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The house as a workplace: challenging the speciality of domestic work in labour law

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Abstract

This thesis explores the contemporary legal treatment of domestic workers from a labour law perspective, shedding light on the role that labour law can play in either shaping or combatting the vulnerability of domestic workers.

Drawing on insights from interdisciplinary literature, the thesis aims to shine a spotlight on an invisible and hitherto rather underexplored topic within labour law scholarship. After illustrating the significance of domestic workers in the contemporary globalised economy, the thesis focuses on the characteristics contributing to sustaining and entrenching the speciality of domestic work in contemporary labour law scholarship, i.e., its place in the private household and its association with traditionally gendered (and racialised) activities, which have been used to justify the exclusion of domestic workers from many labour law provisions.

Against this background, the thesis contends that labour law can, on the contrary, play a role in proactively mitigating the vulnerability of domestic workers, as demonstrated by the historic adoption of the ILO Domestic Workers Convention, 2011 (No. 189), which reclaimed domestic work as 'Work Like Any Other, Work Like No Other'. Likewise, the thesis argues that there has been a small yet significant shift in the EU policy approach towards domestic workers, which can represent a promising avenue to challenge exclusions within national labour law regimes.

Finally, the thesis reflects on the implications of the debate on domestic work for the broader discussion of the re-conceptualisation of the boundaries of labour law in a post-industrial and post-pandemic world.

KEY WORDS:

domestic worker – care work – gender and work – atypical work – EU labour law – feminist legal method

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List of Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EES	European Employment Strategy
EESC	European Economic and Social Committee
EPSR	European Pillar of Social Rights
EU	European Union
ILO	International Labour Organisation
LTC	Long-Term Care
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OSH	Occupational Safety and Health
PHS	Personal and Household Services
SER	Standard Employment Relationship
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
WLB	Work-Life Balance
WTD	Working Time Directive (Directive 2003/88/EC)

Introduction

The house as a workplace

With the outbreak of the COVID-19 pandemic in Spring 2020, and the extensive lockdowns and social distancing measures enforced to limit the spread of the virus, an unprecedent number of workers found themselves working from home. According to ILO estimates, one in five workers globally worked from home during the pandemic,[1] and it appears likely that the exponential growth in teleworking will persist well beyond the end of the pandemic.[2]

The surge in telework brought about a number of regulatory challenges for labour lawyers, regarding working time, occupational safety and health, and work-life balance, to mention only a few. As a result, over recent months, the regulatory implications of the surge in teleworking have dominated scholarly debate.

At a time when a great deal of attention is being paid to the growing number of workers who resorted to work from home due to the outbreak of the COVID-19 pandemic, the focus of this thesis is instead on workers who have always worked 'at home', albeit in the homes of their employers: domestic workers.

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[1] ILO, 'Working from Home: Estimating the Worldwide Potential' (2020) ILO Policy Brief <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/briefingnote/wcms_743447.pdf> accessed 22 January 2021.

[2] Joint Research Centre, 'Telework in the EU before and after the COVID-19: Where We Were, Where We Head To' (Joint Research Network 2020) Science for Policy Brief <https://ec.europa.eu/jrc/sites/default/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf> accessed 21 January 2021.

Domestic work and labour law

This thesis explores the position of domestic workers in labour law.

The category of domestic workers encompasses a variety of occupations, ranging from cleaners, baby-sitters and other home-care providers, to include gardeners, private guards and drivers. What all of these workers have in common is that they provide their services in or for the private house of their employers, unlike the industrial workplace model on which labour law is based. Due to this divergence from the standard employment relationship, and because of the under-valuation of an occupation that is associated with the unpaid care work traditionally performed by women, domestic work is considered a 'special' work relationship that is unfit to be fully covered by a protective labour framework.

This 'speciality' entails numerous detrimental consequences for the working conditions of domestic workers. For example, in many legal frameworks, domestic workers are exempted from basic regulations on normal working hours and daily rest periods and are thus frequently obliged to work long or highly unpredictable hours. Moreover, in most legal frameworks domestic workers are not covered under the legislation on individual dismissal, making them extremely vulnerable to the sudden termination of their employment. It is also extremely common that domestic workers are not covered by occupational health and safety legislation, including protection from harassment, due to the perceived safety of the private household and the unsuitability of burdening the private employer. Finally, the fact that domestic work is carried out in the private household makes domestic workers invisible to labour inspections and contributes to placing them in the informal economy, out of the reach of labour law. In other words, the sector is characterised by substantial deficits in decent work, defined as 'the absence of sufficient employment opportunities, inadequate social protection, the denial of rights at work and shortcomings in social dialogue.'[3]

[3] International Labour Conference, *Reducing the Decent Work Deficit: A Global Challenge ; Report of the Director-General* (ILO 2001).

As such, domestic workers are considered to belong to one of the most vulnerable categories of workers. Not only are they excluded from basic labour protection, but their vulnerability is also exacerbated by the preponderance in the domestic workforce of women at the intersection of various axes of inequality, such as migrant women and women in racial minorities or historically disadvantaged communities.

Against this background, this thesis focuses on the legal treatment of domestic workers from a labour law perspective, paying specific attention to the role played by the 'speciality' of domestic work within labour law theory. In particular, the thesis seeks to analyse the contribution of labour law in both constructing and addressing the speciality. In other words, the main research questions guiding the analysis are: *What are the features that characterise domestic work as special within labour law theory? What are the regulatory approaches adopted to address the specific features of domestic work? And to what extent do they contribute to promoting decent work in the sector?* In other words, *how does labour law interact with the perceived speciality of domestic work?*

Hence, the thesis explores some of the regulatory approaches adopted to address and regulate domestic work as a special working relationship, paying specific attention to the most recent labour law initiatives at the international and European level, such as the landmark ILO Domestic Workers Convention, 2011 (No. 189), and the initiatives taken at EU level in the wake of the proclamation of the European Pillar of Social Rights.

Ultimately, the thesis aims to reveal the assumptions constructing and shaping the 'speciality' of domestic work within labour law, and to assess the potential role that labour law can play in combatting the difficult working conditions experienced by domestic workers.

Aims and scope

Domestic work has long been neglected in labour law at the national level, let alone at the EU level. In Western labour scholarship, domestic work is considered a retain of the past which was supposed to disappear by the second half of the twentieth

century. But this assumption has largely proved wrong: over recent decades, domestic work has regained significance with the rise in the global demand for paid care services, stimulated by the necessity for many families to cope with the growing difficulties of combining paid work with family responsibilities.

The global surge in domestic work has thus highlighted the need to address the 'legal' vulnerability of domestic work and to consider the regulatory approaches that could be taken to improve working condition in the sector and ensure decent work for domestic workers.

Against this background, the main rationale behind this research project is to reintroduce domestic work into current labour law discussions, providing visibility to domestic work as a form of employment. Through the exploration of the position of domestic workers within labour law, and in particular within EU labour law, this thesis aims to reclaim domestic work as subject of labour regulation, and to put domestic workers at the centre of labour discussion.

This thesis builds on the assumption that labour law plays, and can exert, a substantial role in either reinforcing or combatting the 'legal vulnerability' of domestic workers. I am fully aware of the limitations of focussing on international and EU labour law in (relative) isolation; the law, in itself, cannot promote a landmark change in the working conditions of domestic workers without the simultaneous transformation of the broader economic and political context. This is particular true in the EU context, in which EU employment policy and discourse have played a comparable role to EU employment law in informing national regulatory approaches.[4] However, a full investigation of the influence of EU migration policies, employment strategies and discourse on domestic workers lies beyond the scope of this thesis.

Yet, the research acknowledges that the contemporary phenomenon of domestic work is so deeply related to transnational and intra-regional labour migration and globalisation that any regulatory solution developed at the national level may be

[4] Nicola Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective' (2012) 34 Comparative labor law & policy journal 21.

partial. As such, the thesis adopts a specific focus on the international and regional, i.e., European, regulatory level.

The focus on the European Union legal framework is also due to the fact that the thesis also seeks to contribute to the ongoing important discussion within EU labour scholarship on unpaid care work and its interface with paid work.[5] My research interest on domestic workers specifically emerged from my previous research on the EU Work-Life Balance legislative framework, in which I expressed some concerns over the neglect of low-paid and precarious workers and concerns about the combination of paid work and unpaid responsibilities.[6] Whereas the issue of Work-Life Balance has been gaining growing importance in the EU policy discussion, limited attention has been devoted to workers in the care economy.[7] Domestic workers are rarely considered in the broader debate on Work-Life Balance, despite the fact that they are essential to meet the growing care needs of families, enabling other workers (mostly, working women) to outsource part of their care responsibilities and achieve a work-life balance.[8] Indeed, not to include domestic workers in the discussion is to forget that

> 'The employment of the paid domestic worker is one of the means by which some women are able to adopt the masculinised employment patterns that now characterise the work histories of so many European female workers, and

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[5] See Eugenia Caracciolo di Torella and Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge 2020); Miguel de la Corte-Rodríguez, *EU Law on Maternity and Other Child-Related Leaves: Impact on Gender Equality* (Wolters Kluwer 2019); Sarah de Groof (ed), *Work-Life Balance in the Modern Workplace: Interdisciplinary Perspectives from Work-Family Research, Law and Policy* (Wolters Kluwer 2017); Ania Zbyszewska, *Gendering European Working Time Regime: The Working Time Directive and the Case of Poland.* (Cambridge University Press 2016); Nicole Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011); Eugenia Caracciolo di Torella and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan UK 2010); Jane Lewis, *Work-Family Balance, Gender and Policy* (Edward Elg, 2009).

[6] Elisa Chieregato, 'A Work–Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158' (2020) 36 International Journal of Comparative Labour Law and Industrial Relations.

[7] Some recent contributions on the topic have been offered by Lydia Hayes, *Stories of Care: A Labour of Law: Gender and Class at Work* (Palgrave Macmillan 2017) (focusing on the working conditions of social carers in the UK) ; Silvia Borelli, *Who Cares? Il Lavoro Nell'ambito Dei Servizi Di Cura Alla Persona* (Jovene 2020) (analysing working conditions of domestic workers in Italy).

[8] See, e.g. Adelle Blackett, 'Introduction: Regulating Decent Work for Domestic Workers' (2011) 23 Canadian Journal of Women and the Law 1; Sandra Fredman, 'Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers' in Catherine Costello and Mark Freedland (eds), *Migrants at Work* (OUP 2014). (underlying the market-enabling function played by domestic workers).

> migrant domestic workers are increasingly taking on the privatised responsibilities of the welfare state.'[9]

To overlook the poor working conditions and the decent work deficit experienced daily by domestic workers, almost entirely female migrant workers, is also in stark contrast to the promotion of equal opportunities which guides the EU framework on Work-Life Balance.[10] Indeed, domestic work represents a major form of employment for many women, as it is a job-intensive sector that is expected to grow significantly in the coming years (and is unlikely to be disrupted by the increased relevance of automation, AI and robotics).[11] As such, to overlook domestic workers brings about the paradoxical risk of deepening intra-gender inequalities between women working in the traditional workplace, who may employ paid domestic workers, and those women who are employed as domestic workers, the latter being exposed to multiple forms of disadvantage ranging from low wages, long and unpredictable working hours, vulnerability to abuse and harassment, and precarious working conditions. Indeed, it would be over-simplistic to consider care work as a universal female experience, as the common burden of all women, without taking into consideration huge divisions in race, class and citizenship status that differently shape the experience of care work of women who can outsource part of their caring responsibilities, and those of the subaltern women, who migrate to undertake paid care work.[12]

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[9] Bridget Anderson, *Doing the Dirty Work?: The Global Politics of Domestic Labour* (Palgrave Macmillan 2000) 5.

[10] Work-Life Balance policies emerged, and were developed, as part of the EU broader equal opportunities agenda, and became one of the priority tools for implementing the principle of equality between men and women in the labour market. See, e.g. Communication from the European Commission, *A Roadmap for Equality Between Women and Men*, 2006–2010, COM(2006) 92 final. In particular, the recently adopted Directive (EU) 2019/1158 on Work Life Balance for working parents and carers specifically aims to foster gender equality by 'promoting the participation of women in the labour market, the equal sharing of caring responsibilities between men and women, and the closing of the gender gaps in earnings and pay.' (Recital no. 6).

[11] Ai-jen Poo and Palak Shah, 'Opinion | The Future of Work Isn't What People Think It Is' *The New York Times* (24 June 2020) <https://www.nytimes.com/2020/06/24/opinion/sunday/coronavirus-health-workers-nurses.html> accessed 28 March 2021., reporting data from the US according to which home health and personal care is the sector projected to have the largest percentage increase in employment from 2019 to 2029.

[12] Anderson, *Doing the Dirty Work?* (n 9) 1.

Against this backdrop, by focusing on the position of domestic workers in EU labour law, this thesis also seeks to make an albeit small contribution to the discussion on paid and unpaid care work in order to reframe, and reclaim, Work-Life Balance as part of the broader equality agenda.[13]

Methodology

'Thinking about method is empowering.'[14]

This thesis adopts an interdisciplinary and intersectional feminist approach to investigate the position of domestic work in labour law.[15]

The first methodological approach adopted in this thesis is interdisciplinarity.

Since domestic work has long been invisible in the labour law framework, and the aim of this thesis is indeed to highlight the regulatory challenges and the decent work deficits experienced by domestic workers, in this research I necessarily go beyond a doctrinal approach to law to touch on social reality and focus on the lived experience of domestic workers as women, as migrants, as members of a minority, in other words as workers at the margins.

Indeed, my assumption is that domestic work is profoundly gendered, racialised and classed, and it is necessary to provide for a fuller account of the way in which these intersecting dimensions interact to create and sustain the relations of exploitation and vulnerability characterising the domestic work sector. By only

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[13] In particular, I believe that to focus on domestic workers enables the adoption of an intersectional approach to the Work-Life Balance agenda, which offers a critical lens for exploring intra-group differences within society, thus challenging the assumptions and the excessive generalizations that may underpin research agendas. This is what McCall defines as the intracategorical approach to intersectional analysis. See Leslie McCall, 'The Complexity of Intersectionality' (2005) 30 Signs: Journal of Women in Culture and Society 1771.

[14] Katharine T Barlett, 'Feminist Legal Methods' (1990) 103 Harvard Law Review 829, 831.

[15] I follow and combine the approaches adopted in Zbyszewska (n 5); Inga K Thiemann, 'Beyond Victimhood and Beyond Employment? Exploring Avenues for Labour Law to Empower Women Trafficked into the Sex Industry' (2019) 48 Industrial Law Journal 199., two contributions to which I am highly indebted for the inspiration provided during the definition of my research project and methodology.

focusing on law, it is difficult to grasp or address all these dimensions in their dynamic interaction. On the contrary, they require to be examined and critically discussed within sociological and migration studies, gender studies, feminist political economy, comparative social policy, as well as in social history.[16]

Thus, the thesis combines a number of disciplinary perspectives beyond 'black-letter law', drawing inspiration from the insights of a broad range of non-legal literature. As such, the law is not investigated as a self-referential system, but as an element in the broader social context. In other words, through this approach the thesis aims to study the law and legal institutions from the perspectives of the social sciences, both analysing the law as a constitutive element of social relations and assessing the impact of law in the overall social context.

In this sense, an interdisciplinary approach is particularly compatible with critical legal approaches, which assume and aim to assess the constitutive role of the law

[16] With the sharp increase in the global demand for paid domestic work, there has been a growing interest in understanding and narrating the lived reality of migrant domestic workers. Since the 1990s, particularly within the sociological debate, there has been an outflow of pioneering ethnographic studies scrutinising the phenomenon. Through selected interviews, this scholarship shed light on how domestic workers actually worked and lived, disclosing the taken-for-granted ideas and the gendered expectations about domestic work. Of the many, worth mentioning is Rhacel Parreñas, *Servants of Globalization: Migration and Domestic Work, Second Edition* ([2001], Stanford University Press 2015) (focusing on Filipina immigration in California and Italy); Jacqueline Andall, *Gender, Migration and Domestic Service: The Politics of Black Women in Italy* (Ashgate 2000) (analysed the experiences of Black women in Italy as domestic workers from the 1970s to the 1990s); Pierrette Hondagneu-Sotelo, *Doméstica: Immigrant Workers. Cleaning and Caring in the Shadows of Affluence* (University of California Press 2001) (offering an ethnographic studies of Mexican and Central American working as nannies or cleaners in Los Angeles). See also, for a European perspective, Anderson, *Doing the Dirty Work?* (n 9) (offering a broad overview of racialisation of domestic workers in Europe); Helma Lutz, *The New Maids: Transnational Women and the Care Economy* (Zed Books Ltd 2011) (providing an analysis of Eastern European care workers in Germany). This impressive corpus of ethnographic studies proved extremely useful in identifying the key regulatory challenges experienced by domestic workers. Their insights have been echoed by human rights agencies and non-governmental organisations (NGOs) and mirrored in various ILO and UN publications, which denounced the harsh living and working conditions of domestic work, and the conditions of abuse to which they are so vulnerable. See, e.g. Alessandra Cancedda, *Employment in Household Services* (European Foundation for the Improvement of Living and Working Conditions ed, Office for Official Publications of the European Communities 2001); Maria Gallotti, 'The Gender Dimension of Domestic Work in Western Europe' (ILO 2009) 96; ACTRAV/ITC-ILO, ETUC, and EFFAT, 'Decent Work for Domestic Workers. The State of Labour Rights, Social Protection and Trade Union Initiatives in Europe' (2012) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_218133.pdf> accessed 9 July 2020.

in maintaining society's power structures, i.e., in favouring historically privileged groups and reproducing deep-rooted bias against marginalised groups.[17]

Indeed, the second approach that this research adopts is critical, based on the insights of intersectional feminism.[18]

Feminist legal studies aim to critically expose the gendering process underlying legal norms, that is to say the gender relations and expectations assumed and reproduced by the law. As Joanne Conaghan underlined, the adoption of a feminist method in any legal field is, inevitably, to assume a critical perspective:

> 'Because the subordination of women is historically inscribed in processes of knowledge production and validation, there can be nothing comfortable or reassuring about feminist scholarship; its core object and central concern must be to probe and unsettle disciplinary orthodoxies.'[19]

And indeed, the primary method employed by feminist legal critique is to identify and challenge the elements that in the existing legal scholarship exclude or disadvantage women and members of other marginalised groups. In one of the first contributions to feminist legal methodology, Katharine Barlett called it as the praxis of asking the 'women question': have women been omitted from consideration?[20] And what are the gendered implications of rules and practices which might otherwise appear as natural or objective, in other words 'gender neutral'?

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[17] For an overview of Critical Legal Studies (CLS), cf. Mark G Kelman, *A Guide to Critical Legal Studies* (Harvard University Press 1988); Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task* (Verso Books 2015).

[18] With the term intersectionality, I refer to 'the critical insight that race, class, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but as reciprocally constructing phenomena that in turn shape complex social inequalities.' Patricia Hill Collins, 'Intersectionality's Definitional Dilemmas' (2015) 41 Annual Review of Sociology 1, 2. This theoretical approach was first theorized by Kimberlé Crenshaw, who denounced the inadequacy of anti-discrimination legislation to account for the complex discriminatory experience of Black women. Cf. Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U. Chi. Legal F. 139.

[19] Joanne Conaghan, 'Labour Law and Feminist Method' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 93, 95.

[20] Barlett (n 14) 837. She added that since the omission of women from legal entitlements has long been blatant, the women question was whether these omissions were justified by the different role of women.

In its application to labour law, the feminist approach has been used to rethink and discuss foundational issues such as the personal scope of application of labour law and the ability of the contract of employment to be a gateway to accessing employment protection.[21] In her seminal article on the aims and methods of feminist labour law, Joanne Conaghan specified that feminist labour law developed to combat the conceptualization of 'labour' and 'work relationships' traditionally conceived by labour law scholars, as a way to contest 'the nature, scope and purposes of labour law as a discipline and field of regulation.'[22] Put briefly, the adoption of a feminist method to law, and more specifically labour law, is to consider gender as a category of analytical relevance in the legal enquiry in order to expose the operation of gender bias underlying labour norms and to destabilise the normative and conceptual infrastructure of labour law.[23] However, the focus is never on gender in isolation, as 'the category gender is fundamentally complicated by class, race/ethnicity, and other differences,'[24] in line with intersectional feminism.

In so doing, feminist legal methods that are sensitive to intersectionality value the ability to identify missing points of view. They aim 'to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups,'[25] and to assess how policy choices and priorities may contribute to the subordination and marginalisation of workers at the intersection of various axes of inequalities, and to insist on applying rules that do not perpetuate such multidimensional inequality.

Against this background, this thesis adopts an intersectional feminist lens to analyse how the law contributed to shape the 'speciality' of domestic work and thus to reinforce the vulnerability of domestic workers under the law.

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[21] Among others, see Sandra Fredman and Judy Fudge, 'The Contract of Employment and Gendered Work' [2016] The Contract of Employment 231; Sandra Fredman and Judy Fudge, '"The Legal Construction of Personal Work Relations" and Gender' (2013) 7 Jerusalem Revue of Legal Studies 112.
[22] Conaghan, 'Labour Law and Feminist Method' (n 19) 4–5.
[23] Conaghan, 'Labour Law and Feminist Method' (n 19).
[24] Joan Acker, 'Inequality Regimes: Gender, Class, and Race in Organizations' (2006) 20 Gender & Society 441, 442.
[25] Barlett (n 14) 836.

This critical method is used to disclose how the invisibility of domestic work within labour law is not only related to the territorial displacement of work in the private household, but also for the gendered and racialised nature of the activities performed by domestic workers: reproductive work. Reproductive work has long been devalued within labour law because of the expectation that it is a gendered and racialised activity, performed by women for their families (and broader communities) on an unpaid basis. As a consequence, it has long not even been considered 'real work', and has been excluded from some (or all) labour protections. At the same time, the marginalisation of women workers in a feminised sector is magnified by the marginalisation experienced by migrant workers under labour law. As such, domestic work is a particularly complex site of intersectional discrimination,[26] which illuminates and reveals the complexity of the unequal distribution of care and paid work not only between men and women, but also among women, whose experience of care work may be mediated by their experience of race, class, educational background and citizenship status.

Against this background, to assume a methodology informed by intersectional feminism is extremely valuable as it challenges boundaries, to reveal how domestic workers have traditionally been left at the margins of labour law because of their divergence from the 'ideal (white) male worker', and to powerfully challenge their marginalisation, in favour of a more inclusive labour law.

Structure

In order to reply to the research questions, the thesis is structured as follows.

Chapter I focuses on the characteristics of domestic work as a contemporary phenomenon. Drawing on the insights of various contributions on domestic work within the sociological, social policy and political economics

[26] Sandra Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law' (European Union 2016) Report <http://op.europa.eu/en/publication-detail/-/publication/d73a9221-b7c3-40f6-8414-8a48a2157a2f> accessed 18 January 2021; Chieregato (n 6).

literature, the chapter aims to contextualise the resurgence of domestic work within the globalised contemporary economy.

First, a definition of domestic work and domestic workers is provided; second, the chapter describes the size of the phenomenon, and outlines the characteristics of domestic workers within the globalised economy. Phenomena such as the global care chain and the racial division of care work are introduced here. Third, the chapter focuses on the European context to analyse the various reasons that stimulated the demand for domestic work, including the increasing number of women in paid employment, household and demographic changes, the marketisation of care and the unavailability of affordable work-life balance measures, as well as the large supply of migrant workers.

Chapter II presents the characteristics that sustain the construction of domestic work as a special work relationship within contemporary labour law. In order to do so, it first provides a historical reconstruction of domestic servitude and how it developed into the domestic work relationship, analysing how the emergence of the employment contract contributed to constructing the divide between domestic work and other types of work.

It then analyses the speciality by adopting the idea of domestic work as a work 'beyond boundaries', i.e., both disciplinary and territorial boundaries. Domestic work is also shown as disruptive of the disciplinary boundaries between the private and the public sphere, between the market and the family, between productive and non-productive work, between paid employment and unpaid care upon which labour law has traditionally been predicated. As such, it critically analyses the extent to which the persistent 'speciality' of domestic work is shaped by the highly gendered nature of the activities performed and the place of domestic work within the private sphere of the employer's household. On the other side, domestic work is reviewed as a global phenomenon that troubles the territorial boundaries underlying the construction of labour law as a national project. Due to the difficulties of regulating the transnational provision of domestic work within national labour law, the Chapter reviews how the international law of human rights has been used to mitigate the vulnerability of domestic workers; however, it is

argued that this approach contributed to distancing domestic work from the disciplinary field of labour law.

Finally, the Chapter presents the exclusionary approach traditionally adopted to address the speciality of domestic workers.

In contrast, **Chapter III** analyses the different regulatory approach of domestic work adopted by the ILO to counteract the perceived speciality of domestic work and the detrimental consequences of the exclusionary approach.

After briefly presenting the structure and role of the International Labour Organisation (ILO), the Chapter focuses on the adoption of the landmark ILO Convention on Domestic Workers, 2011 (No. 189) and the dual regulatory approach followed by the ILO to both reaffirm equality of treatment of domestic workers with other workers, and to provide specific regulations addressing domestic workers' specific working conditions.

Moreover, the Chapter analyses the ILO regulatory project as a ground-breaking and unprecedented development in the recognition of domestic work as a site of legal regulation, which holds great potential in generating innovative regulatory strategies.

Against this background, **Chapter IV** assesses the position of domestic workers within the European Union (EU) employment system, taking into consideration the evolution of EU labour law in the wake of the proclamation of the European Pillar of Social Rights, which signalled greater attention to filling the gaps in legal protection afforded to non-standard workers.

After presenting the traditional invisibility of domestic workers in EU labour law, this Section analyses the small but significant shift in the policy approach of European Institutions to domestic workers. Although no specific measures have been taken to ensure decent work for domestic workers, the Chapter takes into consideration three trends which are considered relevant to challenging the traditional exclusionary approach: (i) the gradual establishment of a jurisprudential concept of worker in EU employment law, endorsed by the latest Directives adopted in the social policy field; (ii) the adoption of a more 'inclusive' policy approach in the most recent legislative and non-legislative instruments; and (iii) the process of

constitutionalisation of fundamental social rights, which could have a considerable impact in challenging persistent legislative exclusions.

It is acknowledged in this Chapter that these trends represent a promising avenue to challenge the perceived speciality of domestic work and promote equality of treatment for domestic workers; however, the Chapter ultimately argues that this equal treatment approach needs to be supplemented with a regulatory approach based on specific and sectoral regulation for domestic workers, as suggested in the international arena.

Finally, the last Chapter outlines the **conclusions** of the thesis and the significance of the analysis of domestic work in the broader debate on the future of labour law in a post-industrial and post-pandemic world.

A note on terminology

Before proceeding with the analysis, a note on the terminology adopted in this work is required.

Workers performing paid domestic or caring work for (and within) a household have been defined in different ways over the years. In recent years, the term that has become prevalent at the international level is that of 'domestic worker', which 'has the virtue of updating the archaic terms of "maid" and "servant" that clearly implied direct subservience.'[27] This term is also preferred for its emphasis on the fact that domestic work is indeed a form of work, against any risk of de-skilling and belittling the occupation.[28]

Despite this recent development, it is still possible to find other terms referring to the same occupation in EU documents and acts, including domestic 'servants',[29]

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[27] ILO, 'Decent Work for Domestic Workers. Report IV(1)' (ILO 2010) 15 <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf>.

