91} The ECtHR has examined issues of breach of \textit{jus cogens} in \textit{Al-Adsani} \textsuperscript{92}, where the majority upheld state immunity, but several Judges dissented strongly and convincingly, arguing that breach of \textit{jus cogens} rules cannot be covered by immunity.\textsuperscript{93} The argument that diplomats who ill-treat domestic workers cannot enjoy immunity, because 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.

**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 Hounga, who was abused and dismissed, UK 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 labour 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,\textsuperscript{94} and has also recognised that irregular migrants have rights under the ECHR.\textsuperscript{95} The suggestion that irregular migrants do not have a right to work might, therefore, be questioned under article 8. Similarly, the facts of the \textit{Allen v Hounga} 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.\textsuperscript{96} The landmark Advisory Opinion of the Inter-American Court of Human Rights Rights ‘Juridical Condition and Rights of the Undocumented Migrants’\textsuperscript{97} could be of use on this matter, as well the FRA Report that is discussed in the following section. The IACtHR ruled that the exclusion of undocumented migrants from labour rights breached international principles of equality before the law and non-discrimination, which it recognised as norms of \textit{jus cogens}. The Court emphasised that it would not be lawful to deny labour 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 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.’\textsuperscript{98}


\textsuperscript{92} \textit{Al-Adsani v United Kingdom}, App No 35763, Grand Chamber Judgment of 21 November 2001.

\textsuperscript{93} See the Joint Dissenting Opinion issued by Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic.

\textsuperscript{94} \textit{Sidabras and Dziautas v Lithuania}, App Nos 55480/00 and 59330/00, Judgment of 27 July 2004.

\textsuperscript{95} \textit{Hirst Jamms v Italy}, App No 27765/09, Judgment of 23 February 2012.


\textsuperscript{98} Paras 133-134.
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’.\(^{99}\) By using this interpretive method, which can also be understood in the context of discussions on cross-fertilization and dialogue,\(^{100}\) monitoring bodies of civil, political, economic and social rights documents integrate them, and refer to each others’ 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’.\(^{101}\)

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 labour under article 2 of the ESC also covers domestic slavery.\(^ {102}\) This judgment was also mentioned in the Committee’s Conclusions on the UK that examined the compatibility with the Charter of the exclusion of domestic workers from health and safety inspections.\(^{103}\) 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.

**iii. EUCFR**

The above section 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’.\(^ {104}\) 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 labour inspections.\(^ {105}\) 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

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101 See the landmark Airey v Ireland, App No 6289/73, Judgment of 9 October 1979.
103 Conclusions XIX–2, 2009, p 487, United Kingdom.
104 FRA Report, p 3.
105 FRA Report, p 30.
their employer, when these are foreseen for migrants on an irregular situation.\textsuperscript{106} 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.\textsuperscript{107}

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

4. Human rights and labour rights

In the early sections of this paper 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 section explores these, and draws some more general conclusions on the human rights of precarious domestic workers.

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. Labour 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.\textsuperscript{108} 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.\textsuperscript{109} 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 criminalise private conduct, as was seen in Siliadin, to investigate allegations of abuse by private actors and take positive operational measures

\textsuperscript{106} As above, p 33.
\textsuperscript{107} As above, pp 35-36.
\textsuperscript{108} See Anderson, \textit{Doing the Dirty Work?}, pp 4-5.
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 rights law can, in fact, bring to the light workers that have

historically been kept in the shadows of the labour market, in the privacy of the

employers’ homes.

**Three approaches**

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 labour rights. It is sometimes said that the two bodies of rules have

little in common. Labour 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 labour rights. It cannot, therefore, be
used to advance their interests.\(^{110}\) I have argued in detail elsewhere that the answer to the

question whether labour rights are human rights, which we find in academic scholarship,

reflects in fact three different approaches.\(^{111}\) First, there is a positivistic approach,

according to which a group of rights are human rights insofar as certain treaties or

Constitutions recognise them as such. The question whether labour rights are human

rights is uncomplicated on this approach, which we mainly find in international law

literature.\(^{112}\) A response to it comes through a survey of human rights law. If labour