[28] However, it has been argued that the adoption of a different terminology, more suited to the local context or consistent with self-definition of those performing this work, could be preferable. See ILO, 'Decent Work for Domestic Workers' (n 27).

[29] Directive 89/391, Article 3(a); Directive 2008/94, Article 1(3)(a).

workers performing domestic service,[30] persons employed for household work in private households,[31] or more generally workers in the Personal and Household Services (PHS) sector.[32] At the national level, on the other hand, domestic workers are often referred to with different terms, according to the service they provide. In French they are called '*employés de maison'*, '*aides-ménagères*', or '*assistants de vie dépendance'*. In Italian, the terms that have gained formal recognition are '*collaboratrici familiari (colf)*' and '*badanti*'.[33]

Beyond the specific reference to these instruments, in this thesis I uniformly adopt the term domestic worker, pursuant to international labour standards.

Moreover, throughout the thesis I use the feminine pronouns (she/her) to refer to the generality of domestic workers, on the basis that the vast majority of domestic workers are women and that there is a specific gendered dimension in domestic work.

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[30] Directive 94/33, Article 2(2)(a).
[31] European Commission. Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy.* COM(2017) 12 final, 15.
[32] European Commission, Staff Working Document on exploiting the employment potential of personal and household services, SWD (2012) 95 final, 4.
[33] The term, which appeared in the early 2000s in Italian political discourse, has often been disputed due to its offensive connotation. For a broader discussion, see Francesca Degiuli, 'A Job with No Boundaries: Home Eldercare Work in Italy' (2007) 14 European Journal of Women's Studies 193, 206.

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Chapter I

Domestic work: an old occupation in a contemporary globalised economy

1 Introduction

In the second half of the twentieth century, domestic service was considered an obsolete and declining occupation in most developed countries. Yet, just when it seemed domestic service was destined to disappear with the advance of household modernization, technological innovations and social progress, historians and social scientists reported the 'revival' or the 'resurgence' in paid domestic work.[34]

This chapter presents and assesses the renewed significance of domestic work in the contemporary world. Drawing on the insights of social science scholarship and feminist economics literature, as well as gender and migration studies, the chapter reviews the increasingly important role of paid domestic workers, most often women migrant worker from developing countries, to alleviate the crisis of care in

[34] Raffaella Sarti, 'The Globalisation of Domestic Service: An Historical Perspective' in Helma Lutz (ed), *Migration and domestic work: A European perspective on a global theme* (Routledge 2008); Raffaella Sarti, 'Historians, Social Scientists, Servants, and Domestic Workers: Fifty Years of Research on Domestic and Care Work' (2014) 59 International Review of Social History 279. This phenomenon is specific to the Global North: conversely, the number of domestic workers remained stable and steadily increased in developing countries, also due to the stark social (and ethnic) differences, the legacy of colonialism, and the lack of development of a welfare state. See Blackett, 'Introduction' (n 8).

the Global North.[35] The following sections focus on the situation of domestic workers in developed countries, with specific reference to Europe.

2 Definitions of domestic work

2.1 What is domestic work?

Paid domestic work broadly refers to the provision of a wide range of services in private households. It includes activities such as cooking, cleaning, ironing, childminding, caring for persons with disabilities or the elderly, but also gardening, driving a private car, guarding the house, and even taking care of pets. As a consequence, the domestic workforce comprises various occupations, such as maids, cooks, waiters, valets, butlers, laundresses, gardeners, gatekeepers, stable-lads, chauffeurs, caretakers, governesses, babysitters, tutors, secretaries working for a private household, and many others.[36]

Due to these various tasks and occupations, it is difficult to capture and define the domestic workforce. Across the world, national legislations have adopted a variety of definitions of the terms 'domestic work' and 'domestic workers', either on the basis of specific occupational categories, or focusing on the private nature of the employer (the household) or the non-lucrative nature of the work.[37] Against this background, an effort to put forward a unique operationalization of the notion of domestic work was made by the International Labour Organisation (ILO) within the framework of the debate on the adoption of international labour standards for domestic workers in 2010.

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[35] Cfr. Nancy Fraser, *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso Books 2013). The term 'crisis of care' draws upon and develops the concept of 'care deficit' previously coined by Arlie Hochschild. Cfr. Arlie Hochschild, 'The Culture of Politics: Traditional, Postmodern, Cold-Modern, and Warm-Modern Ideals of Care' (1995) 2 Social Politics: International Studies in Gender, State & Society 331.

[36] This list of occupations are enlisted under the International Standard Industrial Classification of All Economic Activities (ISIC), Division 95, 'Activities of private households as employers of domestic staff', quoted in ILO, *Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection* (ILO 2013) 10.

[37] ILO, 'Decent Work for Domestic Workers' (n 27) 28–34.

The definition adopted at the international level does not identify domestic workers on the basis of the tasks performed. In fact, although some workers (i.e., cooks, gardeners, drivers) may actually limit themselves to the provision of specific services, it has been argued that domestic work is characterised by a degree of uncertainty about the tasks to be carried out, often involving a broad and undefined arrange of duties. Moreover, a definition based on the performance of specific tasks would fail to grasp the distinguishing feature of domestic work, since the same task – such as child-minding – is regulated differently, depending on whether it is performed for a private household, or in a private or public educational facility.

Therefore, the ILO proposed and adopted a broad international definition of domestic work. According to the ILO Domestic Workers Convention, 2011 (No. 189), domestic work is defined as the 'work performed in or for a household or households' on an occupational basis. As such, the distinguishing feature of domestic work is that it is performed in a private household and/or for the benefit of a private household. The location of the workplace as a private household is what defines domestic work.

According to the international definition, domestic workers include all workers that perform domestic work in an employment relationship. Hence, people who carry out domestic work occasionally or sporadically and not on an occupational basis, such as young people who do domestic work as part of an international cultural exchange program (so called *au pair* program) are not considered domestic workers.[38] It is not clear whether domestic workers in the informal economy fall within the definition.

The inclusive international definition covers a broad variety of workers in different working arrangements. Indeed, a domestic worker may be employed by a single household or by multiple employers. Moreover, since the concept of employer has not been defined, the category of domestic workers includes both workers employed by one (or many) household(s), as well as those employed by an agency,

[38] It is worth noting that the exclusion of *au pairs* from the range of domestic workers is far from uncontested. Arguably, various studies report that the possible use of au pair programs as a way to circumvent labour regulations. See further below, Chapter 3, §3.1.

including digital platforms, which are gaining importance in the provision of domestic work.[39]

Live-in domestic workers

The category of domestic workers also includes those who are not only working but also residing in the private house of the employer, defined as live-in domestic worker, whereas domestic workers who reside in their private residence are defined as live-out workers.

A live-in working arrangement is indeed a specific feature of the domestic work sector, which represents a direct legacy from domestic servitude. Despite the fact that live-in arrangements were thought destined to disappear in developed countries,[40] it has regained popularity over recent decades, since it enables the domestic worker to be easily and flexibly (if not constantly) available to meet the needs of the employer, and in particular the Long-Term Care (LTC) needs of the ageing population. It is worth noting that, in the context of increasing transnational domestic migration, the live-in arrangements may even be required to meet the restrictive criteria of immigration policies, as will be discussed further below.[41]

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[39] Judy Fudge and Claire Hobden, 'Conceptualizing the Role of Intermediaries in Formalizing Domestic Work' (International Labour Organization 2018) Conditions of Work and Employment Series No. 95; ILO, *Making Decent Work a Reality for Domestic Workers: Progress and Prospects Ten Years after the Adoption of the Domestic Workers Convention, 2011 (No. 189)* (ILO 2021) 46–48; Matias Golman and Uma Rani, *Digital Labour Platforms in the Domestic Work Sector* (ILO forthcoming). Over the last years, an inchoate literature has been developing on the rise of digital platforms in the provision of domestic work. Cf. *inter alia,* Abigail Hunt and Fortunate Machingura, 'A Good Gig? The Rise of on-Demand Domestic Work' (ODI 2016) December; Julia Ticona and Alexandra Mateescu, 'Trusted Strangers: Carework Platforms' Cultural Entrepreneurship in the on-Demand Economy' (2018) 20 New Media & Society 4384; Frances Flanagan, 'Theorising the Gig Economy and Home-Based Service Work' (2019) 61 Journal of Industrial Relations 57; Valerio De Stefano, 'Collective Bargaining of Platform Workers: Domestic Work Leads the Way' (*Regulating for Globalization*, 10 December 2018) <http://regulatingforglobalization.com/2018/12/10/collective-bargaining-of-platform-workers-domestic-work-leads-the-way/?print=print> accessed 3 January 2021.

[40] Sarti, 'The Globalisation of Domestic Service' (n 34).

[41] For the detrimental effects of such requirements in increasing the vulnerability to abuse and exploitation of migrant domestic workers, see further below, Chapter 2, §4.4.

2.2 Domestic work as care work

The terms domestic work and care work are frequently adopted interchangeably in legal scholarship.[42] And indeed, a clear distinction between the two terms is difficult to establish, both from a conceptual and a normative point of view. However, it is useful to clarify these concepts to contextualise the position of domestic workers in the care economy.

Over recent decades, with the growing interest in care work within social science scholarship, there has been a considerable effort to develop sound conceptual and theoretical frameworks to define care work and its economic characteristics.

In early Feminist Economics scholarship, care work was conceptualised as a type of work involving a caring relationship and interdependence between the caregiver and care-recipients.[43] According to Susan Himmelweit, care work is

> 'the provision of personal services to meet those basic physical and mental needs that allow a person to function at a socially determined acceptable level of capability, comfort and safety'.[44]

A similar definition of care work has been offered by Paula England, Michelle Budig and Nancy Folbre, who refer to the 'occupations in which workers are supposed to provide a face-to-face service that develops the human capabilities of the recipient'.[45]

These definition focus on the 'nurturance' and relational aspect of care, and refers to direct personal care activities, such as feeding a baby, teaching young children, nursing the ill and the elderly. Conversely, indirect care activities, such as cleaning,

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[42] Blackett, 'Introduction' (n 8). In the same vein, see Judy Fudge, 'Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada' (2011) 23 Canadian Journal of Women and the Law 235; Guy Mundlak and Hila Shamir, 'Bringing Together or Drifting Apart? Targeting Care Work as "Work Like No Other"' (2011) 23 Canadian Journal of Women and the Law 289.

[43] Among others, see Nancy Folbre, *Who Pays for the Kids? Gender and the Structures of Constraint* (Routledge 1994); S Himmelweit (ed), *Inside the Household: From Labour to Care* (Palgrave Macmillan UK 2000); Susan Himmelweit, 'The Prospects for Caring: Economic Theory and Policy Analysis' (2007) 31 Cambridge Journal of Economics 581; Nancy Folbre, 'Measuring Care: Gender, Empowerment, and the Care Economy' (2006) 7 Journal of Human Development 183.

[44] Himmelweit, 'The Prospects for Caring: Economic Theory and Policy Analysis' (n 43) 581.

[45] Paula England, Michelle Budig and Nancy Folbre, 'Wages of Virtue: The Relative Pay of Care Work' (2002) 49 Social Problems 455, 455.

cooking, and other household work that do not entail personal care are not included in the definition.[46]

However, these definitions encountered some difficulties. Firstly, direct and indirect care activities are usually difficult to separate one from the other, since indirect care activities are nonetheless essential to meet the preconditions for personal care-giving, and in practice they normally overlap.[47] Secondly, the adoption of these definitions would result in the exclusion of domestic work - which usually involves an overlapping of various direct and indirect care activities such as cooking, cleaning and caring[48] - from the care workforce. Thirdly, it has been argued that a theoretical focus on nurturance and direct care would privilege the experiences of some workers to the detriment of large numbers of very low-wage, racialized workers, with the risk of exacerbating existing class-based and racial hierarchies within care work.[49]

As a consequence, development economists and social scientists proposed a broader conceptualisation of care work that also included indirect care. According to Shahra Razavi, care work is

> 'an ambiguous notion stretching from a more pragmatic and practical endeavour of providing physical care, which may to some extent be independent of the relation between the carer and the person cared for, to deeply emotional caring, in which the person doing the caring is inseparable from the care given'.[50]

According to this broader definition, care work includes not only personal, direct care activities but also non-relational, indirect care labour (sometimes referred to

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[46] Mignon Duffy, 'Reproducing Labor Inequalities: Challenges for Feminists Conceptualizing Care at the Intersections of Gender, Race, and Class' (2005) 19 Gender and Society 66.
[47] Shahra Razavi, 'The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options' (UNRISD 2007) Gender and Development Programme Paper 3.
[48] According to Anderson, domestic work involves a wide range of heterogeneous activities that can be summed in terms of three *Cs*: Cooking, Cleaning and Caring. Cfr. Anderson, *Doing the Dirty Work?* (n 9).
[49] Duffy (n 46) 79. founding that white women tended to be concentrated in care requiring public interaction and with an emotional/spiritual dimension, as opposed to more menial "back-room" care occupations.
[50] Razavi (n 47) 8.

as ‘household work’), such as cleaning and cooking. These activities may not require direct contact with members of the household but are nonetheless necessary preconditions for personal caregiving. As such, indirect care work is considered essential and complementary to direct care activities.

The latter approach is now prevalent in the literature and has been adopted by the ILO, which have recently included domestic work within its conceptualisation of the care economy. Indeed, in its comprehensive report on the care economy issued in 2018,[51] the ILO adopted a comprehensive definition of care work covering the entire care spectrum, including both direct, personal, relational care activities and indirect, non-relational care activities (or ‘domestic work’).[52] Following this very broad definition, the ILO definition of the ‘care economy’ significantly includes domestic workers along with all care and non-care workers in education, healthcare and social work, and care workers in other sectors.[53]

The inclusion of domestic work in the care economy has been reaffirmed powerfully in the context of the COVID-19 pandemic. The outbreak of COVID-19 as a public health crisis has highlighted care work as fundamental to the wellbeing of our society as well as to the proper functioning of the economy, and has shone a spotlight on the role of many domestic workers in providing services necessary for the maintenance of households and to meet family care needs. Due to their work providing assistance and personal services to the elderly and to people with disabilities, high-risk groups for COVID-19, domestic workers became visible through their significant contribution to the care economy.[54] Moreover, working at the frontline of the pandemic, they were considered ‘essential workers’, even

[51] ILO, ‘Care Work and Care Jobs for the Future of Decent Work’ (International Labour Organization 2018) Report <http://www.ilo.org/global/publications/books/WCMS_633135/lang--en/index.htm> accessed 2 January 2021.
[52] ibid 6.
[53] ibid 169.
[54] ILO, ‘COVID-19 and Care Workers Providing Home or Institution-Based Care’ (ILO 2020) ILO Sectoral Brief <https://www.ilo.org/sector/Resources/publications/WCMS_758345/lang--en/index.htm>.

though this somewhat symbolic recognition did not result in an improvement in their working conditions or in a broader revaluation of their work.[55]

3 The size and characteristics of the domestic work sector

Domestic workers constitute a substantial part (18 per cent) of the care workforce.[56]

According to the latest ILO estimates for 2019, there are 75.6 million domestic workers over the age of 15 worldwide, representing 2.3 percent of total global employment and 4.5 percent of total female employment.[57]

The distribution of domestic workers varies widely from region to region. The vast majority of domestic workers, amounting to just over half of the global domestic workforce, are employed in Asia and the Pacific area, in particular in China. The second largest share of the global domestic workforce (19.6 per cent) is in South America and the Caribbean. In contrast, only a small percentage of domestic workers worldwide are in Europe (3.6 per cent), amounting to 2.7 million domestic workers in the region.[58]

Data on domestic work are notoriously difficult to capture, and various methodologies have been developed on the basis of existing statistical

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[55] Kritika Pandey, Rhacel Salazar Parreñas and Gianne Sheena Sabio, 'Essential and Expendable: Migrant Domestic Workers and the COVID-19 Pandemic' [2021] American Behavioral Scientist 000276422110003.

[56] ILO, 'Care Work and Care Jobs for the Future of Decent Work' (n 51) 190. Domestic work represents a significant part of the workforce in the Arab States, as well as in many countries in the Global South which are characterized by limited provision of care services. Domestic workers are less significant in high income countries with developed welfare states. However, due to the increasing care deficits, an expanding proportion of care services are provided by domestic workers also in developed welfare states, as will be analysed below, §4.

[57] The data refers to the most recent estimates from the ILO, produced in 2021 and based on pre-pandemic data from 2019. Cf. ILO, *Making Decent Work a Reality for Domestic Workers* (n 39) ch 1. This estimates improve quality and accuracy of the previous estimates produced in 2018, 2015 and 2013. Cf. ILO, 'Care Work and Care Jobs for the Future of Decent Work' (n 51) 168; ILO, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers: Results and Methodology : Special Focus on Migrant Domestic Workers* (ILO 2015); ILO, *Domestic Workers across the World* (n 36).

[58] ILO, *Making Decent Work a Reality for Domestic Workers* (n 39) 17.

classifications to quantify the number of domestic workers across the world.[59] It is worth noting that the current ILO estimates are based on a statistical definition that is narrower than the legal definition of domestic work, as it does not include domestic workers under the age of 15, those who perform domestic work as a secondary job or certain domestic workers employed by public or private domestic service providers.[60] As a consequence, the ILO estimate is likely to underestimate the actual number of domestic workers globally.

Notwithstanding these limitations, it is possible to identify some general statistics and trends in the domestic work sector: the high feminisation rate of the sector and its significance for women's employment (§3.1), the prevalence of migrant workers and the 'racialised' division of care work (§3.2), as well as the largely informal nature of the work in this sector (§3.3).

3.1 Domestic work and women's work

Domestic work has a specific gender dimension.

Domestic work comprises a range of deeply gendered activities, in line with the persisting ideological division between the public sphere of paid employment and the private sphere of reproductive work. Indeed, to perform household activities and provide care, whether on an unpaid basis or in exchange for pay, has been described as a way of 'doing gender'.[61] According to historians, domestic servitude has not always been the prerogative of women; however, this occupation witnessed a strong feminisation during the nineteenth and early twentieth century, in line with the emergence of the family role of the middle-class housewife, whose duties

[59] ILO, *Domestic Workers across the World* (n 36) 9. The ILO adopted a industry-based approach based on the ISIC Division 95 (Activities of private households as employers of domestic staff), which serves as a very close statistical equivalent of the definition of domestic workers used in the ILO Convention no. 189.
[60] ILO, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers* (n 57). Arguably, according to ILO global estimates on child labour, around 6.3 million children aged 5 to 14 were engaged in domestic work in 2012.
[61] Candace West and Don Zimmerman, 'Doing Gender' (1987) 1 Gender & Society 125.

largely overlapped with those of domestic servants,[62] and the consecration of the ideological division between the public sphere of paid employment and the private sphere of domestic activities.[63]

Thus, in continuity with domestic servitude in the past, domestic work today continues to have a strong female component. It has been estimated that 76.2 per cent of all domestic workers globally are women. This share is significantly higher in some regions, reaching 91.1 percent of total domestic workers in Latin America and the Caribbean, and 84.6 percent of all domestic workers in Europe and Central Asia.

Despite the fact that domestic work is highly feminised, the number of male domestic workers is far from negligible, particularly in the Arab States, where almost two-thirds of the total domestic workforce is comprised of men. [64] However, it can be noted that the minority of male domestic workers are usually concentrated in specific occupations in the domestic sector, such as gardeners, drivers or butlers, who do not provide care work in the strict sense. Conversely, women are mostly domestic cleaners and launderers, cooks, childminders, private nurses, elderly carers, or in general domestic workers performing reproductive activities. [65] Whether paid or unpaid, the performance of care work thus remains a gendered activity.

As a result, domestic work is a particularly significant source of employment and income for women, in particular in the Global South. With 57.7 million female domestic workers across the world, it has been estimated that one in every 12 female wage workers worldwide (8.8 per cent) is a domestic worker, but the share increases to more than one in five female wage workers in South America and the Caribbean, or one in three female wage workers in the Arab States.[66]

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[62] Raffaella Sarti, 'Freedom and Citizenship? The Legal Status of Servants and Domestic Workers in a Comparative Perspective (16th – 21st Centuries)' in Suzy Pasleau and Isabelle Schopp (eds), *Proceedings of the Servant Project*, vol III (Éditions de l'Université de Liège, 2005).
[63] On the affirmation of the ideology of the public/private divide, see further below in Chapter 2.
[64] ILO, *Making Decent Work a Reality for Domestic Workers* (n 39) 13.
[65] ibid 14–15.
[66] ibid 12–13.

In the past, whereas middle- and upper-class women were barred from access to paid employment and destined to the role of housewife, paid care work was the main opportunity available to working-class women to earn a wage. They worked as domestic servants, laundresses, cooks, maids, wet nurses and midwifes, and in other occupations in line with the gendered division of labour, which disproportionally allocated caring activities and household responsibilities to women. Nowadays, the performance of paid care work (both within households and in public or private care facilities) is still the main occupation available for women from racialised groups or migrant women, low-skilled women, and in general for women at the intersection of various axes of inequality, who may be restricted in their access to other sectors of the economy due to various labour market barriers, including – inevitably – standard working arrangements due to their own burden of caring responsibilities.[67]

Yet, if on the one hand paid domestic work is essential to guaranteeing many women the ability to earn a wage, paid domestic work is also fundamental in enabling (middle- and higher-class) women to enter and successfully participate in the labour market. Since the large-scale entry of women into the labour market has not been matched by a disruption of gender roles and the redistribution of caring activities between men and women, due to the persistence of the 'male norm' of employment, working women remains nonetheless expected to bear the bulk of household responsibilities on top of their engagement in the paid labour market. Hence, to alleviate the burden of this 'second shift',[68] many working women rely on paid domestic workers to take over some of their caring responsibilities.

In this sense, paid domestic work is a deeply gendered phenomenon, since not only are the majority of domestic workers women but their employers also tend to be women. This raises complex issues of gender equality: on the one side, paid domestic work is regarded as crucial to women's economic empowerment, either

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[67] On the segregation of women in non-standard work, see Leah F Vosko, Martha MacDonald and Iain Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge 2009); Leah F Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford University Press 2011).

[68] Arlie Hochschild and Anne Machung, *The Second Shift: Working Families and the Revolution at Home* ([1989], Penguin 2012).

as a form of employment for many women, or because it enables other women to take up paid employment in the labour market. On the other, however, paid domestic workers are currently among the most vulnerable groups of workers, exposed to multiple forms of disadvantage, including low wages, long and unpredictable working hours, and precarious working conditions.

3.2 Domestic work and global labour migration

Domestic work is closely linked to international labour migration. Indeed, an important share of domestic workers are migrant workers: it is estimated that 11.5 million domestic workers globally are international migrants, representing 17.2 percent of the total domestic workforce.

The share of migrants among domestic workers varies significantly from continent to continent. A very large proportion of migrant domestic workers are in high-income countries, such as the Arab States (27.4 per cent), Northern, Western and Southern Europe (19.2 per cent), and South-Eastern Asia and the Pacific area (19.4 per cent), with some significant gender differences.[69]

It has been argued that the massive prevalence of migrant workers is the main feature that characterises and distinguishes the contemporary form of domestic work from the 'old' phenomenon of domestic servitude. As Raffaella Sarti documented, despite the fact that servant migration was significant even in past centuries,[70] when the supply of domestics, usually ensured through internal migration from the poorest to the richest area of the country, was indeed also

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[69] ILO, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers* (n 57) 20.

[70] Sarti, 'The Globalisation of Domestic Service' (n 34) 80–84. As reported by Sarti, in 1900 Black women made up one third of female domestics in the US, while foreign-born white women were a significant 23 per cent. Over the years, less and less European-born immigrants worked as domestics and were replaced by Afro-American women or other non-white women, so far as that Afro-Americans made up more than 60 per cent of female domestics in 1944. Likewise, similar data reports a growing presence of international migrants among domestic staff in several European countries at the beginning of the Twentieth century, such as Germans in the Netherlands, and Germans, Italians, Belgians and Swiss in France. In Italy, domestic servants were supplied by the sizeable internal migration from the poorest areas (especially from the South) towards the richest ones of the country (the North-West); yet, it is worth noting that this process of internal migration was not devoid of racialization. See, for istance, Jane Schneider, *Italy's 'Southern Question': Orientalism in One Country* (Routledge 1998).

secured through transnational migration from the mother countries to the colonies, the dimension of transnational migration in the contemporary domestic care sector is unprecedented.

Indeed, migrant domestic workers constitute a large portion of total domestic employment, especially in North America, where 70.8 percent of total domestic workers are migrant workers, and in Northern, Western and Southern Europe, where they are 54.6 percent of the total domestic workforce. It is in the Arab States, however, that migrant workers are an extremely high proportion of domestic workers, reaching 82.7 percent, and representing employment for almost one in five migrant workers in the region.[71]

These shares are substantially higher than those of migrant workers in all sectors, highlighting a trend in the segregation of foreign labour in this marginalised sector of the economy.[72] This polarisation is even stronger in the case of female migrant workers, for whom domestic work represents a major (if not the main) source of employment. For many women from the Global South, domestic work has become an entry point to destination country labour markets. In fact, due to the severe deficit of care services in the Global North, and the importance of monetary remittances for the economies of the countries of origin, migration for domestic work is tolerated, if not actively encouraged, by both recipient and originating countries.[73]

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[71] ILO, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers* (n 57) 22.
[72] ILO, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers* (n 57). This report refers to Northern, Western and Southern Europe as a subregion of 28 countries, which goes well beyond the area traditionally referred to as Western Europe, encompassing also the Western Balkans countries and the Baltic republics.
[73] Lutz, *The New Maids* (n 16). For the case of the Philippines, see also Parreñas (n 16) 4 and ff. Anna Romina Guevarra, 'Supermaid: The Racial Branding of Global Filipino Care Labour' in Bridget Anderson and Isabel Shutes (eds), *Migration and Care Labour. Theory, Policy and Politics.* (Palgrave Macmillan 2014).

3.2.1 The development of global care chains

In recent years, a significant strand of literature in social research has been dedicated to migration and domestic work in the globalised economy.[74] In particular, the literature has highlighted the paradoxical consequences of a massive migratory trend sustained by the increasing care needs of families in the Global North, resulting in a considerable care deficit (or 'care drain', a term used to suggest the extraction of emotional care value)[75] in the countries of origin.

Unlike in the past, when domestics were mostly young and unmarried girls who remained in service after marriage, contemporary domestic workers are usually relatively older women with family responsibilities, who leave their children or dependent relatives in their country of origin in order to provide them with more income or greater opportunities.[76] Hence, just as these women migrate to meet other families' care needs, they leave behind their own family and transfer their own caring responsibilities to others, giving rise to the phenomenon of 'global care chains'.

Global care chains are transnational networks of women formed with the aim to provide reproductive work and ensure social reproduction. The term was coined by Arlie Hochschild in 2000 to refer to 'a series of personal links – usually among multiple women - between people across the globe based on the paid or unpaid work of caring'.[77] These chains usually include, a woman or a household in the Global North, who outsources part of the caring responsibilities to a migrant woman employed as a domestic worker. In the migratory process, the migrant woman

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[74] Among many others, *see* Anderson, *Doing the Dirty Work?* (n 9); Parreñas (n 16); Hondagneu-Sotelo (n 16); Helma Lutz, 'At Your Service Madam! The Globalization of Domestic Service' (2002) 70 Feminist review 89; Rosie Cox, *The Servant Problem: Domestic Employment in A Global Economy* (Annotated edizione, Tauris Academic Studies 2006). For a critical reconstruction, *see* Nicola Yeates, 'Global Care Chains: A Critical Introduction' [2005] Global Migration Perspectives 1.

[75] Cf. Arlie Hochschild, 'Love and Gold' in Barbara Ehrenreich and Arlie Hochschild (eds), *Global Women* (Owl 2002) 17. It has been noted, however, that despite physical distance migrant women are still closely involved in the caring of their family, thus giving rise to a process of transnational motherhood. *See* Rhacel Salazar Parreñas, *Children of Global Migration: Transnational Families and Gendered Woes* (Stanford University Press 2005).

[76] Sarti, 'The Globalisation of Domestic Service' (n 34).

[77] Arlie Hochschild, 'Global Care Chains and Emotional Surplus Values' in Anthony Giddens and Will Hutton (eds), *On the edge: living with global capitalism* (Jonathan Cape 2000) 131.

leaves behind her own family, and she may, in turn, employ a (usually lower-class) domestic worker in her country of origin to outsource part of her caring responsibilities to a domestic worker. The latter women resort to relatives (and most often older daughters) to take care of their own families.[78] Hence, all along the global care chain, care work is a gendered activity, albeit experienced differently by different women:

> 'Unequal gender relations in the family represent an underlying dislocation confronted by migrant domestic workers in both ends of the migration process. It is a dislocation they notably share with their female employers'.[79]

While the term 'global care chains' originally emerged with a focus on the 'nanny trade', that is on the transnational provision of childcare work in private households, the concept has developed to comprise more broadly the transnational provision of reproductive labour, to capture the transnational 'outsourcing' of domestic care labour (and the related extraction of emotional labour)[80] from the Global South to the Global North, and from lower income to higher income countries in the same region, as well as from rural to urban areas in the same country, driven by uneven economic development processes in the macroeconomic context of world trade.

The concept has attracted much interest in the migration and gender literature, in particular in the critical work of Nicola Yeates,[81] and has been variously designated within the academic debate as the 'transnational political economy of care',[82] the 'new world domestic order',[83] or the 'international division of reproductive labour'.[84]

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[78] ibid.
[79] Parreñas (n 16) 52.
[80] In opposition to the focus on 'care drain', Rhacel Parreñas focused instead on the maintenance of transnational families across continents. Cf. Parreñas (n 75).
[81] Yeates (n 74).
[82] Fiona Williams, 'Making Connections Across the Transnational Political Economy of Care' in Bridget Anderson and Isabel Shutes (eds), *Migration and Care Labour: Theory, Policy and Politics* (Palgrave Macmillan UK 2014).
[83] Hondagneu-Sotelo (n 16).
[84] Parreñas (n 16).

All these concepts are useful to illuminate the connection between globalisation, the privatisation of social reproduction, and migrant domestic work,[85] and enables to focus on the contribution of the transnational provision of domestic work to reflect, reiterate and exacerbate the global relations of social inequality along ethnic, nationality and class lines.[86]

3.2.2 The racial division of domestic labour

Through the establishment of global care chains and the feminisation of international labour migration, paid domestic work has increasingly been allocated to women of migrant origin.

The outsourcing of care work to 'socially and ethnically other' women is part and parcel of the broader phenomenon of the 'racial division of reproductive work'.[87] The term, coined by Evelyn Nakano Glenn in her landmark contribution, refers to the traditional outsourcing of reproductive work to domestic servants from racial minorities as a form of reproduction of racial identities. As she demonstrated, the racial division of labour emerged not only because working-class women and women from racial minorities could only support the family income by resorting to 'women's work', but also because domestic work was specifically sustained by ideologies of race and social class, which, alongside gender, shaped the normative expectation of who should provide care work. And indeed, a significant strand of literature in the social science has demonstrated that domestic servants were not only hired to alleviate the burden of domestic work for the employing women, but it was also a manifestation of status and racial hierarchy.[88] Referring to the old phenomenon of domestic service, Glenn notes that 'in areas where racial dualism

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[85] Fudge, 'Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction' (n 42) 239.
[86] Yeates (n 74) 3.
[87] Evelyn Nakano Glenn, 'From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Work' (1992) 18 Signs: Journal of Women in Culture and Society 1.
[88] ibid; Anderson, *Doing the Dirty Work?* (n 9). Indeed, according to the cult of 'domesticity', domestic servants were needed to perform the 'dirty work', in order to preserve the purity and cleanliness of the Victorian women. For a broad reconstruction, *see* Phyllis Palmer, *Domesticity and Dirt: Housewives and Domestic Servants in the United States, 1920-1945* (Temple University Press 1989); Glenn (n 87).

prevailed, being served by members of the subordinate group was a prerequisite of membership in the dominant group.'[89]

Nowadays, the resurgence of domestic work has gone well beyond the mere willingness to display status and to reproduce racial/ethnic identities, but has been mainly motivated by the pressing need to meet the increasing care needs of a wide range of households, including in the lower strata of the society.[90] Nonetheless, the provision of domestic work is still structured on race and ethnicity, alongside gender, with migrant women and women drawn from minority ethnic groups predominantly requested to provide care services. On the one hand, given the stigma associated with domestic work and the legacy of servitude, paid domestic work is usually outsourced to subaltern women in order for the female employer to 'differentiate between herself and the type of women who does the dirty work.'[91] On the other hand, the paid domestic work sector constitutes a highly precarious and segmented labour market at the bottom of the occupation hierarchy, due to low salaries, high precarity and poor working conditions. As such, in order to fill in labour shortages without improving working conditions and increasing salaries, there is a general demand for an immigrant and/or marginalized labour force in this sector, a need supported by migration policies at the national level. Migrant women workers, in turn, may have little alternatives to accepting this occupation.[92]

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[89] Glenn (n 87) 9.
[90] This is not to deny that the recruitment of migrant domestic workers still plays an important role in the expression of social relations, including social class and status, and in the very reproduction of these social relations. Anderson, *Doing the Dirty Work?* (n 9); Bridget Anderson, 'Why Madam Has so Many Bathrobes?: Demand for Migrant Workers in the EU' (2001) 92 Tijdschrift voor Economische en Sociale Geografie 18. This is most evident, but not limited, to countries with limited female labour market participation, such as the Arab-Gulf countries. See, Yeates (n 74).
[91] Anderson, 'Why Madam Has so Many Bathrobes?' (n 90).
[92] For a broader account of the relationship between labour market segmentation and international labour migration, see Michael J Piore, *Birds of Passage. Migrant Labor and Industrial Societies* (Cambridge University Press 1979).

3.3 Domestic work and the informal economy

Domestic work is one of the sectors with the highest share of informal employment. The ILO estimates that around 61.4 million of the total domestic workers globally are in informal employment, i.e., more than 80 percent of total domestic workers.[93]

Informality in the sector is related to many factors. Domestic work may not be declared to the relevant authorities by the employer due to economic concerns, perceived administrative complexity, and the belief that domestic work is not 'real work' and is not to be treated as such. Informality in the sector is also fostered by the physical 'invisibility' of domestic work in the isolation of the private and inaccessible sphere of the household. There is a congruence between informal domestic workers and migrant workers in the sector, who may be forced to work in the informal economy because they lack a visa to work legally in the country, and must remain invisible to migration authorities.[94] Finally, it should be noted that in some countries informality may be the only way to do domestic work, particularly in countries where this occupation is still completely excluded from national labour legislation.[95]

Being in informal employment not only limits the ability of domestic workers to access labour rights and results in severe deficits in social protection, but also makes it difficult for labour force surveys to accurately capture the phenomenon.[96] Particularly in developed countries, the official estimates are likely to underestimate the number of domestic workers in the informal economy, most notably undocumented migrants working as domestic workers.

As such, it is difficult to grasp the real size and composition of the sector, and reliable statistical data are often unavailable.

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[93] ILO, *Making Decent Work a Reality for Domestic Workers* (n 39) 17., updating precedent data from ILO, *Formalizing Domestic Work* (International Labour Organization (ILO) 2016) 9.
[94] ILO, *Formalizing Domestic Work* (n 93); ILO, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers* (n 57).
[95] ILO, *Formalizing Domestic Work* (n 93) 16.
[96] Martha Alter Chen, 'Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement, and Regulatory Challenges' (2011) 23 Canadian Journal of Women and the Law 167.

4 The increasing demand of paid domestic work in Europe

Over the past decades, paid domestic work has been a fast-growing phenomenon in most Western countries, stimulated by the growing care needs of the population and the decline in the informal care work that could be provided within the family.

Indeed, the mounting demand for care services is related to a series of interconnecting factors, such as the large-scale entry of women into the paid economy – which has not been matched by the reallocation of caring responsibilities within the households due to the tenacity of gender roles - the shifting structures of households and demographic changes.

These trends have given rise to a 'care deficit',[97] which has been further exacerbated by the simultaneous reduction of public investment in care services in favour of marketised solutions. Against this background, households have increasingly resorted to paid domestic workers, mainly low-cost migrant women, as a solution to meet their increasing care needs, especially the long-term care needs of a rapidly ageing population.

The following subsections analyse these interrelated and mutually reinforcing trends.

4.1 The disruption of the male breadwinner model

4.1.1 From the breadwinner to the Adult Worker model: who cares?

The male-breadwinner family model has long been the norm in Western societies.

According to this family model, men were assumed to take primary responsibility for earning, whereas women were expected to bear all the responsibilities for taking care of the household and the family. This gendered division of labour that rigidly allocated productive work to men and reproductive work to women was not only

[97] Hochschild, 'The Culture of Politics' (n 35).

the result of gender norms and traditions, but was consolidated through the operation of labour law, tax law and welfare policies, which all contributed to discouraging (middle-class) women from entering the labour market, furthering women's economic dependence on the husband's wage.[98] This is excellently exemplified by the institution of the so-called 'family wage', to which men were entitled on the basis that they took care of the needs of their spouses and children. On the contrary, working women were considered to work only for 'pin' money, and were usually expected – if not legally required – to terminate their employment on marriage.[99]

Over the last half century, however, there has been a massive increase in women's employment all across the Global North, which has resulted in the crumbling of the traditional male breadwinner model in favour of the dual-earner family model.

With the expansion of women in higher education, the decline in fertility and the development of anti-discrimination law, a burgeoning number of women have entered paid employment. The promotion of women's employment was considered a milestone in the feminist project towards greater gender equality. At the same time, however, the entrance of women into the labour market was a necessary step to ensure the sustainability of the welfare state. The entrance of women into the labour market was also promoted strongly in order to modernise welfare states and recalibrate public spending. This shift occurred in Western societies and was exemplified with the endorsement of the Adult Worker family model, a social

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[98] In the 1970s and 1980s, a burgeoning feminist scholarship aimed to expose the gendered nature of the welfare state, denouncing the gendered assumptions at the basis of the Beveridge Report. 'Gender relations, embodied in the sexual division of labor, compulsory heterosexuality, discourses and ideologies of citizenship, motherhood, masculinity and femininity, and the like, profoundly shape the character of welfare states.' See Ann Shola Orloff, 'Gender in the Welfare State' (1996) 22 Annual Review of Sociology 51; Jane Lewis, 'Gender and the Development of Welfare Regimes' (1992) 2 Journal of European Social Policy 159; Chiara Saraceno, 'The Ambivalent Familialism of the Italian Welfare State' (1994) 1 Social Politics 60. This scholarship critically stressed that there is a mutually constitutive relationship between gender and the welfare state, meaning that one the one side, social policies reflect, and are shaped by, gender relations; on the other side, the welfare state and its social policies, by regulating "the family", and the relationship between families and the labour market, deeply influence gender relations in the labor market, in the public sphere and in the family itself.

[99] Nancy Fraser, 'After the Family Wage: Gender Equity and the Welfare State' (1994) 22 Political Theory 591; Sandra Fredman, *Women and the Law* (Clarendon Press 1997).

model based on the active participation in the labour market of all adults capable of work, men and women alike.[100]

This trend has been apparent at the European Union level. In EU employment policy, increasing attention has been given to the need to increase women's participation in employment, in particular in Southern European countries, in the general attempt to reshape the work/welfare relationship. This concern has usually been framed as an attempt to promote gender equality in the labour market, as is most apparent in the European Employment Strategy (EES), launched in 1997.[101] The EES was a soft governance strategy aimed at coordinating national employment policies, with a view to promoting growth and employment throughout the EU. Along with employability, entrepreneurship and adaptability, the EES elevated equal opportunities between men and women to the status of an autonomous policy aim. Progress towards gender equality was operationalized in terms of female participation in the labour market, as the 2000 Lisbon Strategy, which set the target of 60 per cent employment rate for women to be achieved by 2010. Likewise, women's under-representation in the labour market remained a compelling policy issue and became a pressing economic necessity in the following EU employment strategy, Europe 2020,[102] whose enforcement was monitored through the European Semester mechanisms. And indeed, within European post-crisis governance, the European Commission country-specific recommendations often cited the aim of increasing women's labour market participation as a means of promoting growth, competitiveness and financial sustainability.[103]

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[100] Jane Lewis, 'Gender and Welfare State Change' (2002) 4 European Societies 331.
[101] European Council, Presidency Conclusions of the Extraordinary European Council Meeting on Employment, Luxembourg, 20-21 November 1997.
[102] European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth: Communication from the Commission* (Publications Office of the European Union 2010).
[103] Maria Karamessini and Jill Rubery, *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge Ltd Published ed, 2014); Jill Rubery, 'Austerity and the Future for Gender Equality in Europe' (2015) 68 ILR Review 715. In the case of Italy, I have argued elsewhere that the country-specific recommendations from 2011 to 2017 included a persistent concern at the low Italian female employment rate, which resulted in a great policy attention towards the development of work-life balance policies. See Elisa Chieregato, 'Gender Equality and the EU's Economic Governance: The Strategic Use of Women's Employment Within Labor Market Reforms in Italy' [2020] Social Politics: International Studies in Gender, State & Society <https://doi.org/10.1093/sp/jxaa012>.

However, from a gender perspective, this change in policy ideas has not been matched by a reallocation of care responsibilities and unpaid care work. Such a push towards a gender-neutral adult worker family model has remained at odds with the tenacious hold of traditional gender roles and cultural codes, which still predominantly consider women as the main party in charge of care work in the household.[104] As such, the promotion of women's participation in the labour market has squeezed the capacity of households to meet family care needs internally.

4.1.2 The development of Work-Life Balance policies

There is a general consensus that the large-scale entry of women into the labour market was not accompanied by a simultaneous reconfiguration of gender roles and attitudes towards care, to the extent that some scholars have talked about an 'incomplete' or of an 'uneven and stalled' revolution in women's employment.[105]

This is confirmed by the latest time use data. According to OECD data, women spend on average twice as much time on unpaid care work than men (4 hours and 23 minutes a day for women, compared to 2 hours and 16 minutes a day for men). Likewise, women spend on average 30 percent less time on paid work than men (3 hours and 37 minutes a day for women, compared to 5 hours and 17 minutes for men), as shown in Table 1 below.[106] In all countries considered, women spend more time in unpaid work than men, and spend less time in paid work than men.

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[104] Jane Lewis and Susanna Giullari, 'The Adult Worker Model Family, Gender Equality and Care: The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach' (2005) 34 Economy and Society 76.
[105] Gøsta Esping-Andersen, *Incomplete Revolution: Adapting to Women's New Roles* (Polity Press 2009). Paula England, 'The Gender Revolution: Uneven and Stalled' (2010) 24 Gender & Society 149.
[106] Oecd Stat, Employment: Time spent in paid and unpaid work, by sex, available at: https://stats.oecd.org/index.aspx?queryid=54757 (last accessed March 26, 2021).

Table 1: Time spent in unpaid and paid work (by gender)

Country	Time spent in unpaid work (minutes per day)		Time spent in paid work (minutes per day)	
	Men	*Women*	*Men*	*Women*
Australia	171.6	311.0	304.1	172.0
Austria	135.3	269.2	364.8	248.8
Belgium	144.2	237.3	273.7	199.2
Canada	148.1	223.7	340.5	268.3
Denmark	186.1	242.8	260.1	194.6
Estonia	160.2	249.2	264.1	244.9
Finland	157.5	235.8	248.6	209.9
France	134.9	224.0	235.1	175.4
Germany	150.4	242.3	289.5	205.5
Greece	95.1	259.5	274.3	184.5
Hungary	162.3	293.8	272.7	202.5
Ireland	127.0	292.5	340.8	194.9
Italy	130.7	306.3	220.8	133.1
Japan	40.8	224.3	451.8	271.5
Korea	49.0	215.0	419.0	269.4
Latvia	129.7	253.3	376.9	288.5
Lithuania	151.6	292.0	354.3	279.3
Luxembourg	121.1	239.6	330.0	238.9
Mexico	131.4	331.3	478.3	236.3
Netherlands	145.4	224.9	284.9	201.4
New Zealand	141.0	264.0	338.0	205.0
Norway	168.5	227.4	277.4	200.0
Poland	158.8	295.0	314.8	203.2
Portugal	96.3	328.2	372.3	231.3
Slovenia	166.5	286.2	299.8	234.2
Spain	145.9	289.1	236.2	166.8
Sweden	171.0	220.2	313.0	275.2
Turkey	67.6	305.0	358.3	133.9
United Kingdom	140.1	248.6	308.6	216.2
United States	165.8	271.3	331.7	247.0
OECD - Average	136.5	263.4	317.8	217.7

Source: Oecd Stat, Employment, 2019

Globally, according to ILO data including non-OECD countries, women perform three-quarters (76.2 per cent) of the total of hours of unpaid care work provided.[107] In brief, disparities in caring responsibilities among men and women continue to persist, with a detrimental effect on women's ability to enter the labour market on an equal basis with their male counterparts.

Encouraged to perform paid work in the labour market, while still expected to perform the bulk of unpaid care work in the household, women have increasingly been required to find a balance between participation in the labour market and caring responsibilities. For this purpose, a wide range of measures have gradually been developed to enable workers to 'reconcile' paid work with 'family' responsibilities.

The term 'reconciliation policies' refers to a wide range of measures in the form of money, services and time accommodating the needs of workers with caring responsibilities. In the framework of labour law, reconciliation policies – over time renamed as 'work-life balance policies' to suggest a more gender-neutral language[108] - refer to a wide range of legislative measures, including protective legislation to ensure the health and safety of pregnant workers and of workers who recently gave birth and to prohibit their dismissal, and legislation recognizing the right for workers with caring responsibilities to take time off while receiving employment protection rights. This is the case of maternity leave, paternity leave, parental leave, childcare leave, and other leave schemes to support disabled, sick or older dependent family members. Moreover, work-life balance measures include

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[107] ILO, 'Care Work and Care Jobs for the Future of Decent Work' (n 51) 53.

[108] The term 'reconciliation policies' has more recently left room to the establishment of the 'work-life balance' (WLB) agenda. Within the literature, the use of the term WLB is far from being undisputed, and alternative terms have been used in the literature: in her book on the topic, social policy scholar Jane Lewis preferred to use the term Work-*Family* Balance, in order to focus on the gendered issue of paid work and unpaid care work, while legal scholars such as Eugenia Caracciolo di Torella and Annick Masselot, as well as Joanne Conaghan and Kerry Rittich, prefer to use 'integration' or 'articulation', instead of the uncritical term 'balance', which is deemed to conceal the tensions and pressures experienced by many workers. Cf. Lewis, *Work-Family Balance, Gender and Policy* (n 5) 15; Caracciolo di Torella and Masselot, *Reconciling Work and Family Life in EU Law and Policy* (n 5); Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press 2005).However, for the purpose of this thesis, I will use the term Work-Life Balance for it has been endorsed by the EU policymakers and has become ubiquitous in everyday language.

flexible working arrangements and other family-friendly policies that ensure working time reductions and variations in normal working patterns to support a balance between work and family responsibilities.

By enabling women to juggle paid work and unpaid caring responsibilities, these policies are considered essential to create effective equality of opportunity and treatment for women entering the labour market. In this vein, the International Labour Organization (ILO) Convention on Workers with Family Responsibilities, 1981 (no. 156),[109] expressly recommended that States adopt all measures

> 'to enable workers with family responsibilities to exercise their right to free choice of employment; and to take account of their needs in terms and conditions of employment and in social security.'[110]

Yet, notwithstanding the gender-neutral formulations, the fact that these policies are mostly taken up by women means that these policies play an active role in reinforcing gendered assumptions about care and paid work. Whilst these policies surely meet women's 'practical' needs of reconciling family responsibilities and paid employment, it has been argued that these policies have not served women's 'strategic' interest in challenging the traditional gender division of labour and overcoming gendered expectations towards (paid) work and care. Caring responsibilities have continued to be overwhelmingly borne by women who, despite entering paid employment, are nonetheless expected to perform the majority of the care work, in a pattern which has been defined as the 'second shift'.[111] As such, the reconciliation of paid employment and caring responsibilities has traditionally been considered the responsibility of women, with segregating effects in the labour market.[112]

Responding to these concerns, some actions were taken at the EU level.

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[109] International Labour Organization, Convention no. 156 on Workers with Family Responsibilities Convention (1981).
[110] *Ibid*, Article 5.
[111] Hochschild and Machung (n 68).
[112] Judy Fudge and Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing 2006); Sandra Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10 International Journal of Law in Context 442; Lewis, *Work-Family Balance, Gender and Policy* (n 5).

First, reconciliation policies were gradually renamed and reframed under the 'Work-*life* Balance' agenda**.** This linguistic shift from family to 'life' was meant to promote a gender-neutral language, to overcome the initial focus on women with small children and to include numerous aspects of life other than care, such as community life, training and education, leisure and personal care, and other activities.[113]

Secondly, policymakers have increasingly been concerned with encouraging men to take up family-related leave and flexible working arrangements, in order to 'de-gender' work-life balance policies. In particular, considerable attention has been paid to designing parental leave schemes and family-related benefits in order to promote a more equal take-up of these measures. Indeed, parental leave schemes have the potential either to reinforce gendered assumptions about care work or to eliminate existing obstacles to a more egalitarian distribution of caring responsibilities between men and women, which is crucial to achieving gender equality.[114] Yet, it has been argued that the 'male norm' of full-time employment, as well as the traditional masculine organizational culture that rests on the assumption that workers are unencumbered by care responsibilities and should be able to devote themselves fully to the workplace, still deter men from using the permits and flexible arrangements they are entitled to.[115]

Against this background, the recently adopted Work-Life Balance Directive (EU) 2019/1158 specifically acknowledges that the 'current Union legal framework

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[113] Suzan Lewis, Richenda Gambles and Rhona Rapoport, 'The Constraints of a "Work–Life Balance" Approach: An International Perspective' (2007) 18 The International Journal of Human Resource Management 360, 360; Groof (n 5).

[114] For a broader perspective, see Caracciolo di Torella and Masselot, *Reconciling Work and Family Life in EU Law and Policy* (n 5); Eugenia Caracciolo di Torella, 'Men in the Work/Family Reconciliation Discourse: The Swallows That Did Not Make a Summer?' (2015) 37 Journal of Social Welfare and Family Law 334; Fredman, 'Reversing Roles: Bringing Men into the Frame' (n 112); Laura Calafà (ed), *Paternità e Lavoro* (Il Mulino 2007).

[115] Among the abundant strand of literature in sociology focusing on the determinants of fathers' constraints to greater involvement in the household, *see* Linda Haas and C Philip Hwang, '"It's About Time!": Company Support for Fathers' Entitlement to Reduced Work Hours in Sweden' (2016) 23 Social Politics 142; Linda Haas, 'Parental Leave and Gender Equality: Lessons from the European Union' (2003) 20 Review of Policy Research 89; Barbara Hobson and S Fahlen, 'Competing Scenarios for European Fathers: Applying Sen's Capabilities and Agency Framework to Work–Family Balance' (2009) 624 The ANNALS of the American Academy of Political and Social Science 214.

provides limited incentives for men to assume an equal share of caring responsibilities' and that the 'lack of paid paternity and parental leave in many Member States contributes to the low take-up of leave by fathers.'[116] As such, the Directive introduces some measures specifically targeted to men, in order to promote their involvement in caring activities and to challenge the various factors that prevent men from taking parental leave. In particular, the notable introduction of the right to ten days of paid paternity leave aims to challenge deep-rooted gender assumptions about care and to encourage men to participate in childcare and use their parental rights.

Yet, there are still many constraints that limit men's entitlement to work-life balance measures, pulling us away from the objective of a more equitable redistribution of unpaid care work among men and women.[117]

4.1.3 The incomplete revolution of women's employment and the development of a new gender arrangement

In the absence of the even participation of men in unpaid care work, and with women increasingly engaged in paid employment, many scholarship contributions have underlined the extent to which the responsibility to meet the care needs of families has increasingly been transferred down to other women, most often migrant women or women from racialised backgrounds. This trend has been renamed as a transnational transfer of gender constraints, in which

> 'In both sending and receiving countries, most women have not achieved a gender-egalitarian division of household work; instead, they have used their race and/or class privilege to transfer their reproductive labor with responsibilities to less privileged women.'[118]

[116] Directive (EU) 2019/1158, Recital no. 11.
[117] For a broad analysis of the Directive, cf. Chieregato (n 6).
[118] Parreñas (n 16) 29.

According to this thesis, strongly sustained by scholars in globalisation studies,[119] advancement in gender equality in the Global North must be reconsidered, for the possibility for (middle-class) women to succeed in the labour market is not the result of a radical challenge to gender roles and the even reallocation of paid work and unpaid care, but on the contrary depends on care work being transferred to other women who perform paid domestic work.

Without an equitable redistribution of caring responsibilities from women to men, and – as analysed below - from families to the state, it is women from the Global South who take on 'the cast-off domestic roles of middle- and high-income women in the First World—roles that have been previously rejected, of course, by men'.[120] Care work is thus outsourced by women to (ethnically and socially) other women down the care chain, according to what Marianne Friese has called a new gender arrangement.[121]

4.2 Demographic and household change

This tension has been further exacerbated by the increasing caring demands of an ageing population and the dissolution of the traditional family network of informal care.

Over the past decades, as a consequence of low fertility rates and the increase in life expectancy, countries in the Global North have been undergoing a process of profound demographic change. The number of people aged 65 and over is increasing steeply. Nowadays, one in 5 people in Europe is aged 65 or older, and 5.8 percent of the overall population is aged 80 or older.[122]

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[119] Cf, among others, Anderson, *Doing the Dirty Work?* (n 9) 5; Parreñas (n 16) 29; Barbara Ehrenreich and Arlie Russell Hochschild (eds), *Global Woman: Nannies, Maids, and Sex Workers in the New Economy* (Metropolitan Books/Holt and Company 2004) 11 ff.; Lutz, *The New Maids* (n 16) 10. For a broader critique of 'white' feminist campaigns and the lack of alliances between women in trade unions and migrant domestic workers in the Italian context, see Andall (n 16); Beatrice Busi (ed), *Separate in Casa: Lavoratrici Domestiche, Femministe e Sindacaliste: Una Mancata Alleanza* (Ediesse 2020). For a broader discussion of these contributions, see below, §

[120] Ehrenreich and Hochschild (n 119) 13.

[121] Friese 1996, quoted in Lutz, *The New Maids* (n 16) 10.

[122]

Hence, the overall population in the Global North is ageing. The European Union has one of the highest old-age dependency ratios (34.1 per cent), i.e., the ratio of persons aged 65 and over and persons aged between 15 and 64, and is expected to increase steeply in the years to come.