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) labour 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 labour rights as human

rights. This is the most common way in which labour law scholars analyse the problem in

question. If strategies are, as a matter of social fact, successful, the question is answered

in the affirmative; if not, scepticism is expressed. The roots of the instrumental approach

lie in the Marxist tradition.\(^{113}\) 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.’\(^{114}\)

Scholars adopting this approach examine which labour rights are human rights according
to the relevant documents, and assess how institutions and civil society organisations fare


in protecting them, so as to find ‘whether labour rights really are promoted under the rubric, or within the framework, of human rights’. Following this analysis, the character of labour rights as human rights is endorsed if either state and international institutions, like courts, or civil society organisations, like trade unions and NGOs, 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 labour 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 labour rights as human rights produces positive outcomes for domestic workers.

Finally, the third approach to the question whether labour rights are human rights is a normative one. It examines what a human right is, and assesses, given this definition, whether certain labour 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. This section 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 labour 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. 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.

Dignity as non-commodification

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. 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. Dignity is not a subjective value. It is not about what each person feels she should have. It is an objective value that refers to people’s 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’ is similarly founded on the value of dignity that underlies human rights treaties. The worker sells her labour to the

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118 For further analysis, see Mantouvalou, ‘Are Labour Rights Human Rights?’, as above n 111.
121 ILO, Declaration of Philadelphia, art I(a).
employer, and the idea underlying labour law is that labour 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. The danger of commodification of labour, namely treating labour 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 non-commodification is under distinct threat, because the domestic worker does not only sell her labour 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.

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 UK parliamentary debates in discussions involving domestic 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’.

It was earlier said that because of the intimacy of the domestic labour relationship, domestic workers are sometimes presented as members of the family where they are employed. Their labour is, therefore, not viewed as a commodity in the sense that other jobs are. From this perspective, it may be said that domestic labour must be commodified, so as to recognise these workers’ important contribution to the labour market. Like other workers, though, the labour 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 law developments, and particularly the ECHR cases and the FRA Report, which did not tie labour rights to the status of a regular migrant, but tied them instead to that of a human being.

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. Yet there are better accounts of freedom, which recognise that people are not free, if the options open to them are very limited and unappealing. Human rights law is founded on a rich account of freedom that values choice, and the case law of courts often recognises positive state duties that increase choice. Labour 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

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123 Collins, as above, p 3.
124 Anderson, Doing the Dirty Work?, p 113. See more generally the discussion on p 112 ff.
125 Martin Salter MP, Hansard, 17 March 2010, Column 258WH.
126 See the analysis in Anderson, Doing the Dirty Work?, Chapter 9.
that is offered to them by a particular employer at a given time. Labour legislation recognises 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 offers and negotiate more favourable terms), and has as its aim to set rules to improve choice.\textsuperscript{129}

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 recognise 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 labour.

**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 fulfilment ought to be given priority when the state allocates resources.\textsuperscript{130} 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 re-distributive 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.

Labour 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.\textsuperscript{131} This is evident, for example, in legislation on minimum wage.\textsuperscript{132}

The legislative precariousness of migrant domestic workers, who are often excluded from labour protective legislation, has significant distributive 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, labour laws lead to unfair distribution.\textsuperscript{133} Shamir uses Doeringer’s and Piore’s dual labour market theory, which talks about a primary labour 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 labour market ‘that is characterized by “low wages and fringe benefits, poor working conditions, high labor turnover, little chance of advancement, and often


\textsuperscript{131} Collins, *Employment Law*, above n 122, p 12 ff.


arbitrary, capricious supervision”.

The exclusion of domestic workers from protective rules creates unfair advantage for the employers, as she argues. Domestic labour is made affordable, in order to enable employers to participate in the primary labour market, at the expense of the domestic workers who earn little and remain excluded from labour rights, being in this way part of the secondary labour 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 labour market does not remain unquestioned. It is challenged and can be found incompatible with fundamental human rights principles.

5. Conclusion

Aspects of labour and human rights law are about the distribution of wealth and, more indirectly, the distribution of power. 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. Monitoring bodies of 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 labour 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 labour rights and human rights should guide national and supranational legislative bodies in this process.

136 See the argument in Mantouvalou, ‘In Support of Legalisation’, as above n 130, p 85.