In fact, the share and the number of older people are expected to increase exponentially in the coming decades. By 2070, it is projected that 13.2 per cent of the population in Europe will be aged 80 years or older, and the old-age dependency ratio is projected to reach 59 percent. In other words, there will be one person aged 65 or over every two people of working age.[123]

The ageing of the population represents an enormous challenge to the financial sustainability of welfare states. On the one hand, the increase in the old-age dependency ratio puts pressure on pension systems and, on the other, the ageing of the population is more likely to increase the demand for formal and informal care, as the older population is more likely to suffer from illness and disability and to become dependent on long-term care. Long-Term Care (LTC) is defined as

> 'a range of services and assistance for people who, as a result of mental and/or physical frailty and/or disability over an extended period of time, depend on help with daily living activities and/or are in need of some permanent nursing care.'[124]

According to the latest data in the EU Green Paper on Ageing, the number of people in the EU potentially in need of long-term care is expected to increase from 19.5 million (in 2016) to 30.5 million in 2050.[125]

A significant share of long-term care has usually been provided within the family, through the provision of informal care by relatives or acquaintances. However, this demographic change has been accompanied by a trend in lower fertility rates, a change in the size and composition of families and the loss of stability in families,

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[123] 'Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations' (European Commission 2021) COM(2021) 50 final.
[124] Social Protection Committee and European Commission, *Adequate Social Protection for Long-Term Care Needs in an Ageing Society* (Publications Office of the European Union 2014) 11.
[125] 'Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations' (n 123) 16.

as evident from the enormous increase in divorces and the dissolution of large, extended families and community networks.

These demographic and social changes have the potential to reduce the amount of informal care provided within the family. Indeed, whereas much informal care was previously performed by older (female) family members, the prevalence of nuclear and single-headed households reduces the ability of families to meet childcare and elderly care needs internally, weakening their role as a welfare provider. This has been extremely significant in Southern European countries, generally clustered together for their strong 'familialism', that is, the traditional reliance 'on a gendered and intergenerationally structured family solidarity' for the provision of care services. [126]

Moreover, reliance on informal care provided within the family is hampered by the lack of work-life balance enabling workers with significant long-term care responsibilities to provide care. Indeed, the development of work-life balance policies has usually neglected the fact that many workers need to meet the long-term care needs of their dependent relatives, as is apparent in the overall EU work-life balance legislative framework. [127] Whereas the new Work-Life Balance Directive 2019/1158 is very much concerned with working parents, there is only one provision providing for a right to take time off from work in order to perform care work other than for childcare. Article 4 of the Directive introduces the right for every worker to a 'carer's leave', that is an unpaid leave of five days per year 'to provide personal care or support to a relative (…) who is in need of significant care or support for a serious medical reason'. [128] Yet, despite its symbolic significance, it has been argued that this measure is too limited to enable men and

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[126] Chiara Saraceno, 'Varieties of Familialism: Comparing Four Southern European and East Asian Welfare Regimes' (2016) 26 Journal of European Social Policy 314, 315. More broadly on the Southern European (or Mediterranean) welfare regime, see Maurizio Ferrera, 'The "Southern Model" of Welfare in Social Europe' (1996) 6 Journal of European Social Policy 17.
[127] Caracciolo di Torella and Masselot, *Caring Responsibilities in European Law and Policy* (n 5) ch 3. The necessity to extend Work-Life Balance discussion to informal long-term care has been specifically discussed by Christina Hießl, 'Caring for Balance? Legal Approaches to Those Who Struggle to Juggle Work and Adult Care' (2020) 36 International Journal of Comparative Labour Law and Industrial Relations 107.
[128] Directive 2019/1158, Article 4.

women with caring responsibilities to reconcile long-term care responsibilities with paid work.[129]

4.3 The marketisation of care and the increasing reliance on migrant carers

4.3.1 Care policies in times of 'permanent austerity' and the rise of DIY welfare

The disappearance of large families and community networks, combined with the significant increase in female employment, has reduced the capacities of families to provide welfare, generating a new range of problems and dilemmas related to the provision of care and domestic work. The emergence of these New Social Risks, defined as 'the risks that people now face in the course of their lives as a result of the economic and social changes associated with the transition to a post-industrial society,'[130] has fostered the attention of policymakers to the provision of care services. And indeed, over the past decades, a number of countries have extended coverage and invested significant resources in developing childcare and long-term services. Indeed, the increased attention to care policies is part of the broader process of modernisation of welfare states and the recalibration of public spending, which has been redirected from investment on measures to ensure income maintenance (such as pensions and unemployment benefits) to measures to enhance employment and provide care services.

Attention to the promotion of formal care services has also been paid in the European context. The development of early childcare education and care services was the focus of the Barcelona European Council as early as 2002,[131] where the Council set the target for providing childcare to at least 33 percent of pre-school

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[129] Eugenia Caracciolo di Torella, 'One More Step along the Way: The 2019 Work Life Balance Directive' [2020] Revue de Droit Comparé du Travail et de la Sécurité Sociale 70, 77.
[130] Peter Taylor-Gooby (ed), *New Risks, New Welfare: The Transformation of the European Welfare State* (Oxford University Press 2004) 2–3. See also Giuliano Bonoli, 'The Politics of the New Social Policies: Providing Coverage against New Social Risks in Mature Welfare States' (2005) 33 Policy & Politics 431.
[131] European Council, Presidency Conclusions of the Barcelona European Council, Barcelona, 15-16 March 2002.

age children as a crucial step in increasing employment for women, enabling working parents to strike a work-life balance and fostering sustainable and inclusive growth in Europe. More recently, attention has also been paid to the development of long-term care services. The European Pillar of Social Rights, proclaimed in 2017, included among its core principles the right of children, people with disabilities and elderly to access affordable, quality childcare and long-term care (LTC) services.[132] In particular, Principle no. 18 prioritises long-term home care.

For a long time, the LTC sector has relied heavily on the provision of informal care provided most often by family members, such as the spouse or children of the care-dependent person. However, the ageing of the population, the changes in the composition of households, and the growing participation of women in the labour market has called for the development of accessible, adequate and high-quality formal care services in the LTC sector.

The development of formal care services, in particular in the LTC sector, raises a series of considerable challenges for welfare states, including, most notably, financial sustainability.[133] As a labour-intensive sector, the provision of care is an area characterised by the rising cost of labour unmatched by an increase in productivity, as explained by the 'cost disease' theory of Baumol.[134] Increased public expenditure on the development of care policies has exerted considerable pressure on public finance, and projections show that it is likely to increase sharply

[132] European Pillar of Social Rights, Artt. 11, 18.
[133] Slavina Spasova and others, *Challenges in Long-Term Care in Europe A Study of National Policies* (2018).
[134] William Baumol and William G Bowen, *Performing Arts, The Economic Dilemma: A Study of Problems Common to Theater, Opera, Music, and Dance* (MIT Press 1966). For the implication of Baumol's cost disease theory to the care sector, see Susan Himmelweit and Ania Plomien, 'Feminist Perspectives on Care: Theory, Practice and Policy' in Mary Evans and others (eds), *The SAGE Handbook of Feminist Theory* (Sage Publications 2014) 449.

in the near future.[135] However, this is at odds with the imperative to curb public spending, a feature of this era of 'permanent austerity'.[136]

Against this background, in recent decades, a series of strategies has been devised to reduce the increasing costs of developing the formal care sector. The main trend has been toward the 'marketisation' of care, i.e., the growing reliance on markets and market mechanisms to deliver care services[137] over the other institutions involved in the provision of care.[138]

The arguments for marketisation were based mainly on empowering care recipients in choosing the preferred care service and/or provider, making them a 'customer', improving the quality of services, and – above all - cutting costs through market competition, according to the logic of New Public Management.[139] As a result, however, this general shift towards the marketisation of care services brought about a departure from the public provision of care services, towards the provision of cash-for-care transfers or tax rebates to enable care recipients to buy their own care services in the market.[140]

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[135] According to the latest data from the European Social Policy Network (ESPN), 'it is expected that LTC spending will be high on many countries' agendas, as projections show that public LTC expenditure in the EU is to increase from 1.6% to 2.7% of GDP, i.e., an increase of almost 70%'. Cf. Spasova and others (n 133) 8.

[136] The term has been famously coined by Paul Pierson, 'Coping With Permanent Austerity Welfare State Restructuring in Affluent Democracies' in Paul Pierson (ed), *The New Politics of the Welfare State* (Oxford University Press 2001).

[137] C Ungerson, 'Social Politics and the Commodification of Care' (1997) 4 Social Politics: International Studies in Gender, State & Society 362; Deborah Brennan and others, 'The Marketisation of Care: Rationales and Consequences in Nordic and Liberal Care Regimes' (2012) 22 Journal of European Social Policy 377; Fiona Williams, 'Converging Variations in Migrant Care Work in Europe'. According to Brennan et al, the term marketisation 'refer to government measures that authorise, support or enforce the introduction of markets, the creation of relationships between buyers and sellers and the use of market mechanisms to allocate care'. See Brennan and others 379.

[138] According to Shahra Razavi, the institutions involved in the provision of care may be conceptualized in a 'care diamond', encompassing the family/household, markets, the public sector and the not-for profit sector that would include voluntary and community provision. Cf. Razavi (n 47) 20.

[139] For an overview, see Per Lægreid, 'New Public Management', *Oxford Research Encyclopedia of Politics* (Oxford University Press 2017).

[140] Clare Ungerson and S Yeandle (eds), *Cash for Care in Developed Welfare States* (Palgrave Macmillan UK 2007); Emmanuele Pavolini and Costanzo Ranci, 'Restructuring the Welfare State: Reforms in Long-Term Care in Western European Countries' (2008) 18 Journal of European Social Policy 246. Alongside the well-known process of commodification and 'marketisation', there has also been a process defined as the 'corporatisation' of care labour, that is the promotion of the

In a context in which public solutions are not widely available or generally affordable, and with the rise of de-institutionalisation trends and concerns for the quality of care, households had thus to resort to the market to find care services, according to a logic that has been defined as *Do-it-yourself* (DIY) welfare[141], significantly limiting the choices available to the household.

Thus, in a context in which families have increasingly been burdened with the responsibility to find a private solution to their care needs, and in the absence of a more equitable redistribution of care responsibilities between men and women, an easy, flexible and affordable alternative to family care was offered by the increasing ability to outsource care work to a flexible and low-cost workforce of migrant workers.

4.3.2 Migrant care workers as welfare providers

Migrant domestic workers have thus gradually taken on the privatised responsibilities of the welfare state. Alongside other developed countries in Europe there has been more reliance on migrant domestic workers to meet the increasing demand for long-term care services.[142]

Especially in Southern Europe, the combination of low public expenditure on care services, the provision of direct economic support of families for purchasing care services in the market through cash-for-care transfers, as well as the high prevalence of undocumented migration, has resulted in the widespread employment of (mostly migrant) domestic workers.

The large number of undocumented female migrants and the traditional preference for family care resulted in the widespread phenomenon of live-in caregivers, in

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development of for-profit care sectors according to corporate and managerial logics. Cf. Sara R Farris and Sabrina Marchetti, 'From the Commodification to the Corporatization of Care: European Perspectives and Debates' (2017) 24 Social Politics: International Studies in Gender, State & Society 109.

[141] See Borelli (n 7).

[142] Helma Lutz, *Migration and Domestic Work: A European Perspective on a Global Theme* (Ashgate 2008); Francesca Bettio, Annamaria Simonazzi and Paola Villa, 'Change in Care Regimes and Female Migration: The "care Drain" in the Mediterranean' (2006) 16 Journal of European Social Policy 271.

which the migrant worker ensures the provision of care by residing in the private home of the care recipient. Live-in care workers are defined as workers employed to provide care services to elderly or people with disabilities who cohabit with the care recipient in his or her own private residence.

This arrangement, which is particularly prevalent in the provision of Long-Term care, has been renamed the 'migrant in the family' model, to refer to the employment of female migrant workers to ensure that long-term care to elderly relatives is provided.[143]

On the demand side, live-in domestic work arrangements are favoured because they ensure the constant 24-hour presence of a carer in the household and the flexibility to respond to the multiple care needs that can emerge in the home of the care recipient. Moreover, live-in working arrangements make the cost of labour even more affordable through the provision of board and lodging. Live-in domestic work arrangements are also preferred for cultural reasons, given the proximity of this arrangement to the ideal model of family care,[144] as well as the preference of the people in need of care to stay in the home environment, in line with deinstitutionalisation processes.[145]

Likewise, on the supply side, it has been argued that live-in domestic work arrangements may be advantageous for migrant domestic workers as well, since co-residence could solve their problem of board and lodging, in particular for migrants who have just arrived in the country. It also enables migrants to minimise living costs and to save much of their wage, and it offers a safe haven from national (labour) authorities for migrants with irregular migration status.[146]

This 'domestic work' solution is also implicitly favoured by the states, which are able to save considerable amounts in public resources by relying on low-cost

[143] Bettio, Simonazzi and Villa (n 142).
[144] ibid 281.
[145] European Economic and Social Committee, The rights of live-in care workers (rapporteur: Adam Rogalewski, expert Karol Florek). SOC/535, adopted on 21/09/2016.
[146] ibid.

alternative solutions to a wide-ranging reform of the welfare state and a (much needed) investment in long-term care services.[147]

According to a recent report by Eurofound, the provision of LTC through the employment of live-in care workers is relatively common in Southern European welfare states characterised by a strong reliance on the family as the main providers of care, such as Cyprus, Greece, Italy, Malta and Spain. These countries have the highest number of (registered) domestic workers in the region, notably Italy (763,000) and Spain (615,000).[148]

However, it is increasingly common also in countries with more conservative care regimes, such as Austria and Germany.[149] Finally, a small but increasing number of migrant live-in care workers have been registered in countries with a traditionally rather comprehensive system of public care provisions, such as Sweden, usually through the system of *au pairs*.[150]

As such, live-in care workers represent a numerically significant section of the LTC workforce, and their prominence is expected to grow in the wake of the COVID-19 pandemic. In fact, due to the large number of COVID-19 outbreaks in residential long-term care facilities, it is expected that priority will be given to the provision of home-care over institution-based care.[151] Yet, despite the essential role that live-in domestic workers play in the provision of LTC services in many countries, they are nonetheless at the bottom of the labour hierarchy in the sector, and have for a long time been invisible in policy discussions of the LTC sector.[152] The outbreak of the COVID-19 pandemic and its disruptive impact on health workforce governance,

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[147] An interesting study by Costanzo Ranci et al made clear the rather positive attitudes towards migrant care workers in Italy. Costanzo Ranci and others, 'Migrant and/or Care Workers ? Debating the Ethnicization of the Elderly Care Market in Italy and the United Kingdom' (2019) forthcoming Social Politics.
[148] ILO, *Making Decent Work a Reality for Domestic Workers* (n 39) 18.
[149] Eurofound, *Long-Term Care Workforce: Employment and Working Conditions* (Publications Office of the European Union 2020) 26.
[150] C Calleman, 'Cultural Exchange or Cheap Domestic Labour : Constructions Of' in LW Isaksen (ed), *Global care work: gender and migration in Nordic societies* (Nordic Academic Press 2010).
[151] ILO, 'COVID-19 and Care Workers Providing Home or Institution-Based Care' (n 54).
[152] See e.g. Spasova and others (n 133)., were the role of migrant care workers has only been hinted at. A notable exception can be found in the latest report by Eurofound, which paid specific attention to live-in domestic workers as a type of LTC provision. Cf. Eurofound (n 149).

has demonstrated once more the need to include migrant carers more systematically in LTC workforce governance and research.[153]

4.4 The availability of migrant care workers: free movement and the intra-EU care chain

Alongside a truly global care chain, the past years have seen the development of a significant 'regional' care chain in Europe. A general migratory trend emerged from the East to the West, with a large number of Eastern European women migrating to Western, Northern and Southern European countries to be employed as domestic workers.[154]

After the dissolution of the Soviet Union, a large wave of migrants from Eastern European countries migrated to Western Europe for economic reasons; among them, a significant proportion were women workers, either migrating alone or with their families, leaving their country of origins due to high unemployment rates (in particular for the older generation), the inability to find a job and the low earnings in the nursing and care professions. Thus, fueled by the stark income inequalities along the East-West axis, a significant share of Eastern European women migrated to Southern Europe, where the demand for paid domestic work was rising steeply due to the deficiencies (both in accessibility and affordability) of the public provision of care services, and the active encouragement of governments in Southern European countries, which adopted specific quotas for the recruitment of domestic workers or promoted periodic sector-based regularisation.[155]

In this regard, Francesca Bettio, Annamaria Simonazzi and Paola Villa argued for the emergence of a so-called 'care drain' in the Mediterranean.[156] This process was

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[153] Ellen Kuhlmann and others, 'Migrant Carers in Europe in Times of COVID-19: A Call to Action for European Health Workforce Governance and a Public Health Approach' (2020) 30 European Journal of Public Health iv22.
[154] Williams, 'Converging Variations in Migrant Care Work in Europe' (n 137) 364. Lutz, *Migration and Domestic Work: A European Perspective on a Global Theme* (n 142).
[155] Helma Lutz and Ewa Palenga-Möllenbeck, 'Care, Gender and Migration: Towards a Theory of Transnational Domestic Work Migration in Europe' (2011) 19 Journal of Contemporary European Studies 349.
[156] Bettio, Simonazzi and Villa (n 142).

accelerated further with the enlargement of the EU to many Central and Eastern European countries in 2004 and 2007, which significantly facilitated intra-European migration flows along the East-West axis due to the extension of the free movement of workers to the citizens of the new Member States.

One of the founding principles of the EU, the fundamental right of free movement of workers, enshrined in Article 45 TFEU, establishes that every citizen of an EU Member State and his or her family members have the right to move and reside freely in EU territory. Thus, every EU citizen can leave the territory of a Member State to travel to and enter another Member State, and to reside in this Member State without having to fulfil any conditions or formalities.[157] Moreover, every EU citizens has the right to seek employment and to work in another Member State, being treated on an equal footing with nationals of that Member State without any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment.[158]

The accession of Eastern European countries further facilitated the process of care migration to older Member States, in particular to Southern Europe and neighbouring Central European countries, to the extent that Eastern European citizens are now the overwhelming majority of domestic workers in these countries.

Looking at the paradigmatic case of Italy, data from 2019 show that almost two-thirds of migrant domestic workers are from Eastern Europe, representing 40.9 percent of all (registered) domestic workers.[159] In relation to live-in domestic workers providing residential care for the elderly, the share of Eastern European migrant workers is even more striking, as almost half of live-in domestic workers

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[157] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. OJ L 158, 30.4.2004, p. 77–123.

[158] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.OJ L 141, 27.5.2011, p. 1–12.

[159] DOMINA, '2° Rapporto Annuale Sul Lavoro Domestico. Edizione 2020. Analisi, Statistiche, Trend Nazionali e Locali.' (Osservatorio Nazionale DOMINA sul Lavoro Domestico 2020) 66 <https://www.osservatoriolavorodomestico.it/documenti/Rapporto-2020-lavoro-domestico-osservatorio-domina.pdf> accessed 20 April 2021.

providing elderly care are from Eastern European countries,[160] in particular Romania, Ukraine and Moldavia, as well as – more recently – Croatia.

In addition to Southern European countries, Eastern European women care workers are numerous in other countries, most notably Germany and Austria.[161] Although reliable data on the size of the sector are lacking due to the large proportion of undeclared work and the practice of resorting to posted workers in the provision of domestic work, it is estimated that currently one in ten German households employs a caregiver from Eastern Europe, mostly from Poland.[162]

Due to the wage disparities between EU Member States, it is likely that some will continue to rely on migrant live-in carers as providers of LTC services. This however raises multiple issues of long-term sustainability and social equity, since it deprives the countries of origin of the LTC workforce, and involves very poor working conditions for a large number of migrant women, thus exacerbating regional inequalities along gender, racial, class and nationality lines. Against this background, due to the specific intra-European and cross-border characteristics of the provision of domestic work, there has been a call for the adoption of specific regulatory solutions at the European level.[163]

5 Summary

This chapter sets out the background and renewed significance of domestic work in the contemporary economy.

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[160] S Pasquinelli and F Pozzoli, 'Badanti dopo la pandemia: Vent'anni di lavoro privato di cura in Italia' (2021) Quaderno WP3 del progetto "Time to care" <http://www.qualificare.info/upload/RAPPORTO%20BADANTI%202021.pdf>.
[161] Lutz and Palenga-Möllenbeck (n 155).
[162] Adam Rogalewski and Karol Florek, 'The Future of Live-in Care Work in Europe. Report on the EESC Country Visits to the United Kingdom, Germany, Italy and Poland Following up on the EESC Opinion on "The Rights of Live-in Care Workers".' (EESC 2020) 20.(reporting the words of Dr Sylwia Timm, responsible of the Fair Mobility Project of the trade union DGB).
[163] ibid 9.

First, it provides a definition of domestic workers and clarifies their place in the global care economy.

Secondly, it provides some data on the dissemination of domestic workers globally and the characteristics of domestic workers today. It gives an overview of the significance of domestic work for women, as both a significant form of income for some women, and as a strategy to enable other women to enter paid employment; it also appraises the increasing prevalence of transnational migrant workers in the sector and illustrates the phenomenon of global care chains.

Thirdly, it outlines the various factors contributing to the increased demand for domestic work in private households in the Global North, focusing on socio-economic changes in post-industrial societies. Specific attention has been paid to the surge of domestic work in Europe and the essential role played by (intra-EU) migrant domestic workers as welfare providers, in particular in the Long-term Care (LTC) sector.

Finally, the chapter stresses the importance of the paid domestic work sector, due to the essential role domestic workers play (and will increasingly be required to play) in meeting the growing demand for care, and in ensuring the proper functioning of societies and of the globalised economy. Despite this, domestic work remains largely invisible in labour law theorisation, as will be explained in the next Chapter.

Chapter II

Working across boundaries: theorising the 'speciality' of domestic work

1 Introduction

> 'Paid domestic work transgresses a number of boundaries that law both defines and reflects, and it is this transgression, historically, that has made protecting this important activity difficult.'[164]

In labour law, the domestic work relationship has usually been distinguished from other types of employment due to the special location in which domestic work is carried out, i.e., the private space of the employer's family home, a location that decisively characterises this type of work.[165] Because of this 'speciality', labour law scholarship has long tended to highlight the distance of domestic work from other

[164] Fudge, 'Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction' (n 42) 242.
[165] Within international labour standards, domestic work is broadly defined as all the activities performed in or for a private household or households within an employment relationship. Cf. Chapter 1, §2.1.

forms of work, if not from the concept of work itself, and to subject it to exceptional regulatory treatment.

This chapter explores the construction of the speciality of domestic work in labour law and reviews the role of this speciality in determining the long-standing exclusion of domestic workers from full legislative recognition and protection.

For this purpose, Section 2 provides a historical reconstruction of the transition from domestic servitude to domestic work as a special working relationship. It reviews how, in countries both of common law and civil law, the development of the employment contract, based on the industrial workplace, maintained the divide between domestic work and other types of work and led to the exclusion of domestic work from full coverage from labour legislative frameworks.

Subsequently, the chapter focuses on the elements that contributed to sustaining and entrenching the speciality of domestic work in contemporary labour law.

Section 3 concentrates on domestic work as work beyond the traditional disciplinary boundaries of labour law. If it is acknowledged that domestic work is a form of paid employment, the fact that it is generally carried out by women in other's people private households nonetheless troubles the traditional boundaries between the house and the market and between the public and the private sphere which labour law has taken as one of its major premises. Drawing on insights from feminist labour law,[166] this section discusses the concept of social reproduction and the traditional undervaluation of reproductive work as a form of 'labour' within the scope of labour law, the impact of the physical location of domestic work within the private sphere of the household, and its proximity with the family as determinants of the uneasiness of labour law in regulating paid domestic work, as exemplified by the tendency to classify domestic workers as 'one of the family', and as such presumed to be performed for free, out of affection.

Section 4 focuses on domestic work as work beyond the territorial boundaries of labour law. It explores the implications of the prevalence of migrant workers in the

[166] Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (2014) 22 Feminist Legal Studies 1.

paid domestic sector and how this reinforces the 'otherness' of domestic workers, thus contributing to structure the separation of domestic work from other types of work and from full entitlement to labour protection. It first explores the interaction of labour and migration law in creating precarious statuses and the legal challenges brought by global care chains. Secondly, it reflects on the association of domestic work with forms of modern slavery, and the implications of such a narrative in reinforcing a consideration of migrant domestic workers as 'victims' of severe human rights violations, instead of workers lacking labour rights.

Section 5, finally, illustrates the exclusionary regulatory approach traditionally adopted to address the speciality of domestic work within labour law.

2 Domestic work in the evolution of labour law

In order to understand the emergence of domestic work as a special form of working relationship, mostly invisible to labour regulation, this Section retraces the evolution of the category of domestics in modern history, in parallel with the development of labour market relations and the creation of labour law as a discipline.

2.1 Domestic service in pre-industrial Europe

The publication of a wide-ranging volume by the historian Antoinette Fauve-Chamoux, and the research undertaken by the EU-funded Servant Project, demonstrate the historical importance of domestic service in the socio-economic development of pre-industrial European societies, as well as in the delineation and formation of European identities.[167]

However, scant attention has been paid to the legal category of domestic servants in the theoretical literature on the development of labour market relations from the

[167] Antoinette Fauve-Chamoux, *Domestic Service and the Formation of European Identity: Understanding the Globalization of Domestic Work, 16th-21st Centuries* (Peter Lang 2004); Suzy Pasleau, Isabelle Schopp and Raffaella Sarti (eds), *Proceedings of the Servant Project/Actes Du Servant Project* (Ed de l'Université de Liège 2005).

fall of the feudal system to the modern evolution of the employment contract after the Industrial revolution.[168]

It is generally reported that, for a long time, domestic chores and household services were mainly performed by slaves or indenture servants, a phenomenon which survived until the nineteenth century and which still structures the racial division of reproductive work.[169] However, since the feudal and early modern times, domestic service has also been performed by a considerable number of free people, who placed themselves in the service of a master in exchange for board and lodging or for a salary.

The relationship between what we would now call the employer and his (or her) workers was governed by the so-called 'master and servant regime'. This regime, which in some countries lasted until the nineteenth century, was predicated on the idea of servile hiring, regulating the provision of labour by suppliers to a hirer on the basis of their status.

Domestic servants were thus one of the various categories of servants into which the workforce was divided. In fact, in pre-revolutionary times, the provision of labour was regulated within the framework of servitude. In civil law countries, along with the category of the 'servant in perpetuity', the role of servants was also taken up by free people who took on the obligation of serving a master. As such, the domestic servant (so called *famulus domesticus*) was one of several types of servant, such as agricultural labourers.[170]

Likewise, in Britain, the category of domestic servants, defined as 'menial' servants, was specifically referred to in the influential survey of common law by William Blackstone, Blackstone's Commentaries:

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[168] In the legal literature, an exception is Bruno Veneziani, 'The Evolution of the Contract of Employment' in Bob Hepple (ed), *The Making of Labour Law in Europe* (Mansell Publishing Ltd 1986); Einat Albin, 'From "Domestic Servant" to "Domestic Worker"' in Judy Fudge, Kamala Sankaran and Shae McCrystal (eds), *Challenging the Legal Boundaries of Work Regulation* (Bloomsbury Publishing 2012).
[169] Glenn (n 87).
[170] Sarti, 'Freedom and Citizenship? The Legal Status of Servants and Domestic Workers in a Comparative Perspective (16th – 21st Centuries)' (n 62).

> ‘THE first sort of servants therefore, acknowledged by the laws of England, are menial servants; so called from being *intra moenia* [in Latin: within the walls], or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not (…)’.[171]

With the term ‘menial servant’, Blackstone refers to servants working and living in the household, unlike other groups of servants (such as apprentices, manual workers and superior servants), who did not live in the master’s residence and were not deemed part of the household.[172]

Therefore, at a point in time in which the recognition of different groups of workers according to their status was a fundamental characteristic of workforce regulation in both civil and common law countries, the condition of (free) domestic servants was not dissimilar to those of other servants.

2.2 From domestic servants to domestic workers

After the abolition of servitude enshrined in the French Declaration of the Rights of Man and the Citizen of 1793,[173] in civil law countries employment relationships were governed by contract. The legal model of *locatio conductio* [in Latin: letting and hire], derived – if only nominally – from Roman law was adopted by civil law to regulate the freely bargained letting and hiring of a specific commodity: the worker’s labour. Replacing the paternalistic and authoritarian relationship between master and servant (as between parents and children), the *locatio conductio* model,

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[171] William Blackstone, *The Oxford Edition of Blackstone’s Commentaries on the Laws of England (1765-1769)*, vol Book I: Of the Rights of Persons (Oxford University Press 2016) Chapter 14: Of Master and Servant.
[172] Albin (n 168).
[173] Déclaration des droits de l'homme et du citoyen de 1793, Article 18: ‘*La loi ne reconnaît point de domesticité* [servile status]*; il ne peut exister qu'un engagement de soins et de reconnaissance, entre l'homme qui travaille et celui qui l'emploie.’*

created a working relationship characterized by the depersonalized exchange of labour for money by free and equal contracting parties.

The model of *locatio* was also formally adopted for domestic servants. The French Civil Code of 1804 provided for the category of the '*louage des Domestiques et Ouvriers'* [letting of domestics and workmen]. Inspired by the affirmation of the principle of freedom of contract and free commerce, the abolition of status and the principle of the equality of all people, Article 1780 of the French Code held that people could enter into the service of a master only for a specified period or to carry out a specific activity. Likewise, the first Italian Civil Code of 1865, drawing from the French example, did not name domestic servants as such, but Article 1628 similarly forbade continuous service.[174]

However, the principle of equality established by the Code was merely formal. Article 1791 of the French Civil Code also affirmed that the master was in a (morally) superior position to servants, since he was credible in a dispute over wages.[175] Moreover, (male) domestic servants were excluded from franchise until 1848, since the condition of *domesticitité* of servants was considered incompatible with the independence necessary for the exercise of civil rights.[176] A similar inequality of treatment in legal proceedings could be found at the same time in Italy.

The numerous contradictions in the law conflicted with the formal application of *locatio* to domestic service, unlike for other types of labour.[177] Indeed, the invisibility of domestic workers in the codes inevitably left the regulation of domestic work to local customs and consolidated traditions of inferiority and personal dependency.

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[174] 'Code Civil Des Français, 1804' <http://data.legilux.public.lu/file/eli-etat-leg-memorial-1804-5-fr-pdf.pdf> accessed 21 May 2021.
[175] Code Civil des Français, 1804. Article 1791: '*Le maître est cru sur son affirmation, pour la quotité des gages; pour le paiement du salaire de l'année échue; et pour les à-comptes donnés pour l'année courante.'*
[176] French Constitution of 3 September 1791, title III, chap. I, section II, article 2. For a comparative overview of citizenship and the legal rights of servants in Europe, see Sarti, 'Freedom and Citizenship? The Legal Status of Servants and Domestic Workers in a Comparative Perspective (16th – 21st Centuries)' (n 62).
[177] However, according to Vita Levi (1876), only higher servants were applied the contract of the "*locatio conductio*" in Italy. See Veneziani (n 168) 47.

Towards the end of the nineteenth century, with the expansion of the large-scale industry and the development of the Marxist ideology, various protective measures were introduced for specific categories of labour, first to limit the drudgery of work for children and women in the industrial sector, then more generally to protect all industrial workers, distinguishing between blue-collar workers and office clerks. Other measures were taken to extend protection to agricultural workers. Yet, none of these regulations applied to domestic servants.

In France, the Law of 1892 forbidding child labour and protecting working women and the Law of 1898 covering accident at work applied solely to the industrial environment.[178] In Italy, the Law of 1886 and 1902 regulating the work of minors and women, the Law of 1898 on industrial accidents, and the Law of 1907 on the protection of maternity did not include domestic servants.[179] Significantly, the Law of 1893 establishing arbiters (*probiviri*) to settle disputes between workers and their employers excluded domestic servants from their jurisdiction, underlining the traditional jurisdiction of the head of the household over domestic servants.[180] The situation was similar in other civil law countries, such as Belgium, in which domestic workers were not included in the Law of 1900 on employment contracts for blue-collar workers.[181] In the Netherlands, domestic servants were actually included in the Law of 1907 on employment contracts but were excluded from the laws on working hours and on the protection of women and minors.[182]

In Germany, the disparity between the legal regulation of domestic servants and other workers was even more apparent. During the nineteenth century, domestic servants and agricultural labourers were subject to special 'feudal' regulations, the Servant Orders (*Gesindeordnung)*, which survived until 1918. These servant orders

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[178] *Loi du 2 novembre 1892 sur le travail des enfants, des filles et de femmes dans les établissements industriels,* and *Loi du 9 avril 1898 sur les accidents du travail.*
[179] *Legge n. 3657/1886 (GU n. 040 del 18.02.1886), cosiddetta "Legge Berti" sul lavoro dei fanciulli nelle cave, nelle miniere e negli opifici*; and the subsequent *Legge n. 242/1902 (GU n. 157 del 07.07.1902), cosiddetta 'Legge Carcaro) recante disposizioni circa il lavoro delle donne e dei fanciulli negli opifici industriali, laboratori, ecc.* and Legge n. 416/1907.
[180] *Legge n. 295/1893.*
[181] *Loi du 10 mars 1900 sur le contrat de travail.*
[182] *Wet op de Arbeidsovereenkomst 1907.* For a broader comparative overview, see Veneziani (n 168); Sarti, 'Freedom and Citizenship? The Legal Status of Servants and Domestic Workers in a Comparative Perspective (16th – 21st Centuries)' (n 62).

commanded immediate obedience to the head of the family/landlord who was allowed to inflict corporal punishment. While these Servant Orders punished freedom of association and strikes, workers in industrial sectors enjoyed freedom of association as early as 1869, with the Trade Act for the North German Confederation (*Gewerbeordnung*).[183]

Through these exclusions, the disparity between domestic servants and industrial workers intensified.

A similar phenomenon can be observed in common law countries. Before the Industrial revolution, domestic servants were differentiated from other groups of servants due to the private and personal relationship with their masters, in a condition not dissimilar to that of other servants. Indeed, under the Master and Servant Acts, domestic servants as well as manual workers were required to obey and be loyal to their master or mistress, and were not free to leave service. Desertion, neglect of duties and other types of misconduct were sanctioned as criminal or quasi-criminal law acts.

In the nineteenth century, with the emergence of the contract of service and the adoption of the first protective social laws, the separation between domestic servants and other groups of workers gradually grew. Domestic servants were excluded from protective legislation such as the Truck Act of 1831 and other Factories Acts relating to specific industries.[184] They were also excluded from the Employers and Workmen Act of 1875, which repealed the Master and Servants Acts and, consequently, formally consecrated the relationship between the employer and blue-collar, industrial and manual workers as one based on contractual freedom and equality between the contracting parties.[185] Additionally,

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[183] *Gewerbeordnung für den Norddeutschen Bund,* 1869 *(Bundesgesetzblatt des Norddeutschen Bundes Band 1869, Nr. 26, Seite 245 – 282*). Cf. Veneziani (n 168) 46; See also Antoine Jacobs, 'Collective Self-Regulation' in Bob Hepple (ed), *The Making of Labour Law in Europe* (Mansell Publishing Ltd 1986).
[184] Truck Act 1831 (UK Public General Acts 1831 c. 37).
[185] The Employers and Workmen Act 1875 (38 & 39 Vict c 90). Cf. *Albin (n 168); Veneziani (n 168) 47.* More broadly, on the evolution of the employment contract in the UK, see Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press 2005); Otto Kahn-Freund, 'Blackstone's Neglected Child: The Contract of Employment' (1977) 93 Law Quarterly Review 508.

while the first protective laws limiting working hours began to curb the severity of factory work, similar protective legislation was not enacted for domestic servants, who remained confined to their traditional dependence and 'liab[ility] to serve at any time of the day or night at the master's request'.[186]

As a series of legislative acts were introduced, applying to 'employees' and 'workmen', a new category of worker - domestic servants - was left outside the boundaries of the emerging field of 'labour law'. Under the emerging employment contract, there was no room for status-based servitude, and (domestic) servants were rendered invisible to the law.

As a result, at the beginning of the twentieth century, when the civil law model of *locatio* and the common law remnants of the Master and Servant relationships were abandoned in favour of the establishment of the employment contract, domestic servants continued to constitute a special category. Thus, as other working relationships were evolving towards uniform regulation in the early twentieth century, the regulation of domestic servants continued to be characterised by the pre-capitalist and pre-industrial vestiges of status,[187] on the basis of the special characteristics of this type of work against the standard employment relationship established in the industrial environment.

Indeed, in a 1934 seminal article on the social, economic and legal conditions of domestic servants in various countries, Erna Magnus reported that

> 'The relevant provisions of the general law or of special laws governing the contract of employment do not always apply to domestic servants. A number of countries have special laws for domestic servants – some of them old, some of them quite recent – to supplement the provisions of the general law.'[188]

These laws stated, for example, that 'domestic servants must perform all the duties required of them within the reasonable limits of their physical strength and moral welfare',[189] or that 'in case of urgent need, a servant engaged for specified duties

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[186] Kahn-Freund 1977, in Veneziani (n 168) 64.
[187] ibid 45.
[188] Erna Magnus, 'The Social, Economic, and Legal Conditions of Domestic Servants: I Special Article (Part I)' (1934) 30 International Labour Review 190, 201.
[189] ibid 206 referring to Portugal, Yugoslavia, Hungary.

must also undertake other work', a principle which was considered to 'inevitably [follow] from the nature of domestic service'.[190] These special laws on domestic workers reflected the legacy of servitude that has long characterised the domestic work relationship and shaped the socio-legal assumptions about paid domestic work.

It was not until the second half of the twentieth century that some of the older special laws based on outworn patriarchal customs were repealed, and a consistent number of countries narrowed the gap between the rights of industrial and domestic workers. However, despite the fact that domestic workers were to come under the umbrella of labour law and domestic work was to be formally recognised as a form of employment, [191] domestic workers are still deemed in an atypical working relationship, whose special features require a differentiated and rather minimalist legal treatment.

3 Beyond disciplinary boundaries: paid domestic work as reproductive labour

The historical evolution of the employment contract within the industrial economy, analysed above, explains the tenacity of the ideological divide between domestic workers and other types of employment. This Section illustrates the characteristics that sustain the construction of domestic work as a special working relationship in contemporary labour law.

After introducing the ideology of the public/private divide and the theoretical basis of the concept of reproductive labour (§4.1), the Section critically analyses the extent to which the persistent 'speciality' of domestic work is shaped around the highly gendered nature of the activities involved, that are perceived as not belonging to the productive market economy and are presumed carried out on an

[190] ibid referring to Switzerland and Denmark.
[191] Sarti, 'Freedom and Citizenship? The Legal Status of Servants and Domestic Workers in a Comparative Perspective (16th – 21st Centuries)' (n 62).

unpaid basis, out of love and affection (§4.2). Indeed, the continuity between unpaid care work and paid domestic work contributes to the traditional devaluation of care work and to a consideration of paid domestic work as different from productive labour. The Section also discuss how the speciality of domestic work is constructed on the location of domestic work within the private sphere of the employer's household, in the intimate and untouchable sphere of the family, which further complicates the proper placing of paid domestic work under labour law (§4.3).

3.1 Theorising reproductive labour

3.1.1 The public/private divide

The traditional consideration of domestic work performed in the household as unproductive is deeply rooted in the history of economic thought in the modern age. In the landmark volume of 'The Wealth of Nations', Adam Smith labelled the work of menial servants as 'unproductive', radically different from the productive work of manufacturers, which he valued for its capacity to increase the value of the material processed. With the advent of industrialisation, the ideological distinction between productive factory work and unproductive household labour was deepened and consecrated, as made evident by the work of Karl Marx,[192] in which domestic servants are not considered productive but are disparaged for 'labouring for sheer subsistence and needed for effortless consumption rather than for production'.[193] As reconstructed by Hannah Arendt in 'The Human Condition',

> 'Smith and Marx were in agreement with modern public opinion when they despised unproductive labor as parasitical, actually a kind of perversion of labor, as though nothing were worthy of this name which did not enrich the world.'[194]

[192] Cfr. Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations* (Harriman House 2007); Karl Marx, *Capital: A Critique of Political Economy. Volume 1* (first published 1887, Penguin Books 1990). Both quoted in Blackett, 'Introduction' (n 8).
[193] Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998) 86.
[194] ibid.

Indeed, from the process of industrialisation, a broader ideological dichotomy emerged between the household and the market. The household was no more 'an explicitly economic unit housing both human reproduction and material production',[195] and productive work for pay definitely moved out of the household to the public space of the market. As a result, the household remained in charge solely of reproduction, and was inevitably associated with consumption.[196]

The domain of the market economy and the household realm were thus divided into two 'separate spheres', constructed and presented as opposing spaces, in hierarchical opposition one to the other. Furthermore, this ideological separation between the public and the private domain was also deeply gendered: the public and civil sphere of paid employment and citizenship were inhabited by men, while women were relegated to the private, natural and domestic sphere of household work and intimacy.[197] As such, these productive and so-called reproductive activities were sexually differentiated, becoming the markers for different social relations.[198] Additionally, the connotation of domestic work as unproductive was further reinforced by the increasing feminisation of the occupation and its association with the women's domain. Hence, in the words of Silvia Federici,

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[195] Janet Halley and Kerry Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 American Journal of Comparative Law 753, 756.

[196] The process has been well described by Fredman and Fudge, 'The Contract of Employment and Gendered Work' (n 21) 232 ff.; Glenn (n 87). See also Joanne Conaghan, 'Gender and the Labour of Law' in Virginia Mantouvalou, Hugh Collins and Gillian Lester (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018).

[197] The ideology of the separate spheres, or the public/private dichotomy, has been central to the critical effort of numerous feminist scholars and activists, who denounced to what extent the public and the private spheres are constructed and presented as separated and opposed gendered spaces, in hierarchical opposition one to each other. *See* Carole Pateman, *The Sexual Contract* (Stanford University Press 1988); Susan B Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press 1997).Not only has such a distinction devalued the importance of care and domestic work for the economy, but it has also overlooked the significance of reproductive labour in limiting public exercise of citizenships. In fact, the demotion of women in the private sphere has been considered essential to the long-standing the exclusion of women from citizenship, as all the functions and the activities deemed incompatible with the creation of value and the exercise of citizenship in the 'public' were relegated in the 'private', female sphere. For a broader assessment, *see* Ruth Lister, *Citizenship. Feminist Perspectives* ([1997], Palgrave Macmillan 2003).

[198] Silvia Federici, *Caliban and the Witch* (2., rev ed, Autonomedia 2014) 74.

reproductive work performed by women 'began to be considered as valueless from an economic viewpoint and even ceased to be considered as work'.[199]

3.1.2 The domestic labour debate

As the tasks of domestic servants began to largely coincide with the (unpaid) duties expected from women in the family according to their roles as wives and mothers, it became even more difficult to conceptualise domestic servants as 'real' workers. With the emergence of the institution of the bourgeois family (and the related process of 'housewifisation'),[200] married women were expected to dedicate themselves fully to a wide range of household activities, such as cleaning, cooking, shopping, and raising children. These activities were not considered work to be remunerated, but the 'natural' task of women, performed out of love and affection.

Against this backdrop, an ample debate on the importance of unpaid domestic work began in the 1960s as part of a systematic discussion of the activities performed by housewives and of the oppression of women in capitalist society.

This so-called 'domestic labour debate'[201] focused on the traditional devaluation of domestic work in political/economic discussions. The devaluation of the activities performed in the household as less than 'real work' not only originated from the fact that these activities were usually carried out by women on an unpaid basis, but also from the mystification of housework as the natural occupation of women and a feature of femininity, as a 'labour of love'.[202] Within Marxist feminist theory, the consecration of housework as a natural attribute of femininity, 'an internal need, an aspiration, supposedly coming from the depth of our female character',[203] was deemed a necessary operation to convince women to accept unpaid work. In this

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[199] ibid 75.
[200] Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (Zed Books 1986).
[201] A full reconstruction of the domestic labour debate falls beyond the scope of this thesis. For a broader discussion, see Lise Vogel, 'Historical-Critical Dictionary of Marxism: Domestic-Labour Debate' (2008) 16 Historical Materialism 237.
[202] Mariarosa Dalla Costa and Selma James, *The Power of Women and the Subversion of the Community* (Falling Wall Press Limited 1975).
[203] Silvia Federici, *Wages Against Housework* (Power of Women Collective 1975) 2.

view, housework was considered one of 'the most pervasive manipulations, most subtle and mystified forms of violence that capitalism has perpetrated against any section of the working class.'[204]

Against this backdrop, it was claimed that domestic work performed in the household was a 'masked form of productive labor',[205] which was not paid but was nonetheless functional and essential to the reproduction of the (paid) workforce and to the creation of surplus value. Indeed, Marxist feminist scholars and activists underlined that it is thanks to the myriad care activities overwhelmingly performed by women that (white) male workers were in a position to devote themselves fully to the workplace, unencumbered by care responsibilities.[206]

Against the narrative of housework and caring work as a 'labour of love', Marxist feminist scholars argued that housework was not a choice, a preference, an aspiration of women, but constituted work and was to be recognized as such. Moreover, domestic work was also to be remunerated. In the 1970s, a small but influential feminist movement launched a provocative campaign to reclaim 'Wages for Housework', demanding remuneration for the housework performed by women, both in and outside the home.[207]

> 'We believe that the weakness of all women – that weakness that's behind our being crossed out of all history, that's behind the fact that when we leave the

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[204] *ibid.*
[205] Dalla Costa and James (n 202).
[206] Sandra Fredman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 Industrial Law Journal 299, 300.
[207] The campaign was launched in 1974, with the famous speech gave by Dalla Costa in Mestre (Italy). In her speech, Dalla Costa highlighted the exclusion of women from trade unions' mobilization and agendas, denouncing the overlook of housework as a locus of (capitalistic) exploitation. 'When half the working population is at home in the kitchens, while the others are on strike, it's not a general strike. We've never seen a general strike. We've only seen men, generally men from the big factories, come out on the streets, while their wives, daughters, sisters, mothers, went on cooking in the kitchens.' See Mariarosa Dalla Costa, 'A General Strike' in Wendy Edmond and Suzie Fleming (eds), *All Work and No Pay: Women, Housework and the Wages Due* (Falling Wall Press 1975) <https://caringlabor.wordpress.com/2010/10/20/mariarosa-dalla-costa-a-general-strike/> accessed 5 May 2021. See also, Federici, *Wages Against Housework* (n 203); Silvia Federici and Nicole Cox, *Counter-Planning from the Kitchen. Wages for Housework: A Perspective on Captal and the Left* (Falling Wall Press 1975) <https://caringlabor.wordpress.com/2010/10/20/nicole-cox-and-silvia-federici-counter-planning-from-the-kitchen/> accessed 5 May 2021; Wendy Edmond and Suzie Fleming, *All Work and No Pay: Women, Housework, and the Wages Due* (Power of Women Collective 1975).

> home we must face the most revolting, underpaid and insecure jobs – this weakness is based on the fact that all of us women, whatever we do, are wearied and exhausted at the very outset by the 13 hours of housework that no-one has ever recognized, that no-one has ever paid for.'[208]

In this context, demanding wages was considered a necessary strategy to acknowledge and make the contribution women made in the household and in the community visible and recognised as real work. Indeed, by making women's unpaid work within the family visible and demanding remuneration for it, the campaign aimed to reclaim the role of housework and other caring activities in producing value.[209]

Although the campaign was ultimately unsuccessful, the domestic labour debate had a long-lasting impact. The debate acknowledged and highlighted the contribution women made in the household by recognising the value of domestic work and its role in the economy, in vehement contrast to the dominant narrative which depicted domestic work as unproductive labour.

3.1.3 Reproductive labour and social reproduction

In the following years, the interest shifted from unpaid work to a broader analysis of reproductive labour, which included a wider range of unwaged activities beyond the household sphere. Many radical feminist scholars engaged with a theoretical analysis of how reproductive work generated value. Influenced by the Marxist theory of value, feminist scholarship developed the concept of social reproduction to include the work of maintaining existing life and reproducing the next generation.[210]

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[208] Dalla Costa (n 207).
[209] Federici, *Wages Against Housework* (n 203).
[210] Among many, see Leopoldina Fortunati, *L'arcano Della Riproduzione : Casalinghe, Prostitute, Operai e Capitale* (Marsilio 1981); Mies (n 200); Antonella Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge University Press 1992); Silvia Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (Pm Pr 2012).

Broadly speaking, social reproduction refers 'to the social processes and labour that go into the daily and generational maintenance of the population.'[211] According to a more comprehensive definition, social reproduction encompasses all

> 'the activities and attitudes, behaviors and emotions, and responsibilities and relationships directly involved in maintaining life, on a daily basis and intergenerationally. It involves various kinds of socially necessary work—mental, physical, and emotional—aimed at providing the historically and socially, as well as biologically, defined means for maintaining and reproducing population. Among other things, social reproduction includes how food, clothing, and shelter are made available for immediate consumption, how the maintenance and socialization of children is accomplished, how care of the elderly and infirm is provided, and how sexuality is socially constructed.'[212]

The concept of social reproduction offers a theoretical framework that influences the feminist approach to political economy. It was developed to illuminate the economic significance of the activities – usually performed by women – involved in maintaining existing life and reproducing the next generation, which are both socially necessary and economically essential for the functioning of the labour market.[213]

The term 'reproductive labour' includes all activities that are essential to the reproduction of the workforce, be they remunerated or not, and stresses their role in the production process.

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[211] Cf. Picchio (n 210).
[212] Barbara Laslett and Johanna Brenner, 'Gender and Social Reproduction: Historical Perspectives' (1989) 15 Annual Review of Sociology 381, 382.
[213] Since the 2000s, the concept of social reproduction has witnessed a renaissance. In contrast to early interests in the concept, the most recent contributions on this topic focus on the marketization and (re)privatization of social reproduction, against the background of the restructuring in the global political economy towards a neoliberal economy. Cf. Stephen Gill & Isabella Bakker, Power, Production and Social Reproduction: Human In/security in the Global Political Economy (2003), https://www.palgrave.com/gp/book/9781403913203 (last visited Jan 17, 2021), Isabella Bakker, 'Social Reproduction and the Constitution of a Gendered Political Economy' (2007) 12 New Political Economy 541, 541.

Unlike the provision of most other goods and services, reproductive work involves an emotional, relational and embodied dimension.[214] Whereas work is traditionally considered an 'impersonal activity, with bodies, emotion, sexuality and even one's physical attractiveness restricted to the province of private, family life,' [215] reproductive work is an activity that involves bodily characteristics, skills and emotions that are embodied in female personhood, which are devalued because they are considered 'natural' and pre-existing in women. Indeed, reproductive work comprises myriad activities traditionally deemed women's responsibility in the framework of heterosexual marriage, including cleaning, preparing food, ensuring the wellbeing of the family, engaging in sexual activities, and even reproducing life (e.g. in the case of surrogacy).[216]

By focusing on the concept of reproductive labour, it is possible to transcend the traditional conceptualisation of work based on the 'ideal male worker', to focus instead on these gendered activities, which are usually devalued, invisible, and under-analysed.

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[214] Yet, the requirement to perform emotional labour dominates all female-dominated sector. See Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling* (University of California Press 1983).

[215]RL Cohen and others, 'The Body/Sex/Work Nexus: A Critical Perspective on Body Work and Sex Work' in C Wolkowitz and others (eds), *Body/Sex/Work: Intimate, embodied and sexualised labour* (Palgrave 2013) 8. The text is quoted in: Thiemann (n 15).

[216] Pateman (n 197). Highly contested, even within the feminist scholarship, is the conceptualisation of prostitution as sex work. For the legal scholarship recognising prostitution as a form of embodied work and a personal work relationship, see Cohen and others (n 215); Thiemann (n 15); Inga K Thiemann, 'Sex Work Regulation, Protectionist Anti-Trafficking Policy and Their Effects on Sex Workers' Labour Rights in Germany' (2020) 36 International Journal of Comparative Labour Law and Industrial Relations 195; Katie Cruz, 'Beyond Liberalism: Marxist Feminism, Migrant Sex Work, and Labour Unfreedom' (2018) 26 Feminist Legal Studies 65. *Contra*, see Catherine MacKinnon, 'Trafficking, Prostitution, and Inequality' (2011) 46 Harvard Civil Rights Civil Liberties Law Review.

Even more contested is the conceptualisation of surrogate motherhood as work. An interesting perspective on this can be found in Amrita Pande, 'Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India' (2009) 16 Indian Journal of Gender Studies 141.

3.2 Reproductive work and the scope of labour law

The concept of social reproduction and reproductive labour brought about a broader reconfiguration of the conceptualisation of 'work' in social sciences and economics scholarship.[217]

To make unpaid work visible, and to account for its economic value in the context of the measurement of gross domestic product (GDP), over the past two decades there has been an attempt to develop the use of household 'satellite accounts' in the System of National Accounts.[218] Most recently, the ILO established a new ground-breaking concept of 'work' for statistical purposes, according to which '[w]ork comprises any activity performed by persons of any sex and age to produce goods or to provide services for use by others or for own use.'[219] As evident from the formulation adopted, this definition of work transcends employment work (comprising work performed for others in exchange for pay or profit), to include non-compulsory work performed for others without pay, irrespective of its formal or informal character or the legality of the activity.

Yet, this debate has not significantly influenced the discipline and scope of labour law, which remains based on the traditional boundary between productive and unproductive labour. Indeed, the scope of labour law is still predicated on strict disciplinary boundaries between what is considered 'productive work' and reproductive care work, which tends to be left in the 'private' realm of the family. It has been argued that labour law, as a discipline, struggles to extend its scope of application to fully cover reproductive labour, even where commodified and performed for a wage. In fact, even when reproductive work is paid, the fact that this activity involves bodily characteristics, emotions and feelings that are located in the private sphere both quantitatively and qualitatively troubles the proper

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[217] See, among others, David M Brennan, 'Defending the Indefensible? Culture'S Role in the Productive/Unproductive Dichotomy' (2006) 12 Feminist Economics 403.
[218] Eurostat, *Household Production and Consumption: Proposal for a Methodology of Household Satellite Accounts* (Office for Official Publications of the European Communities 2003).
[219] 19th International Conference of Labour Statisticians (ICLS), Resolution I on 'statistics of work, employment and labour underutilization', 2013. See ILO, 'Care Work and Care Jobs for the Future of Decent Work' (n 51) 10.

conceptualisation of reproductive work as 'real' work and its full recognition in the realm of labour law.

Only recently has a burgeoning feminist scholarship critically assessed the limitations inherent in the concept of 'labour' on which labour law is based. Feminist labour law scholars have expressed intense criticism of the exclusion of reproductive work, particularly unpaid care work, from the mainstream labour law debate.[220] They have critically assessed the gendered consequences of the traditional exclusion of unpaid care work from the discussion of labour law on the labour regulation of reproductive work, and in particular of paid domestic work.

Indeed, by criticising the invisibility of unpaid care work in the discussion of labour law, they have emphasised the significance of reproductive work in constraining, and shaping women's ability to enter paid employment and to work on an equal footing with men. Likewise, they have denounced the neglect of the economic significance of care work and the wide range of reproductive labour performed in the household in the discussion and labour law regulatory paradigm, showing how labour law contribute to reinforces and creates the ideological divide between reproductive labour and 'productive' work, construing care work as different and with lower value than paid employment. In other words, feminist labour lawyers have contributed to the discussion of the permeable and changing definition of

[220] By using the concept of social reproduction, feminist labour lawyers have denounced the extent to which and emphasised how the link between the 'productive' economy and social reproduction has been underexplored within labour law theorisation. Among many, cfr. Joanne Conaghan, *Feminist Perspectives on Labour Law* (Sweet & Maxwell Ltd 1999).Conaghan, 'Labour Law and Feminist Method' (n 19); Joanne Conaghan, 'Gender and the Labour of Law' in Joanne Conaghan, *Philosophical Foundations of Labour Law* (Oxford University Press 2018) <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198825272.001.0001/oso-9780198825272-chapter-15> accessed 3 January 2021; Fredman and Fudge, 'The Contract of Employment and Gendered Work' (n 21); Fudge and Owens (n 112); Judy Fudge, 'From Women and Labour Law to Putting Gender and Law to Work' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013); Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (n 166); Conaghan and Rittich (n 108); Fredman, *Women and the Law* (n 99). For a reconstruction of feminist labour law scholarship, *see* Fudge, 'From Women and Labour Law to Putting Gender and Law to Work'.

'labour' for the scope of labour law, revealing the discursive role that labour law plays in shaping this distinction between productive and reproductive labour.[221]

This scholarship has highlighted the detrimental consequences of the devaluation and lack of recognition of reproductive work for many gendered activities, such as nursing, providing childcare or elderly care, professional cleaning, as well as working in the food processing sector,[222] collecting waste,[223] or working in the sex industry, [224] which are excluded from the whole array of labour rights and protection. As such, these sectors are usually segmented in the 'secondary' labour market, characterised by poor working conditions, low wages and often relegated to the informal economy.[225]

All in all, whereas reproductive work performed for a wage is to be located within the sphere of employment, the fact that it involves activities that are traditionally gendered and devalued contributes to complicate the place of paid care work in the realm of labour law, which continues to be based on the industrial workplace model.

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[221] Most notably, cfr. Fudge, 'From Women and Labour Law to Putting Gender and Law to Work' (n 220). It has been argued that through a broad set of legal rules that shaped and maintained specific family structures, labour law played a relevant role in consecrating and construing the deeply gendered division between productive labour and reproductive work. Widespread practices of dismissing women once married or pregnant, sometimes institutionalized into marriage bars (that is, laws requiring women to leave paid work upon marriage, which were the norm in many Western countries until the 1960s) reinforced the idea that married women had to devote themselves first and foremost to the household, and entrenched the social norm that find it improper for (middle-class) married women to be employed. Yet, the division between productive and reproductive labour operated also for working-class and ethnic minority women, who were constrained to perform reproductive work for other households, working as domestic servants, laundresses, cooks, maids, wet nurses, midwifes, thus consecrating - even in the context of paid employment – care work as the primary responsibility of women. For an historical reconstruction, see Fredman and Fudge, 'The Contract of Employment and Gendered Work' (n 21). See also Fredman, *Women and the Law* (n 99) 80 and ff. Glenn (n 87) 3.

[222]On foodwork, *see* Maud Perrier and Elaine Swan, 'Foodwork: Racialised, Gendered and Classed Labours' (*Futures of Work*, 9 December 2019) <https://futuresofwork.co.uk/2019/12/09/foodwork-racialised-gendered-and-class-labours/> accessed 15 December 2020.

[223] On the gendered dynamics in waste picking, cf. Sonia M Dias and Lucia Fernandez, 'Waste Pickers – a Gendered Perspective' in Cela Blerta, Irene Dankelman and Jeffrey Stern (eds), *Powerful Synergies: Gender Equality, Economic Development and Environmental Sustainability* (United Nations Development Programme (UNDP) 2012).

[224] Katie Cruz, Kate Hardy and Teela Sanders, 'False Self-Employment, Autonomy and Regulating for Decent Work: Improving Working Conditions in the UK Stripping Industry' (2017) 55 British Journal of Industrial Relations 274. Further on sex work, see *supra,* note n. 216.

[225] Vosko (n 67).

Hence, reproductive activities are deemed and actively construed as different or 'special', resulting in their exclusion from labour law protective frameworks.

Whereas these considerations apply generally to the whole range of reproductive activities, this 'speciality' is exacerbated further in the case of paid domestic work due to its physical location within the private space of the employer's private home, and its proximity to the intimate sphere of the employer's family.

It is to these two strictly intertwined characteristic features of domestic work that I now turn.

3.3 Disrupting the family/market divide: the house as a workplace

3.3.1 Inside the household: care work as a matter of family law

As anticipated at the end of the previous subsection, the 'speciality' of paid domestic work, meaning the reluctance of labour law to regulate this phenomenon, owes much to the physical location of the workplace, i.e., the private household of the employer.

The ideology of the private/public divide has always played a significant role in establishing boundaries for state regulation, which is considered should not intervene in the private sphere of the family. Indeed, it has been argued that this divide has also been used to justify the non-intervention of the state to address injustice and oppression within the family.[226]

As such, the household has been considered a safe harbour from labour regulation, and the traditional public/private divide has long been relied upon as the fundamental disciplinary boundary of labour law.[227] As a consequence, the private

[226] Elizabeth Frazer and Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal-communitarian Debate* (Prentice-Hall 1993).
[227] Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation* (Bloomsbury Publishing 2012). Against this backdrop, feminist labour lawyers aim to disclose the the discursive role that labour law plays in tracing and consecrating this boundary. According to Fudge, 'The boundaries between home/market and public/private became deeply

sphere of the household is not only considered 'unproductive', but also an area deemed distinct from the market: an area regulated by special rules, with which the law of the market should not interfere. Contract law, and consequently labour law, has not been considered appropriate to regulate the private, internal dynamics of the family, and the (supposedly necessarily unpaid) activities that are performed in the household.

Unpaid care work has received scant attention from labour law, whose aim is to regulate paid employment in the market by ensuring protective standards and labour rights to industrial workers employed in a standard employment relationship (SER).[228] Activities such as housework and childcare have traditionally been viewed as performed on a unpaid basis, out of love and affection.

This is evident in the case of Italy, where case law has developed a strong presumption that care work performed in one's household, and in general all work performed for a family member is provided free of charge. In a line of argument established in a decision dating back to 1979, the Court of Cassation established that in the case of services rendered between co-habiting persons that are members of the same family ('linked by a bond of kinship or affinity'), the services themselves are presumed to be unremunerated and not linked to an employment relationship, and should be considered carried out under the sole stimulus of moral and affective principles and impulses.[229] In other words, the presumption of 'gratuitousness' is sourced in the circumstance that in the presence of a family relationship, these activities are deemed to be normally rendered for reasons of

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inscribed in contemporary legal doctrines, discourses, and institutions such that the initial jurisdictional classification appeared natural and inevitable and not political and ideological'. Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (n 166) 11.

[228] For a critique of the Standard Employment Relationship and its exclusionary role in determining which workers are not covered by labour law from a gendered perspective, see Vosko, MacDonald and Campbell (n 67); Fredman and Fudge, '"The Legal Construction of Personal Work Relations" and Gender' (n 21) 116.

[229] Cassazione civile, sez. lav., 11/04/1979, no. 2124. *Giust. civ. Mass.* 1979, fasc. 4. Originally, the scope of intervention of such presumption was very broad, operating also when the co-habiting persons were tied 'even just by a bond of affectionate hospitality'. Over the years, the circumstances in which this presumption could operate were narrowed, to necessitate a 'commonality of life and interests between cohabitants which does not end in a merely affective or sexual relationship.' (own translation). Cf. Cassazione civile, sez. lav., 11/07/2017 , no. 17093. *Foro it.* 2017, 10, I, 3021; Cassazione civile, sez. lav., 29/09/2015, no. 19304. *Foro it.* 2015, 11, I, 3472.

affection and benevolence (according to the Latin adage: *affectionis vel benevolentiae causa*); however, the presumption is based on gendered norms and assumptions that may have detrimental consequences on (mainly) women's economic independence. This presumption has a series of detrimental consequence at different levels: at the symbolic level, it contributes to demean informal care work and – more generally – women's work, reinforcing the idea that women's work is necessarily owed to the family, is performed 'out of love' and as such is not to be remunerated. At the fundamental rights level, the presumption seriously limits the spouse's (in the vast majority of cases, the wife's) right to proportionate and sufficient remuneration, as enshrined in the Italian Constitution (Article 36), and may place her at risk of economic violence. At the enforcement level, it imposes a weighty and sometimes impossible burden of proof of the existence of a working relationship based on subordination (so-called '*probation diabolica*') on the most vulnerable party, the family member performing work.[230]

Indeed, 'the family and its law are deemed, either descriptively or normatively, to be special':[231] in the opinion of Janet Halley and Kerry Rittich, who summarised what they call 'family law exceptionalism', which creates a boundary between the internal dynamics of the family, on the one side, and the law of the market, on the other. It is worth noting that this exceptionalism is not only descriptive but has also normative leverage:

> 'family law itself is saturated with claims that family law (or marriage, or "the family") *should* be different because of the unique, special, crucial, affective, altruistic, social-ordering, and/or sacred nature of the relationships that it houses'[232]

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[230] For a comprehensive debate on the topic, see the Special Issue on Economic Violence and the Presumption that work performed in the family is free of charge hosted by Rivista AIAF, issue no. 2/2018, edited by Maria Carla Serafini. In particular, see the contributions of Gabriella de Strobel, 'Il Lavoro Prestato Da Un Coniuge a Favore Dell'altro: Lavoro Subordinato o a Titolo Gratuito?' [2018] AIAF - Rivista dell'Associazione Italiana Avvocati per la Famiglia e i minori 37; Anna Luisa Terzi, 'Il Lavoro Gratuito Femminile in Ambito Familiare Nella Giurisprudenza' [2018] AIAF - Rivista dell'Associazione Italiana Avvocati per la Famiglia e i minori 37.
[231] Halley and Rittich (n 195) 753.
[232] ibid 754.

Being normatively construed as governed by rules other than those of the labour market,[233] informal care work has thus traditionally been considered a private issue falling within the scope of family law.[234]

3.3.2 Paid domestic work at the junction of the public/private divide

Yet, this disciplinary boundary is complicated by the case of paid domestic workers. Situated at the junction of the traditional divide between paid and unpaid activities, productive and reproductive work, the market and the family, paid domestic work performed in other people's homes raises a significant challenge to the 'conventional maps of jurisdiction'[235] and to the public/private divide that labour law regulation has taken as one of its major premises.

Whether domestic work is deemed to fall within the private sphere of the family or should be related to the public sphere of paid employment has long been debated and is still a source of anxiety for labour law theory.[236] Moreover, the new prevalence of live-in working arrangements, where the worker is not only working but also residing in the employer's private household, further complicates the place of domestic work within the traditional binary categorization based on the public/private divide.

In the past, domestic work was long deemed to fall under family law: domestic servants (mostly slaves or indentured servants)[237] living in the house of the master were considered part of the family and hence different from wage labour. This distinction with wage labour is also based on the particular, personal and intimate relationship that the domestic worker establishes (or should) with the employer.[238] And indeed, for a long time, the special nature of domestic work has been argued to be based on the persisting direct dependency and personal subordination of

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[233]Fredman and Fudge, 'The Contract of Employment and Gendered Work' (n 21) 234.
[234] Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (n 166).
[235] ibid 11.
[236] Albin (n 168); Fredman and Fudge, 'The Contract of Employment and Gendered Work' (n 21).
[237] Cf. Glenn (n 87) 12; Sarti, 'Freedom and Citizenship? The Legal Status of Servants and Domestic Workers in a Comparative Perspective (16th – 21st Centuries)' (n 62).
[238] Blackett, 'Introduction' (n 8) 12.

domestic workers to the head of the household, considered akin to a private family relationship.[239] In common law systems, not many disputes brought by domestic servants were decided before the court, as judges were reluctant to interfere with the patriarchal authority of the master and the mistress within their own household.[240] Likewise, in civil law countries, domestic servants were excluded from the jurisdiction of specialist arbiters, according to the traditional idea that they were subject to the jurisdiction of the head of the household.[241] In the same vein, it has long been considered impossible to clearly define and control the duties of domestic workers and the limit of their work obligations, which were usually left to the consideration of the employer and the rest of the family, according to their needs (and benevolence).[242]

In other words, labour law systems have long demonstrated a certain reluctance in regulating a phenomenon deemed a private matter.

Nowadays, the difficulty in conceptualizing informal care work as 'labour' still inevitably bias the full inclusion of 'paid' domestic work within labour law. Indeed, it has been argued that there is resistance to the full inclusion of paid domestic work in labour law because it 'transplants assumptions and techniques of regulation developed for one social field to another in which it is conventionally considered to be inappropriate.'[243] Labour law continues to be deemed an inadequate instrument to regulate the internal, private, family-like dynamics that the domestic work relationship is believed to entail, leaving the household and its internal legal relationship as a matter of family law.

In fact, as Guy Mundlak and Hila Shamir have persuasively demonstrated, nowadays the normative assumption persists over the intimate character of the domestic work relationship. Intimacy and affection in the paid work relationship is

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[239] Veneziani (n 168) 45.
[240] Albin (n 168).
[241] Sarti, 'Freedom and Citizenship? The Legal Status of Servants and Domestic Workers in a Comparative Perspective (16th – 21st Centuries)' (n 62).
[242] Magnus (n 188) 196. See also, in the Italian scholarship, Luigi De Litala, *Contratti speciali di lavoro* (2. ed, UTET 1958). According to which it is the indefinite nature of the household tasks to be the peculiar and defining characteristics of the domestic work relationship.
[243] Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (n 166) 19.

presumed in order not to alter socio-legal assumptions about care work, an activity which is considered to be performed out of affection, preferably by family members. On the one hand, intimacy is required from the employer, who needs this to justify the re-commodification of care work to a non-family member. On the other, intimacy is required to remove the domestic work relationship from the protective framework of labour law, in order to justify the persistence of a relationship based on the relics of direct servitude, such as patriarchal and matriarchal supervisory and disciplinary practices.[244]

As such, the intimacy that the domestic work relationship *should* establish between the different parties is presumed, and is used to mask the deeply unequal relationship between the employer and domestic servants, still influenced by the legacy of the old direct dependency of servants on the head of the household, relics of servitude, slavery and colonialism.

The regulatory approach adopted towards domestic work displays with great clarity the persistence of a certain 'commodification anxiety,'[245] a term coined to refer to the reluctance to fully regulate an activity (paid care work) which is the same as performed, on an unregulated basis, by family members. According to Mundlak and Shamir,

> 'The socio-legal commodification anxiety places the worker in an indistict zone between the legal categories of private and public, a zone that is shared by careworkers and housewives, and might be required in order to preserve

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[244] A significant number of sociological contributions have investigated the employee-employer relationship in domestic work, demonstrating the manners in which domestic workers occupy a role that is at times worker, at times family member. See, for instance, Abigail Bakan and Daiva Stasiulis (eds), *Not One of the Family: Foreign Domestic Workers in Canada* (University of Toronto Press 1997).

[245] The term, used by Guy Mundlak and Hila Shamir, 'Between Intimacy and Alienage: The Legal Construction of Domestic and Carework in the Welfare State' in Helma Lutz (ed), *Migration and Domestic Work. A European Perspective on a Global Theme* (Ashgate 2008)., has been coined by Joan C Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It* (Oxford University Press 2001) 31. Part of the literature underlined that there are persisting normative and social expectations that caring labour should be provided within the family, and in particular by female family members, resulting in widespread societal reluctance to (and disapproval of) putting a price on love and care, that is to attaching market value to care work. Yet, it has been argued that the anxiety of labour law in the commoditization of care work overlooks the fact that reproductive labour has long been a commodity for class-privileged families, and that paid domestic work pre-existed the development of labour law.

coherency in the legal regulation of women's domestic careworker, paid or unpaid.'[246]

An example of this reluctance is evident in the legal reasoning adopted by French courts in the early stage of the *Siliadin* case, which later gave rise to one of the most renowned judgments of the European Court of Human Rights.[247] The case, which will be analysed in more depth below, concerned the alleged exploitation of an underage girl who was forced to perform domestic tasks in the house where she was hosted. Despite the fact that there was evidence that she was required to work for up to fifteen hours a day, with no day off and without remuneration, the court of first instance rejected the argument for labour exploitation on the basis that working long hours looking after children is a 'normal' activity usually performed by (and expected from) mothers. Hence, the judges did not consider her working conditions unacceptable.[248]

Overall, in accordance to the devaluation of unpaid care work, the full consideration of paid domestic work as real work, subject to labour law, still encounters difficulties, as is clearly shown by the strategy of considering domestic workers 'one of the family'.

3.3.3 Promoting exclusion: domestic workers as 'one of the family'

Due to this 'commodification anxiety', a number of mechanisms have been developed to retain domestic workers within the disciplinary field of family law. The most powerful discourse used consists in the internalisation of domestic work within the family: by considering domestic workers as 'one of the family' it is possible to divert attention away from their status as workers, conflating their work with family obligations in line with the narrative of care work as a 'labour of love'.

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[246] Cf. Mundlak and Shamir (n 245) 174.
[247] *Siliadin v. France,* Application no. 73316/01 (2005) ECHR 2005-VII. The case is analysed in depth below, §4.3.2.
[248] Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing 2015); Adelle Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (Cornell University Press 2019) 152.

As such, labour law not only reflects gender norms and expectations but also contributes in itself to creating and reproducing the supposed difference of domestic workers from other workers.[249] Indeed, the conflation of domestic workers with family members reinforces the devaluation of domestic work as something different from 'real work'. It also adds to the ambiguity of the employee-employer relationship in the domestic work relationship, as it

> 'divert[s] attention from the existence of an employment relationship, in favour of a form of paternalism that is thought to justify domestic workers being asked to work harder and longer for a "considerate" employer without material reward.'[250]

A number of legislative frameworks are still shaped by the assumption that domestic workers – in particular live-in domestic workers – are to be assimilated with family members, as widely noted in the literature.[251] As a result, the whole array of labour protection is not applied, in particular with regard to rules on working hours, occupational safety and health, the minimum wage and termination of employment.

One example is offered by Israel, where (live-in) domestic workers are excluded from regulations on overtime pay and working hours due to the difficulties in distinguishing between working hours and personal time for domestic workers living as 'family members'.[252] As demonstrated by the various contributions of Guy Mundlak and Hila Shamir, domestic workers are generally excluded from regulations on working time for their conflation with the (unregulated) situation of those performing unpaid care work. As such, the lack of specific regulation of working hours is justified by, and in turns perpetuates, the embedded social norms about the unquantifiable nature of care work.

Another example is offered by the UK, where live-in domestic workers are excluded from national minimum wage legislation if they are not members of the

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[249] Mundlak and Shamir (n 245).
[250] ILO, 'Decent Work for Domestic Workers' (n 27) para 45.
[251] E Albin and V Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41 Industrial Law Journal 67.
[252] Mundlak and Shamir (n 245).

family but are nonetheless 'treated as such in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities.'[253] It is important to note, however, that this provision has very recently been reversed.[254]

Through the legal device of considering the domestic worker as a family member, she is removed from 'the legalistic protective sphere that governs the employment relationship',[255] to be left, once again, at the mercy of the head of the household.

4 Beyond territorial boundaries: paid domestic work as migrant work

After exploring the extent to which paid domestic work is considered and construed as a 'special' form of employment due to its place at the junction of the traditional public/private and market/family boundary, this Section turns to how the detachment of paid domestic work from the scope of labour law is further exacerbated by the sheer number of migrant workers in this occupation.

After briefly illustrating the challenges raised by globalisation to labour law as a national project based on the nation-state (§5.1), the Section discusses the role of migration law and policies in conditioning the work experience of migrants, by fostering precarious working arrangements and the condition of vulnerability (§5.2).

Against this background, much legal scholarship concerned with migrant domestic workers has resorted to international human rights law and the modern slavery

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[253] National Minimum Wage Regulation 2015, Section 57(3)(b).
[254] The family member exception has been declared unlawful by a recent decision of the Employment Tribunal, *Puthenveettil v Alexander & George, & Others,* no. 2361118/2013. See Natalie Sedacca, 'A Crucial and Long-Needed Step against the Devaluation of Domestic Work: "Family Worker" Exemption Dis-Applied in Puthenveettil v Alexander & Ors' (*UK Labour Law*, 1 March 2021) <https://uklabourlawblog.com/2021/03/01/a-crucial-and-long-needed-step-against-the-devaluation-of-domestic-work-family-worker-exemption-dis-applied-in-puthenveettil-v-alexander-ors-by-natalie-sedecca/> accessed 1 March 2021.
[255] Mundlak and Shamir (n 245) 166.

agenda as a means to improve the living and working conditions of domestic workers. After reviewing the considerable case law of the European Court of Human Rights, emblematic of the modern slavery approach to addressing the vulnerability of migrant domestic workers (§5.3), the Section ends with the limitations of a human rights approach (§5.4). It is argued that, by focusing on domestic workers as the individual victims of human rights abuse not only diverts attention from the underlying economic causes of their vulnerability, but also detaches them from consideration as workers entitled to labour rights.

In so doing, it is concluded that the affirmation of the international human rights approach has inadvertently contributed to endorsing the need for domestic work to be subject to special and differential legal treatment.

4.1 Labour law in a globalised economy

The place of paid domestic work – and more generally of paid reproductive work – in the context of globalisation raises a significant challenge to national labour law.

Labour law has traditionally been defined and administered on a territorial basis, its norms determined by the state and applied (only) to employers and workers residing in the state. However, the role of national labour law has been called into question by the current phenomenon of globalisation and the increase in transnational labour migration.

Theorists of globalisation have long pointed to the impact of economic globalization on the territorial jurisdiction of the nation-state.[256] According to Saskia Sassen, the effect of globalisation is to alter the nation-state's 'exclusive authority over its territory', producing new territories that destabilise the unitary

[256] Saskia Sassen, 'Territory and Territoriality in the Global Economy' (2000) 15 International Sociology 372.

spatio-temporal concept of sovereignty and its exclusive institutional location in the nation state.[257]

In the same vein, in an influential essay on the topic, Guy Mundlak has observed that globalisation has significantly affected the capacity of labour law to pursue its original aim (that is, to correct deep structural imbalances between capital and labour). In his words, '[w]ith the process of globalisation the territorial solutions created within labour law are no longer adequate'.[258]

And indeed, the possibility for workers (and companies) to move across national borders and territories, produces new territories beyond the reach of national labour law, with the result that migrant workers usually receive only partial labour protection. In the words of Lucie Williams,

> 'privileging nation-state waged work as the site for redistributive politics ignores and devalues the needs and concerns of millions of low and non-waged workers in a globalized economy.'[259]

The development of global care chains is emblematic, as it displays the extent to which transnational labour migration complicates the territorial application of labour law and troubles its territorial foundation. In global care chains, private employment agencies established in one (or more) countries recruit and place domestic workers in another country, involving a range of legal instruments at different territorial levels. [260] In fact, in global care chains, the transnational provision of domestic work operates in various countries (the country of origin and the recipient country) as well as between countries, and calls for the operation of

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[257] ibid 373. This has attired much criticism even within legal theorists, such as Raustiala, who refused the notion of 'legal spatiality', according to which '[t]he scope and reach of the law is connected to territory, and therefore, spatial location determines the operative legal regime'.Kal Raustiala, 'The Geography of Justice' (2005) 73 Fordham Law Review 2501, 106.
[258] Guy Mundlak, 'De-Territorializing Labor Law' (2009) 3 Law & Ethics of Human Rights 218.
[259] Lucy A Williams, 'Beyond Labour Law's Parochialism: A Re-Envisioning of the Discourse of Redistribution' in Joanne Conaghan, Karl Klare and Richard Micheal Fischl (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2004).Quoted in Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (n 166) 9.
[260] Fudge, 'Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction' (n 42) 237. On the myriad agent involved in the transnational provision of care services, ranging from private employment agencies and job brokers to governmental employment programs, see Yeates (n 74).

international standards, bilateral agreements, regional and national laws and regulation, voluntary codes of conduct and other instruments of international labour law. In this sense, it has been argued that by establishing networks of transnational dimension in which workers from the Global South are increasingly in demand to meet the care needs of families of the Global North, domestic work is significant in its capacity to display the inherent limitations of the traditional linkage between labour rights and national citizenship.[261]

Against this background, over the past years a burgeoning scholarship has underlined the need to address the impact of globalization by paying more attention to the development of a theory of transnational labour law.[262]

4.2 Transnational domestic work and labour migration

Closely linked to globalisation is the phenomenon of transnational labour migration.

For a long time, mainstream labour law scholarship tended to deem migration law as outside their scope of analysis. However, recently, there has been a general call within labour scholarship to appraise the impact of labour migration and the law and regulation of migration upon labour law.[263]

Migration law determines who is entitled to enter the territory to work, who requires an authorisation to work, the conditions for granting this authorisation and how long it can be granted or extended. As such, migration law tends to create a multiple temporary 'migration status' within the host state, with a profound impact on

[261] Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (n 166).
[262] On the topic, see more generally Simon Deakin and Frank Wilkinson, 'Rights vs Efficiency-The Economic Case for Transnational Labour Standards' (1994) 23 Indus. lj 289; Tonia Novitz and Phil Syrpis, 'Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism' (2006) 35 Industrial Law Journal 367; Adelle Blackett and Anne Trebilcock, *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015). In the EU context, see, more recently Andrea Iossa and Maria Persdotter, 'Cross-Border Social Dumping as a "Game of Jurisdiction": Towards a Legal Geography of Labour Relations in the EU Internal Market' Journal of Common Market Studies.
[263] Mark Freedland and Cathryn Costello, 'Migrants at Work and the Division of Labour Law' in Cathryn Costello and Mark Freedland (eds), *Migrants at work: immigration and vulnerability in labour law* (Oxford University Press 2014).

working relations.[264] In other words, migration law not only determines whether a migrant has the right to work in the country, but also shapes the nature of employment relations for the migrant.

In the EU, these migration statuses range from EU citizens and their family members, who enjoy the right to free movement within the EU, to third-country nationals with a permanent residence permit, third-country nationals with a temporary work visa, students, as well as refugees, asylum-seekers and trafficked persons, to undocumented foreign workers, who face the risk of deportation.

Part of labour scholarship has underlined the role of migration law, and consequently of the state, in creating and institutionalising a precarious and 'ultra-flexible' workforce of migrant workers.[265] Drawing from citizenship studies, especially from the work of Ruth Lister and Leah Vosko,[266] increasing attention has been paid to the role of the nation state in differentiating migrants through the selective and increased extension of civil, political, and social citizenship rights, and also in creating a distinct component of the workforce, segregated in devalued and less protected labour market segments excluded from the standard employment relationship.[267]

Indeed, restrictive immigration frameworks, border controls and visa conditions are a significant barrier to the exercise of labour rights. This is particularly the case for migrants who are dependent on employers for their visas or are undocumented, hence beingin a particularly vulnerable position towards the risk of labour exploitation, severe abuse and dire violations of human rights. In such cases, it has been argued that migration rules contribute to increasing the dependency in work relations, inducing domination, and ultimately creating fertile conditions for forced

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[264] Costello (n 248).
[265] ibid; Judy Fudge and Kendra Strauss, 'Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014); Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 95 Comparative Labor Law and Policy Journal 34; Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 Work, Employment and Society 300.
[266] Lister (n 197); Vosko (n 67).
[267] Vosko (n 67) 12. For a general theorisation on segmented labour markets and migrations, cf. Piore (n 92).

labour and extreme exploitation.[268] Fear of deportation, or the risk of losing the entitlement to work and reside in the host countries, may deter migrants from seeking remedies for breaches. As a result, migrants find it difficult to enforce the labour rights they are formally entitled to. And indeed, even those with a 'more secure' migration status, such as EU citizens within the EU, can be deterred from enforcing their rights,[269] and can face the risk of labour exploitation.[270]

The influence of migration law is particularly strong in the context of paid domestic work, a sector characterised by the strong presence of low-skilled migrant workers, mostly women. In this very sector, the precarious working arrangements of migrants interact with the social location of paid domestic work, embedded in social relations of subordination linked to workers' attributes, such as sex, ethnicity, race, immigration status, as well as skill and ability levels, with the unfortunate consequence of further reinforcing the domestic worker's dependence on the employer, creating the conditions for labour exploitation and vulnerability to abuse.

As such, not only are domestic workers partially excluded from a protective legal framework, but they are also constrained in their possibility to enforce and realise the labour rights they are formally entitled to due to restrictive immigration policies. The dependency of migrant domestic workers on their employer is exacerbated in the case of live-in domestic workers, who are in a particularly vulnerable position in relation to termination. In fact, in their case, termination could entail not only the loss of income but also of accommodation or even of their right to work and reside in the host country.[271] In fact, the right to stay in the host country may be contingent upon the existence of an employment relationship or the requirement to reside in

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[268] Costello (n 248) 191.
[269] Catherine Barnard, 'Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Nationals' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014).
[270] See, for example, Letizia Palumbo and Alessandra Sciurba, 'Vulnerability to Forced Labour and Trafficking: The Case of Romanian Women in the Agricultural Sector in Sicily' [2015] Anti-Trafficking Review.
[271] For an account of irregular migrant domestic workers in the EU context, see Anna Triandafyllidou (ed), *Irregular Migrant Domestic Workers in Europe: Who Cares?* (Ashgate 2013); Norbert Cyrus, 'Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers' in Helma Lutz (ed), *Migration and Domestic Work: A European perspective on a global theme* (Routledge 2008).

the house of the employer. As such, termination may ultimately put live-in domestic workers at risk of deportation.

This is the case in countries such as Canada[272] and the United Kingdom.[273] In the latter, the condition of entry of migrant domestic workers was further restricted in 2012 as part of a broader immigration reform to restrict the entry of 'low-skilled' migrants. To obtain a so-called Overseas Domestic Worker visa and hence permission to enter the UK legally, migrant domestic workers must be accompanying their third-country national employer on a temporary basis, and the visa is for a maximum period of six months. Additionally, domestic workers cannot extend their visa, nor can they change employers within the semester, since their visa status is tied to that of their employer. Many commentators, notably Virginia Mantouvalou, have argued that these visa requirements contributes to make migrant domestic workers extremely dependent on the employer with whom they enter the country, with the risk of creating the conditions for labour exploitation and rendering the working condition of migrant domestic workers even more precarious. [274]

Against this background, and in light of the difficulties migrants face in enforcing labour law rights based on citizenship, some scholars have resorted to international human rights law as a more promising avenue for protecting migrant domestic workers.[275]

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[272] Fudge, 'Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction' (n 42) 245 ff.
[273] Virginia Mantouvalou, '"Am I Free Now?" Overseas Domestic Workers in Slavery' (2015) 42 Journal of Law and Society 329.
[274] Over the last fifteen years, Virginia Mantouvalou has dedicated many writings on the topic. See, among others, Virginia Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers' (2006) 35 Industrial Law Journal 395; Virginia Mantouvalou, 'Modern Slavery: The UK Response' (2010) 39 Industrial Law Journal 425; Virginia Mantouvalou, 'What Is to Be Done for Migrant Domestic Workers?' in Bernard Ryan (ed), *Labour Migration in Hard Times* (Institute of Employment Rights 2013); Mantouvalou, ''Am I Free Now?' (n 273). See also Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (n 265).
[275] Fudge, 'Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction' (n 42) 96.

4.3 Addressing the vulnerability of migrant domestic workers in international human rights law

4.3.1 The appeal to the modern slavery framework

Given the dramatic prevalence of forced labour and abuse in the domestic work sector, many scholars and activists have drawn parallels between domestic work practices and 'modern slavery'. Modern slavery is an umbrella term that describes several forms of abuse and violations of basic human rights characterised by situations of exploitation such as slavery, servitude and forced labour, as well as human trafficking, in which the victim cannot refuse or leave because of threats or violence.[276]

In fact, due to the restrictive immigration frameworks and visa conditions, the constant proximity of the employer and the invisibility of domestic workers from labour inspections, as well as the operations of a large number of private employment agencies engaged in abusive practices in the recruitment, placement and employment of migrant domestic workers,[277] the domestic work sector is one in which labour exploitation occurs far too often.

Remarkably, Recommendation 1523 (2001) and Recommendation 1663 (2004) of the Parliamentary Assembly of the Council of Europe specifically acknowledged the phenomenon of 'domestic slavery'.[278] The latter recalls that

> 'Today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers, au pairs or 'mail-order brides'. Most have come voluntarily, seeking to improve their situation or escaping poverty and hardship, but some have been deceived by their employers, agencies or other intermediaries, have been debt-bonded and even trafficked. Once working (or married to a 'consumer husband'), however, they

[276] Eurofound and International Labour Office, *Working Anytime, Anywhere: The Effects on the World of Work*, vol 1 (2017) 16 <http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms_544138.pdf>.
[277] Fudge, 'Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction' (n 42).
[278] Council of Europe, Recommendation 1523 (2001) on "Domestic slavery", adopted by the Parliamentary Assembly on 26 June 2001 (18th Sitting); Council of Europe, Recommendation 1663 (2004) on "Domestic slavery: servitude, au pairs and mail-order brides", adopted by the Parliamentary Assembly on 22 June 2004 (19th Sitting).

> are vulnerable and isolated. This creates ample opportunity for abusive employers or husbands to force them into domestic slavery'.[279]

As a consequence, over the past two decades, the legal treatment of migrant domestic workers has mostly been analysed within the dominant framework of human rights law, with much of European legal scholarship focused on severe forms of exploitation and cases of extreme abuse.[280]

This is shown by the abundant case law of the European Court of Human Rights (ECtHR) on migrant domestic workers, which exemplifies the turn to the modern slavery approach in addressing the vulnerability of migrant domestic workers.

4.3.2 European Court of Human Rights case law[281]

In 2005, the ECtHR delivered its decision in the landmark case *Siliadin v France*.[282] The case concerned a Togolese girl, Ms Siwa-Akofa Siliadin, who arrived in France with a relative on a tourist visa. It was agreed that she would work in his house and would be enrolled in school while her immigration status was regularised. Instead, her passport was confiscated and she was 'lent' to another French couple of Togolese origin (Mr and Mrs B.), where she served as a domestic worker.[283] She was forced to perform a wide range of domestic tasks for up to fifteen hours a day, without a day off and without remuneration. As the decision states:

> 'The applicant … worked seven days a week, without a day off, and was occasionally and exceptionally authorised to go out on Sundays to attend mass. Her working day began at 7.30 a.m., when she had to get up and prepare breakfast, dress the [four] children, take them to nursery school or their

[279] Council of Europe, Recommendation 1663 (2004), para 2.
[280] For a reconstruction of how the modern slavery and trafficking discourses have become dominant in the European legal scholarship on migrant domestic workers, see Vera Pavlou, 'Where to Look for Change?' (2018) 20 European Journal of Migration and Law 83.
[281] This subsection is based on European Court of Human Rights, 'Guide on Article 4 of the Convention. Prohibition of Slavery and Forced Labour' <https://www.echr.coe.int/documents/guide_art_4_eng.pdf> accessed 11 February 2021.
[282] *Siliadin v. France,* Application no. 73316/01 (2005) ECHR 2005-VII.
[283] In the decision, they actually refer to the rather archaic term 'domestic servants'.

> recreational activities, look after the baby, do the housework and wash and iron clothes.
>
> In the evening she prepared dinner, looked after the older children, did the washing up and went to bed at about 10.30 p.m. In addition, she had to clean a studio flat, in the same building, which Mr B. had made into an office.
>
> The applicant slept on a mattress on the floor in the baby's room; she had to look after him if he woke up.
>
> She was never paid, except by Mrs B.'s mother, who gave her one or two 500 French franc [76.22 EUR] notes.'[284]

After the intervention of the French authorities, the couple was charged with the crime of forced labour, but was later acquitted on appeal. Siwa-Akofa Siliadin subsequently made an application to the ECtHR, claiming that France failed to comply with its positive obligation under Article 4 of the European Convention on Human Rights (the ECHR, hereafter 'The Convention') to adopt adequate criminal law provisions to prevent and effectively punish the perpetrators of slavery, servitude or forced/compulsory labour.

In a landmark decision, the Court acknowledged that the mistreatment suffered by the applicant amounted to forced and compulsory labour and servitude under Article 4 of the Convention. Consequently, the Court held that France violated their positive obligations to protect individuals from slavery, servitude and forced labour.

The Court found that the situation of Siwa-Akofa Siliadin did not amount to slavery in the traditional sense, since Mr and Mrs B. did not exercise a genuine right of legal ownership over her, thus reducing her to the status of an 'object'.[285] Instead, drawing from the ILO Convention No. 29 concerning forced or compulsory labour, the Court held that the applicant was subjected to 'forced labour', interpreted as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[286] Moreover, the

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[284] *Siliadin*, paras 14-15.

[285] It has been argued that the ECtHR interpreted the concept of slavery in the 'classic' (and outdated) sense of 'the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. See Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 246.

[286] *Siliadin*, para 116.

Court held that the applicant was kept in servitude because, in addition to the fact that she was required to perform forced labour, she was a minor with no resources, vulnerable and isolated with no means of living anywhere but the home where she worked at their mercy and completely depended on them with no freedom of movement and no free time.[287] Indeed, the Court conceptualised servitude as a 'particularly serious form of denial of freedom,' a form of forced labour aggravated by 'the obligation for the "serf" to live on another person's property and the impossibility of altering his condition'.[288]

Furthermore, the Court held for the first time that States have positive obligations to adopt criminal-law provisions which penalise slavery, servitude and compulsory labour, and to apply them in practice.[289]

In the wake of this landmark case, two other strikingly similar cases were taken up by migrant domestic workers before the ECtHR in the following years.

The first case, *C.N. and V. v France,*[290] concerned two underage girls from Burundi, who were entrusted to the care of a relative living and working as a diplomat in France. Upon their arrival in France, however, they were accommodated in an underground room, poorly heated and with deplorable hygiene conditions, and were used as unpaid housemaids. The first applicant was forced 'to do all the housework and domestic chores necessary for the upkeep of the house and the family of nine',[291] including taking care of the disabled son of Mrs M., with no wage nor days off. She was ill-treated, never went to school, and her immigration status was never legalised. The second applicant was sent to school but she was forced to contribute to the domestic duties of her sister after completing her homework.

Similarly, the second case, *C.N. v the United Kingdom,*[292] concerned a Ugandan woman who entered the United Kingdom illegally. She was introduced by a relative to a man who ran businesses providing caregiving services, and started working as

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[287] *Siliadin*, paras 126-127.
[288] *Siliadin*, paras 123-124.
[289] *Siliadin,* para 89.
[290] *C.N. and V. v. France*, no. 67724/09 (ECtHR, 11 October 2012).
[291] *C.N. and V. v. France*, para 12.
[292] *C.N. v the United Kingdom*, no. 4239/08 (ECtHR, 13 November 2012).

a live-in carer for a couple. The work was very demanding, and she did not receive remuneration for it, since her 'manager' retained her wage. As the Court put it,

> 'The applicant began to work as a live-in carer for an elderly Iraqi couple ("Mr and Mrs K"). She found the role physically and emotionally demanding as Mr K. suffered from Parkinson's disease and she was required to change his clothing, feed him, clean him and lift him as necessary. As a result, she was permanently on-call during the day and night. On one Sunday every month she was given a couple of hours leave but on these occasions she would usually be collected by M. and driven to S.'s house for the afternoon.
> 10. …she received no significant payment for her labour … from time to time S. would give her GBP 20 or GBP 40 when she went to his home on her monthly afternoon of leave.'[293]

In addition, her freedom of movement was restricted, and she was warned not to speak to anybody, being forced to spend her few hours of leave at her 'manager's' house.

In both cases, which were decided in 2012, the Court found that the situation experienced by the migrants employed as domestic workers amounted to servitude. Building on the findings in *Siliadin v France,* in *C.N. v the United Kingdom* the Court reaffirmed the procedural obligation of States to effectively investigate complaints which raise 'a credible suspicion that the person has been held in domestic servitude',[294] while in *C.N. and V. v France* the Court held that while the State conducted an effective investigation into the case, it failed in its positive obligation to set in place a legislative and administrative framework to penalise and effectively prosecute servitude and forced labour.[295]

Poignantly, in *C.N. and V. v France,* the Court established that the threat of deportation amounted to a 'menace of any penalty',[296] which is one of the main

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[293] *C.N. v the United Kingdom*, para 9.
[294] *C.N. v the United Kingdom*, para 71.
[295] *C.N. and V. v. France*, paras 105-108.
[296] See *C.N. and V. v. France*, para 77, quoting the ILO report 'The cost of coercion: global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work': 'the penalty … can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal'.

factors determining whether a work situation constitutes forced or compulsory labour. This point was stressed again in *C.N. v the UK*, in which the Court specifically referred to 'domestic servitude', considered as 'a specific offence, distinct from trafficking and exploitation, with a complex set of dynamics, involving both overt and more subtle forms of coercion'.[297]

Indeed, it is worth noting that, in both *C.N. v France* and *C.N. v the UK*, the applicants lost the use of their passports and were repeatedly threatened to be reported to the police and be deported. In so doing, the Court suggested the link between the immigration status and vulnerability to abuse in a more explicit manner than in the *Siliadin* case.[298] However, it is only in the recent case *Chowdhury and Others v Greece*, which concerned Bangladeshi migrants working in the agricultural sector in Greece, that the Court explicitly linked restrictive immigration policies with the vulnerability of migrant domestic workers to treatment in a manner contrary to Article 4 of the Convention.[299]

Finally, the Court was called on to decide another case brought by migrant domestic workers, *J. and Others v Austria.*[300] The case concerned three female migrant domestic workers from the Philippines, employed as maids in the United Arab Emirates. As the applicants reported, their passports were confiscated and they were subjected to ill-treatment and exploitation by their employers. In particular, they were forced to work from 5 a.m. to midnight, for seven days a week without a single day off. During a short stay in Austria with their employer, where they were threatened and subjected to extreme form of verbal abuse, they escaped, and managed later to file a complaint against their employer.

In this case, the ECtHR found that there was no violation of Article 4 of the Convention, as States are not required to provide for universal jurisdiction over

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[297] *C.N. v the United Kingdom*, para 80.
[298] Clíodhna Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe' (2013) 62 International and Comparative Law Quarterly 599, 624.
[299] *Chowdhury and Others v. Greece,* no. 21884/15 (ECtHR, 30 March 2017), para 95: 'The applicants were aware that their irregular situation put them at risk of being arrested and detained with a view to their removal from Greece. An attempt to leave their work would no doubt have made this more likely and would have meant the loss of any hope of receiving the wages due to them, even in part'.
[300] *J. and Others v Austria,* no. 58216/12 (ECtHR, 17 January 2017).

offences committed abroad and that the legal and administrative framework in place concerning the protection of (potential) victims of human trafficking in Austria was sufficient. What is relevant, however, is that in this case the mistreatment of migrant domestic workers was framed in the context of human trafficking. In this case, the Court reaffirmed that human trafficking is a separate crime that nonetheless falls within the scope of Article 4 of the Convention.[301]

4.4 The limitations of a modern slavery approach: towards a labour law approach to tackle labour rights violations

The landmark decisions of the European Court of Human Rights on migrant domestic workers analysed above have been celebrated for their contribution to shining light on the exploitative working conditions of migrant domestic workers and their vulnerability to abuse and exploitation. These judgments were positively welcomed by many human rights scholars, who commented that the Court played a crucial role in requiring states to acknowledge and address modern forms of forced labour. Indeed, in these cases the Court indicated the legal obligations on states in terms of providing effective protection and minimum standards to ensure the effective criminalisation of contemporary forms of slavery, and this eventually resulted in the reform or adoption of new national criminal law provisions.[302]

However, the appeal to modern slavery and human trafficking in the legal response to migrant domestic workers precarious working conditions has received some

[301] *J. and Others v. Austria*, para 104. Since the much-celebrated case *Rantsev v. Cyprus and Russia,* no. 25965/04 (2010) ECHR 2010-I, the Court considered human trafficking to fall within the scope of Article 4 of the Convention. While the addition of human trafficking to the conceptual limits of Article 4 can be heralded as an important development; however, the lack of rigour in conceptualizing human trafficking and the concepts that are explicit in Article 4 ECHR has been criticised by some human rights scholars. See Vladislava Stoyanova, 'European Court of Human Rights and the Right Not to Be Subjected to Slavery, Servitude, Forced Labor, and Human Trafficking' in John Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (Springer International Publishing 2020); Stoyanova (n 285).
[302] Murphy (n 298) 625; Mantouvalou, 'Servitude and Forced Labour in the 21st Century' (n 274); Mantouvalou, 'Modern Slavery' (n 274).

criticism within labour law scholarship, which has highlighted the limitations of such an approach.[303]

Indeed, it has been argued that ECtHR case law perfectly exemplifies the very limitations and biases underpinning the adoption of a modern slavery approach based on criminal law and human rights law. As Judy Fudge and Kendra Strauss persuasively state,

> 'A human rights approach that hinges on the international instruments against forced labour and trafficking tends both to skew attention towards the worse cases of abuse and to transpose the stereotypes that dominate the public discourses around slavery and trafficking into the discussion of forced labour'.[304]

Let us focus on the two main criticisms expressed in this sentence.

First, all the cases discussed before the ECtHR concerned heinous violations of human rights and dire situations of abuse which met the severity criteria required under Article 4. These situations are unfortunately widespread, but they are not representative of the regulatory challenges and poor working conditions experienced by a large number of domestic workers who may choose voluntarily to migrate and who may accept drudgery in order to survive in the host country to be able to send remittances to their country of origin.

Yet, only in the most despairing and tragic cases can these domestic workers claim to have been held in slavery or servitude, to have been required to perform forced labour. To claim these types of offence under international and national criminal law involves an extremely high threshold of abuse, a high standard of proof, and a degree of (employer's) culpability in depriving somebody of their freedom.

Likewise, with specific regard to human trafficking, it has often been noted that the current legal framework risks providing support and remedies only to a limited number of migrant workers who fall within the category of 'victim', while offering

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[303] For a general critique to human trafficking and forced labour in the context of migrant workers, *see* Hila Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60 UCLA Law Review; Fudge and Strauss (n 265); Costello (n 248); Pavlou, 'Where to Look for Change?' (n 280); Thiemann (n 15).

[304] Fudge and Strauss (n 265) 173.

no protection to migrant workers suffering other types of labour abuse.[305] The criminal offence of human trafficking addresses a very specific activity that requires the presence of coercion at the beginning of the chain of recruitment, transportation, transfer, harbouring or receipt of persons.[306]

Indeed, the modern slavery agenda, and in particular the strategy against human trafficking is not suited to addressing the varied situations of 'unfree' labour of migrants who enter a country voluntarily, without overt coercion.[307] On the contrary, focusing solely on these cases at one extreme of the 'free-unfree labour spectrum' runs the risk of trivialising the daily lack of labour rights experienced by migrant workers in the domestic sector, from inadequate rest periods to insufficient wages and the lack of social security.[308] As Clíodhna Murphy acknowledged,

> 'the legal framework of Article 4 is, of itself, inadequate to deal with labour law violations experienced by migrant domestic workers which do not reach the threshold of severity of slavery, servitude or forced labour'.[309]

Hence, this system runs the risk of creating a hierarchy of victims with some considered worthy victims and other migrant workers who experience everyday abuse not considered 'victim enough'.[310] In other words, it conceals the 'normality' of exploitation induced by capitalist relations of production: if there are no 'slaves'

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[305] Shamir (n 303).
[306] Within public international law, human trafficking is defined as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'. Cf. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 (s.c. 'Palermo Protocol'), Article 3(a).
[307] Costello (n 248) 206; Nerina Boschiero, 'Lo sfruttamento economico dei lavoratori migranti: vecchie o nuove forme di schiavitù nell'era della "private economy"?' (2010) 4 Diritti Umani e Diritto Internazionale 344, 361; Fudge and Strauss (n 265).
[308] Pavlou, 'Where to Look for Change?' (n 280).
[309] Murphy (n 298) 602.
[310] Haverkamp, in Joel Quirk, Caroline Robinson and Cameron Thibos, 'Editorial: From Exceptional Cases to Everyday Abuses: Labour Exploitation in the Global Economy' [2020] Anti-Trafficking Review 1, 11.

in the farms and households of Europe, there are indeed many exploited and underpaid workers, whose labour rights are neither recognised nor protected.[311]

Secondly, the cases discussed by the ECtHR all concerned particularly vulnerable extra-EU 'victims' and ruthless employers with extra-EU backgrounds. As noted by Fudge and Strauss in the passage quoted above, focusing solely on cases involving third country nationals carries with it the risk of reinforcing the narrative of 'Saviour Europe' and the stereotypes according to which these forms of modern slavery are a prerogative of specific 'uncivilised' environments.[312] In exposing a good deal of Orientalism, this narrative contributes to depoliticise the discussion, obscuring the role of national and European systems regulating work and migration (and gender) whilst shaping and maintaining the conditions that pave the way for the vulnerability of (migrant) workers. According to Adelle Blackett, to focus on the modern slavery agenda and the individualized victim of modern slavery places the phenomenon outside politics and fails to challenge the underlying structural conditions that render these forms of vulnerability so pervasive.[313] In the same vein, Fudge and Strauss denounce the adoption of the modern slavery agenda

> 'tends to reinforce the view that migrant domestic workers' exploitation is the result of morally culpable individuals who should be publicly vilifies, rather than systemic and institutional feature of state policies and practices relating to immigration and labour regulation'.[314]

In conclusion, the modern slavery agenda risks actually undermining efforts to identify and tackle the structures of labour markets prone to severely exploitative

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[311] Laura Calafà, 'Per un approccio multidimensionale allo sfruttamento lavorativo' [2021] Lavoro e diritto 193, 195.
[312] Fudge and Strauss (n 265). Against this narrative of the narrative of the 'saviour Europe', Adelle Blackett presents the positive case of Côte d'Ivoire in addressing the vulnerability of domestic workers without adopting an approach that privileges criminalization. See Blackett, *Everyday Transgressions* (n 248) 155 ff.
[313] Blackett, *Everyday Transgressions* (n 248) 154; Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 11.
[314] Fudge and Strauss (n 265) 173.

labour practices, obscuring the role of the global economy in shaping and sustaining the vulnerability of precarious (migrant) workers on which it is predicated.[315]

This is evident in the fact that most legal responses to modern forms of slavery, at both the international and national level, are usually grounded in a punitive response. Yet, the criminal response is an *ex-post* response to a criminal offence and does not focus on understanding the laws, practices and regulatory gaps that create the vulnerability to forced labour.[316] This is particularly true in the response to human trafficking, which has traditionally been accompanied by a strong immigration-control ethos, as exemplified by the UK, where the much-celebrated adoption of the 2015 'Modern Slavery Act' was a means for promoting an anti-migration agenda.[317] The modern slavery approach may paradoxically focus on promoting a repressive and rather paternalistic response associated with strengthened border controls, resulting in an approach that aims more to repress organised crime than to protect victims, with marginal attention on labour law and fundamental rights.[318] In other words, the anti-trafficking agenda may be employed as a diversionary tactic to limit the rights of migrant workers and to speak on their behalf, instead of focusing on decent work deficits in the sectors into which they are segregated.[319]

Moreover, it has been argued that the very use of the term 'vulnerability' in the context of migrant workers risks naturalising atypical, unstable and unprotected working conditions, segregating migrant workers within their 'victimhood' even further. [320] Such a discourse does not consider that migrants exercise a high degree

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[315] Quirk, Robinson and Thibos (n 310); Judy Fudge, 'Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization' (2018) 27 Social & Legal Studies 414.
[316] Costello (n 248).
[317] Fudge, 'Modern Slavery, Unfree Labour and the Labour Market' (n 315) 414.
[318] Judy Fudge, 'Modern Slavery and Migrant Domestic Workers: The Politics of Legal Characterization' (The Foundation for Law, Justice and Society 2016) Policy Brief 6.
[319] Global Alliance Against Trafficking in Women (GAATW) (ed), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007). See also Quirk, Robinson and Thibos (n 310). In their Editorial, Quirk, Robinson and Thibos introduced a special issue of the *Anti-Trafficking Review* which hosted a discussion on whether the anti-trafficking cause should be reformed to tactically contribute to challenge systems producing everyday abuse within the global economy.
[320] Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (n 265) 203.

of agency when they decide to flee from limited life options in their country of origin; they only became vulnerable due to the temporary (or illegal) status they are given in the country of destination.

This narrative of victimhoodmay actually reinforce the gendered and racialized stereotypes of 'victims' and 'employers' that have long been recognised as permeating the anti-trafficking approach, according to which the trafficked person is conceptualised as an idealised and highly gendered victim in need of rescue and charity, rather than labour rights.[321]

For the purpose of this discussion, however, the focus should be on the main consequences of adopting a human rights approach under the modern slavery agenda as the main tool to tackle the vulnerability of migrant domestic workers. Despite its substantial contribution to shining light on the difficult living and working conditions of domestic workers, focusing mainly on domestic workers as victims of human rights abuse may not only result in a merely punitive response, but can also unintentionally contribute to moving the discussion away from the scope of labour law. This is clear in the EU legal framework, where – as analysed in Chapter 4 – the working conditions of migrant domestic workers have only been considered in the area of legal migration and criminal justice.[322] Against this background, burgeoning labour law scholarship has been calling for the development of a 'labour law approach' in the study and response to the vulnerability of migrant workers, since it would focus on the conditions of exploitation resulting from the complex and interacting economic, legal and social factors within the global economy that produce everyday abuse and could impact on the protection of fundamental rights at work for marginalised workers.[323]

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[321] Fudge and Strauss (n 265).
[322] See below, Chapter 4, §2.
[323] The conceptualization of a 'labour law approach' to unfree work is owed to Catherine Costello. Cf. Costello (n 248). In the Italian scholarship, this approach has been advocated by Calafà, 'Per un approccio multidimensionale allo sfruttamento lavorativo' (n 311); Laura Calafà, 'Focus Europa. La Lotta al Lavoro Forzato e Obbligatorio. Riflessioni Sul Lavoro Indecente Dopo La Pronuncia Chowdury' [2019] Lavoro e Diritto 499; Laura Calafà and Venera Protopapa, 'Logiche interdisciplinari e salute dei migranti' [2021] Lavoro e diritto 105.

Indeed, considering migrant domestic workers only as innocent victims without agency, fails to consider them as real workers, entitled to labour rights on a par with other workers. In other words, relying on the modern slavery agenda to address the widespread human rights abuse of migrant workers, and migrant domestic workers more specifically, is ultimately to demean the role of labour law in promoting fundamental rights at work.[324]

5 The consequences of speciality: the exclusionary legal approach to domestic work

While at the beginning of modern labour law, the first social laws were specifically tailored to the most vulnerable groups of workers, during the twentieth century these distinctions between groups of workers were gradually eroded, in favour of a single regulatory framework, in which all workers were protected through the gateway of the employment contract.[325] Yet, this turn to universalism had some notable exceptions.

Indeed, a number of work relationships were considered so divergent from the standard employment relationship that they were considered unfit to be covered by the full array of labour law protection. This is the case of the domestic work relationship: because of its continuity with the legal category of domestic servants, which has long remained separated from the generality of employees, and its association with the private sphere of the 'unproductive' household and with socially reproductive work, the domestic work relationship has been assumed to be

[324] Thiemann (n 15) 202, 205. For a broader discussion on the construction of the idealized trafficked victim, see Amy M Russell, 'The Boundaries of Belonging: Gender, Human Trafficking and Embodied Citizenship' (2016) 25 Journal of Gender Studies 318. These gendered stereotypes are also reinforced by the traditional difficulty to consider domestic work as 'real' labour, as emerges from the ECtHR case-law on migrant domestic workers. See Costello (n 248). The case of sex work is even more indicative of how such a (paternalistic) devaluation of embodied women's work contributes to the construction of passive 'victims' of crime, instead of workers lacking rights.

[325] As Guy Davidov recently stated, 'the historical development of modern labour law can be described as a movement from selectivity to universalism'Guy Davidov, 'The Goals of Regulating Work: Between Universalism and Selectivity' (2014) 64 University of Toronto Law Journal 1, 551.

unfit to be fully regulated within a labour law system developed on the model of the industrial workplace. Moreover, the prevalence of women and migrant workers in the sector has further complicated attempts to bring domestic work into the fold of employment protection.

As such, the domestic work relationship has been categorised as a 'special work relationship', regulated through a set of separate provisions and regulations. This differential, 'exclusionary' regulatory approach, i.e., the widespread exclusion of domestic workers from general labour legislation and the consequent adoption of different regulations specifically applicable only to the employment contract of domestic workers, resulted in domestic workers being entitled only to a limited set of labour rights. Indeed, the adoption of special regulations applicable solely to domestic workers led to different or no limitations to normal working hours and overtime, the lack of protection against unfair dismissals; exclusion from minimum wage policies, insufficient or no provisions regulating health and safety standards, protection from harassment, maternity protection, privacy as well as the right to a private and family life, as well as provisions ensuring freedom of association and collective bargaining rights, as recently confirmed by research on national labour law frameworks.[326]

In this regard, Einat Albin has argued for the existence of a 'sectoral disadvantage' for domestic workers, meaning a situation 'in which the *rules* of a specific sector—its structure and culture—impact on workers in the direction of disadvantage,'[327] leading workers to a disadvantaged situation.[328] In a similar manner, Virginia Mantouvalou refers to a situation of 'legislative precariousness,' that is 'the special vulnerability created by the explicit exclusion or lower degree of protection of

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[326] For a broad review of the widespread and persisting exclusion of domestic work from most labour law frameworks, see the extensive research undertook by Adelle Blackett for the ILO. Cf. ILO, 'Decent Work for Domestic Workers' (n 27). For an updated report presenting the progress occurred over the last decade, see also ILO, *Making Decent Work a Reality for Domestic Workers* (n 39).
[327] Albin (n 168) 231.
[328] See also Einat Albin, 'Sectoral disadvantage: The case of workers in the British hospitality sector' (PhD Thesis, University of Oxford 2010) <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.527273> accessed 17 January 2021; Albin and Mantouvalou (n 251) 70.

certain categories of workers from protective laws.'[329] Indeed, the adoption of differential and discriminatory regulatory treatment has immense consequences for the fundamental rights of domestic workers, contributing to shaping the conditions of vulnerability within the sector. Furthermore, given the prevalence of women with migrant backgrounds or from historically marginalised groups, many concerns arise concerning indirect discrimination on the grounds of sex,[330] or on multiple grounds (so-called intersectional discrimination).

Due to this traditional difficulty of the general principles of labour law to percolate through and permeate the domestic work relationship, the traditional assumptions and expectations about domestic work still play a significant role in shaping the modalities in which domestic work is conceptualised and regulated. These special regulations have reflected, if not directly sustained, the invisible norms and customary rules that perpetuate the vestiges of servitude in domestic work and reproduce stark social inequalities along gender, race, class and other lines. As Adelle Blackett persuasively argues, neglecting domestic work relationships in the labour law discussion has contributed to perpetuating the customary norms, traditions and expectations that regulate the domestic work relationship in an unequal, asymmetrical and largely invisible way. With reference to this corpus of reflexive law, she uses the term 'law of the household workplace'. In her definition, this is

> 'the common sense way in which the domestic work relationship is understood and regulated [which] is part of a global legacy of subordination and servitude that operates in particular places and in particular ways on particular women's bodies.'[331]

Although these socio-legal assumptions vary from one cultural context to the next, they are nonetheless based on embedded social and gendered norms and institutions

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[329] Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2012) 34 Comparative labor law & policy journal 133, 133.
[330] As suggested by Nuria Ramos Martin, Ana Belen Munos Ruis and Niels Jansen, 'Deficits on Social Protection of Workers in the PHS Sector. Can Equality Law Solve the Gap? Comparative Perspectives from Spain and the Netherlands.' (2021) Working Paper presented at the ILERA Conference 2021. See also, Vera Pavlou, 'Whose Equality? Paid Domestic Work and EU Gender Equality Law' [2020] European Equality Law Review 36.
[331] Blackett, *Everyday Transgressions* (n 248) 11.

established on the remnants of subservience, which contribute to reproducing the vestige of servitude in the domestic work relationship.[332]

5.1 Domestic work as boundaryless: the exclusionary approach in working time regimes

This is most evident in the case of working time regulation. Working time is one of the elements of the employment relationship in which domestic workers commonly are entitled less protection than other workers. According to research undertaken for the ILO in 2010, in almost half of the countries investigated,[333] domestic workers were excluded from working time regulations limiting weekly working hours and establishing weekly rest periods This is generally justified by lawmakers with the impossibility of measuring domestic work, due to the fact that it is not possible to distinguish between 'actual' work and the personal time of the worker, in particular in the case of live-in domestic workers.

This 'policy narrative of [domestic workers'] working hours as inescapably ungovernable'[334] is sustained by the traditional expectation of domestic work as a 'boundaryless' activity.[335] This conflicts with the boundary-setting functions of working time regulations itself, which is to measure the activities required from the worker; limit working hours to ensure health and to protect workers from interferences into their free time and private life.[336]

As highlighted by a large number of ethnographic studies and ILO reports, domestic workers usually have long (or completely open-ended) working hours, long or

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[332] For an analysis of the 'law of the household', see also below, Chapter 3, fn. 379.
[333] ILO, 'Decent Work for Domestic Workers' (n 27) 49.
[334] Deirdre McCann, 'Equality through Precarious Work Regulation: Lessons from the Domestic Work Debates in Defence of the Standard Employment Relationship' (2014) 10 International Journal of Law in Context 507, 513.
[335] Blackett, *Everyday Transgressions* (n 248) 61.
[336] In the words of Alain Supiot: 'The reference to 'working time,' on the one hand, limits the employer's hold on the worker's life and, on the other, allows the employer to evaluate his [or her] services. Time is simultaneously a limit to worker obligations and a standard against which to value what labour is worth.'Alain Supiot, *Au-Delà de l'emploi : Transformations Du Travail et Devenir Du Droit Du Travail En Europe* (Flammarion 1999). On the debate on the contemporary functions of working time, see also Deirdre McCann and Jill Murray, *The Legal Regulation of Working Time in Domestic Work* (ILO 2010).

unpredictable periods of 'on call' duty, and unpredictable schedules.[337] In the case of live-in domestic workers, in particular, it has been reported that they may end up being considered, *de facto*, as constantly available to the employer, because the place in which they reside, and where they mostly spend their rest time, overlaps with their workplace, i.e., the private household of the employer. Hence, their work is shaped by an extreme and unconstrained form of flexibility, in total contrast to the usual regulation of normal working hours, overtime limitations, daily and weekly rest time, and annual leave.

This unconstrained flexibility is sustained and reflected in the extensive use in domestic work of 'stand-by' time, i.e., periods in which live-in domestic workers are expected to be present in the workplace and available to the employer without engaging in the primary activities of the job.[338] For example, live-in domestic workers who are employed to provide LTC to a non-self-sufficient person are traditionally required to stay all night in the house they share with the care-recipient, in order to be available to provide care in case he or she wakes up during the night and requires assistance.[339] Stand-by time is a major regulatory challenge in labour law theory,[340] as it is not always considered (or remunerated as) working time and hence contributes to determine the long working hours in the sector.

The assumption that domestic workers must always be available to fulfil the employer's wishes partly derives from continuity with the role of mothers and housewives, as well as from their role in the care economy. Indeed, domestic workers are hired specifically because they are required to respond to the

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[337] McCann and Murray (n 336) 5.
[338] Guy Mundlak, 'Recommodifying Time: Working Hours of "live-in" Domestic Workers' in Joanne Conaghan and Kerry Rittich (eds), *Labour law, work, and family: critical and comparative perspectives* (Oxford University Press 2005).
[339] As reported by Degiuli (n 33).
[340] Notably, the issue of standby time and on-call duty is a perpetual conundrum within the EU working time regime, having generated a rich case-law. See, in particular, CJEU, Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-07963; Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger.* [2003] ECR I-08389. More recently, the debate on stand-by time has been reinvigorated by the decisions rendered in case C-518/15, *Ville de Nivelles v Rudy Matzak*, ECLI:EU:C:2018:82, case C-344/19 *D. J. v Radiotelevizija Slovenija* ECLI:EU:C:2021:182; case C-580/19 *RJ v Stadt Offenbach am Main* ECLI:EU:C:2021:183.

unpredictable care needs of their employers (who are, in turn, flexible workers), or to provide for 24-hour care to an elderly or a person with disabilities.[341]

The expectation of constant availability emerged with absolute clarity in the context of the COVID-19 pandemic, during which some domestic workers were exposed to an increasing workload to cope with the mounting caring needs of their employers. It was reported that in some cases domestic workers who were not living-in were coerced to move into the house of the employers, under the threat of dismissal at the worst possible time, i.e., during a pandemic.[342] For live-in domestic workers, the lockdown measures exacerbated the condition of constant availability, as they were inevitably forced to stay at home (the workplace) even during their daily or weekly rest. News articles reported cases in which live-in domestic workers were confined to the workplace and ordered not to leave the house to reduce the risk that they could spread the virus to the employer.[343]

5.2 Domestic work as essential and expendable:[344] the exclusionary approach in the national responses to COVID-19

Recent regulatory attempts to define the rights and duties of domestic workers have been inexorably shaped by the perceived speciality of domestic work. This is most evident in the national responses to the COVID-19 crisis, which not only dramatically highlighted the detrimental consequences of the traditional differential regulatory approach of the domestic work relationship, but also further excluded domestic workers from labour law protections.

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[341] McCann and Murray (n 336) 13.
[342] Pandey, Parreñas and Sabio (n 55).
[343] E.g. Borzou Daraghi and Bel Trew, 'Coronavirus Trapping Domestic Workers in Virtual "Slavery"' *The Independent* (1 May 2020) <https://www.independent.co.uk/news/world/middle-east/coronavirus-turkey-migrant-workers-lebanon-human-rights-a9489616.html> accessed 24 July 2021; May Bulman, 'The Domestic Workers Trapped in Homes Where Their Wealthy Employers Flout Lockdown Rules' *The Independent* (2 March 2021) <https://www.independent.co.uk/news/uk/home-news/domestic-workers-lockdown-rules-coronavirus-b1802525.html> accessed 24 July 2021.
[344] I adopt these term following Pandey, Parreñas and Sabio (n 55)., which majestically assessed the symbolic celebration of care workers and other precarious workers as 'essential' to reinforce expectation of self-sacrifice from vulnerable and thus expendable workers.

Domestic workers were among the categories of workers worst hit by the pandemic, with a disproportionally loss of jobs within the domestic work sector, partly due to the ease with which an employer can terminate the working relationship.[345] The vulnerability of domestic workers to termination is exacerbated by the lack of social protection. Whereas domestic workers are excluded from Short-Time Work schemes, domestic workers are also commonly not entitled to unemployment benefit, for example in Spain. Against this background, the Spanish government reacted during the COVID-19 crisis by providing an extraordinary subsidy for lack of work specifically to domestic workers.[346] Although this is to be welcomed, it is only a temporary measure and represents a rather unique case of attention to domestic workers in Europe during the response to the COVID-19 pandemic.

On the contrary, in Italy, domestic workers were among the very few categories that were explicitly excluded from the temporary income support provided in response to the COVID-19 crisis.[347] After much outcry from social movements and trade unions, the government reincluded domestic workers in subsequent relief measures, but maintained some significant differences and limitations: the amount was lower than for other workers, and applied only to live-out domestic workers, maintaining the exclusion of live-in domestic workers.[348]

This event is symptomatic of the long-standing exclusionary approach of Italian lawmakers to domestic workers, but it is by no means unique. A similar approach was adopted in the UK, where migrant domestic workers were also excluded from COVID-19 related income support measures, and in the United States.[349] Despite the fact that the pandemic has highlighted the crucial role of care work for our society, this recognition (and celebration) of domestic workers as 'essential

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[345] ILO, *Making Decent Work a Reality for Domestic Workers* (n 39) 232.
[346] *Real Decreto-ley 11/2020, de 31 de marzo, por el que se adoptan medidas urgentes complementarias en el ámbito social y económico para hacer frente al COVID-19.* BOE núm. 91, de 01/04/2020.
[347] *Decreto-legge 17 marzo 2020, n. 18 recante misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19*. GU Serie Generale n.70 del 17/03/2020.
[348] Cf. *Decreto-legge 19 maggio 2020, n. 34 recante Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonche' di politiche sociali connesse all'emergenza epidemiologica da COVID-19*. GU Serie Generale n.128 del 19-05-2020 - Suppl. Ordinario n. 21. Cf. Borelli (n 7).
[349] Pandey, Parreñas and Sabio (n 55).

workers' is largely symbolic and has not resulted in greater interest in the material improvement of their working conditions. As with other low-paid, precarious and devalued occupations (e.g., people working in agriculture, large-scale distribution and logistics, as well as social care, to name only a few), the pandemic has regrettably reproduced long-standing expectations of unbridled and unrequited self-sacrifice, thus covering once again the structural vulnerability of workers in this sector.[350]

6 Summary

This chapter demonstrates that the regulation of domestic work is complicated by its location across traditional disciplinary and territorial boundaries, contributing to making domestic work a special working relationship and justifying its widespread exclusion from the full array of labour rights and protection.

It provides a historical reconstruction of the evolution of the domestic work relationship derived from the legal category of domestic servants andhighlights how, during the unfolding of Industrial Revolution and the ideals of the French Revolution, both civil law and common law systems gradually transitioned from status to the employment contract, whilst domestic servants remained largely excluded from the developments in working relationships and in social legislation. This different – and minimal - legal approach towards domestic workers still exists today, on the basis of the perceived speciality of domestic workers, which is

[350] ibid 13., according to which the categorisation of domestic workers as essential workers has been used as a 'controlling mechanism to extract uncompensated labor that allows the public pedestalizing of their vulnerabilities as "sacrifices"'. For a broader reflection on the social categorization of 'essential worker' and its interaction with existing form of inequalities at the intersection of gender, race, and class, see Andrew Lakoff, '"The Supply Chain Must Continue": Becoming Essential in the Pandemic Emergency' (*Items: Insights from the Social Sciences*, 5 November 2020) <https://items.ssrc.org/covid-19-and-the-social-sciences/disaster-studies/the-supply-chain-must-continue-becoming-essential-in-the-pandemic-emergency/> accessed 17 June 2021.

considered unfit to be regulated by a regulatory labour framework based on the industrial workplace model.

The chapter explores how the 'speciality' of domestic work is normatively construed in labour law.

First, it is argued that the speciality of domestic work rests on the ideology of the public/private divide, according to which the private and gendered sphere of the household is construed in hierarchical opposition to that of industrial labour, relegating domestic work – and reproductive work more generally – to a secondary position. Not only is the private sphere construed as secondary to the 'public' sphere of the market, but it is also considered an area and set of social relations which, due to the proximity with the intimate sphere of the household, should not be governed by the law of the market but by family law instead.

It is also argued that the speciality of domestic work is magnified by its geographical location across national borders. Paid domestic work is a transnational phenomenon characterised by the enormous prevalence of migrant workers. Yet, the migrant status of domestic workers further complicates their ability to enforce labour law rights based on citizenship, to the extent that immigration law plays a constitutive role in institutionalising precarious employment norms for migrant workers. Much scholarship has addressed the legal regulation of migrant workers against the background of universal-based international human rights instruments. However, the appeal to the modern slavery framework is analysed as a strategy contributing to distancing domestic work from other types of work: considering migrant domestic workers passive 'victims' of heinous crime, instead of workers segregated in sectors with structural decent work deficits, mirrors and reinforces the traditional devaluation of reproductive work as not 'real' work.

Finally, the Chapter explores how the speciality of domestic work has justified the adoption of an exclusionary regulatory approach, giving rise to a series of considerable regulatory challenges and decent work deficits for domestic workers. But is this the only regulatory approach to domestic work? The next Chapter provides an example of the different – and rather pioneering – regulatory approach developed at the ILO level.

Chapter III

Beyond speciality: the ILO Domestic Workers Convention

1 Introduction

In the previous chapter, I investigated how the constructed 'speciality' of domestic work has traditionally been exacerbated by legislation to put domestic workers beyond the boundaries of labour law, justifying their exclusion and invisibility in regulatory frameworks. This chapter focuses on the different regulatory approach adopted by the ILO to reverse that trend, as exemplified in the historic adoption of the Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 204). Instead of relying on the special features of domestic work to identify areas of exclusion from labour legislation, the approach adopted by the ILO acknowledges these special features as a reason to provide further, sector-specific protections that are able to overcome the barriers to the realisation of domestics workers' rights.

This chapter investigates the ILO Domestic Workers Convention and accompanying Recommendation as an example of selective and sectoral regulatory projects aimed at ensuring that domestic workers enjoy labour rights as other workers.

Section 2 introduces the actors and sources of international labour law, focusing on the International Labour Organisation (ILO) and its endorsement of the Decent Work Agenda. It also provides an overview of the early involvement of the ILO in the legal regulation of domestic workers, from the reaffirmation of their inclusion

in international labour standards to their placement as a main topic on the ILO agenda.

Section 3 provides an analysis of the content of the Convention, including the definition of domestic workers by the Convention, the provisions reaffirming fundamental rights for domestic workers and specific provisions addressing domestic workers' working conditions in relation to the live-in arrangement, working time, work-life balance and autonomy, occupational health and safety, and vulnerability to forced labour and abuse. The Section also points to the limitations of the Convention, in particular with regard to the termination of employment and the regulation of private employment agencies.

Finally, Section 4 concludes by assessing the significance of the dual regulatory approach adopted by the Convention to counteract invisibility and exclusion, while highlighting the special circumstances in which domestic work is performed.

2 Addressing the speciality of domestic work in international labour law

2.1 The International Labour Organization (ILO)

The principal international institution that develops and enforces international labour law is the International Labour Organization (ILO). Created in 1919, the ILO is grounded on the belief that universal and lasting peace can be accomplished only if it is based on social justice. With the famous Declaration of Philadelphia adopted in 1944, which powerfully established the centrality of human rights for all people and human dignity at work through the motto '*labour is not a commodity',* the original mandate of the ILO was extended further. In 1946, the Declaration of Philadelphia was integrated into the ILO Constitution, and the ILO became the first specialised agency of the United Nations.

2.1.1 International labour standards

The ILO is based on cooperation and dialogue between social partners, according to the so-called principle of 'tripartism'. Through its unique tripartite structure consisting of representatives of governments, employers, and workers from each of its Member States, its main aim is to set labour standards, to develop policies and, more recently, to devise programmes promoting decent work for all women and men.

Up to now, the ILO has adopted 190 Conventions and 206 Recommendations, establishing international labour standards over a wide range of topics. International Conventions are established and adopted by the International Labour Conference (ILC), which brings together governments', workers' and employers' delegates of the Member States.

International labour Conventions are binding for ratifying Member States, which are therefore obliged to 'take such action as may be necessary to make effective the provisions' of a ratified Convention.[351] Member States who have ratified a Convention are therefore bound to ensure that labour standards are implemented in practice, through law, court decisions, arbitration awards or collective agreements, in accordance with national practice. Conversely, recommendations are non-binding instruments that provide guidelines and authoritative guidance to Member States as to policy, legislation and practice.

2.1.2 The monitoring mechanisms

The monitoring of the implementation and application of the international conventions is entrusted to two supervisory mechanisms: regular supervision, based on the annual reports of Member States on the implementation and impact of the

[351] Article 19(5)(d) of the Constitution of the ILO. See, ILO, 'Handbook of Procedures Relating to International Labour Conventions and Recommendations (Centenary Edition)'.

ratified Conventions in their national context, and other special monitoring procedures.[352]

Regular supervision of compliance with standards-related obligations is ensured by the Committee of Experts on the Application of Convention and Recommendations (CEACR), an independent body comprising 20 distinguished experts, and the tripartite Conference Committee on the Application of Standards (CAS).[353] General monitoring and enforcement of international labour is based on the reports which Member States must regularly submit, supplemented by copies of observations from employers' and workers' organisations, in line with the tripartite structure.[354] After reviewing the reports of the Member States, the CEACR can issue observations and direct requests issuing comments and observation to Member States. The annual report of the CEACR is then submitted to the International Labour Conference, where it is examined by the CAS. The latter tripartite body selects a number of observations for discussion, refers and invites governments to respond to comments, and draws up specific recommendations to governments to address an issue.[355]

Besides this regular cycle of monitoring, a special monitoring procedure is entrusted to the Committee on Freedom of Association (CFA). The CFA, comprising representatives of governments, workers and employers, analyses complaints from trade unions or employers' organizations regarding violations of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87) and of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).[356]

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[352] See, for an overview, Paul van der Heijden, 'The ILO Stumbling towards Its Centenary Anniversary' (2018) 15 International Organizations Law Review 203, 209.
[353] ILO, 'Handbook of Procedures Relating to International Labour Conventions and Recommendations (Centenary Edition)' (n 351).
[354] Article 22, Article 23(d) of the Constitution of the ILO.
[355] ILO, 'Handbook of Procedures Relating to International Labour Conventions and Recommendations (Centenary Edition)' (n 351); Bernd Waas, 'How to Improve Monitoring and Enforcement of International Labour Standards?' in Tarja Halonen and Ulla Liukkunen (eds), *International Labour Organization and Global Social Governance* (Springer International Publishing 2021).
[356] van der Heijden (n 352) 210.

2.1.3 Beyond employment: the Decent Work Agenda and Fair Globalisation

Over the hundred years since its founding, the ILO has played a significant and active role in the enforcement of fundamental rights at work. At the same time, the approach of the centenary from its founding sparked attention to the number of issues the ILO has to face. Some of the Conventions have been ratified by a very limited number of states, and the number of conventions and recommendations that have been adopted over the last two decades is extremely low compared to previous decades. As van der Heijden argues, 'in this current age of nationalism, populism, protectionism, and patriotism it is not expected that many more Conventions will come from the ILO.'[357] Although the supervisory mechanisms have traditionally been praised for their efficiency and influence, they are nonetheless challenged by the large number of complaints they need to handle and the criticism received by some governments and multinational companies.[358]

To update its mandate in the current globalised economic system, challenged by the emergence of new technologies and increasing inequalities, over the last three decades the ILO has tried to revitalise its aspiration to promote social justice.[359]

First, in 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, which affirmed the 'core labour standards' that are deemed fundamental for social justice. With the adoption of this Declaration, Member States recognised their obligation to work towards realising certain fundamental rights, namely: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour;

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[357] ibid 207.
[358] Stressing the need to reform and review the supervisory mechanisms to ensure their functioning, see Silvia Borelli and Silvana Cappuccio, 'Chi monitora e come? Appunti sui meccanismi di supervisione dell'OIL' [2019] Lavoro e diritto 513.
[359] Matteo Borzaga and Michele Mazzetti, 'Core labour standards e decent work: un bilancio delle più recenti strategie dell'OIL' [2019] Lavoro e diritto 447.

the real abolition of child labour; and the elimination of discrimination in relation to employment and occupation.[360]

Secondly, in 1999, the ILO launched an instrument to improve working conditions and social justice: the Decent Work Agenda. The concept of decent work is defined as work 'in conditions of freedom, equity, security and human dignity'. [361] It consists of four strategic objectives, namely (*i*) achieving universal respect for fundamental principles and rights at work; (*ii*) creating greater employment and income opportunities for women and men; (*iii*) extending social protection; and (*iv*) promoting social dialogue. In addition, these objectives are supplemented by the cross-cutting principles of gender equality and non-discrimination. In other words, 'The goal is not just the creation of jobs, but the creation of jobs of acceptable quality'. [362]

The Decent Work Agenda puts an emphasis on decent work 'for all workers', with the aim of involving the informal economy as well, thus the sectors that are traditionally considered outside the productive/waged economy, such as domestic work. In other words, the ILO took on the challenge of decolonising labour law by insisting that decent working conditions are to be ensured not only to employees but to all people who work, even in the absence of an employment contract.[363] It is a challenge that not only reveals an interest in developing countries, where the share of work performed in the informal economy is highly significant, but also points towards the need to ensure labour rights and social protection to the increasing number of non-standard workers in Western economies.

The Decent Work Agenda was solemnly reaffirmed in the Declaration on Social Justice for a Fair Globalization, adopted in 2008 'to strengthen the ILO's capacity to promote its Decent Work Agenda and forge an effective response to the growing challenges of the transformation of the world of work in the context of

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[360] ILO, *The Rules of the Game. An Introduction to the Standards-Related Work of the International Labour Organization* (Centenary, 2019) 120.
[361] ILO, 'Decent Work: Report of the Director-General' (International Labour Office 1999).
[362] ibid.
[363] Valerio De Stefano, 'L'ambito di applicazione soggettivo degli International Labour Standards dell'OIL' [2019] Lavoro e diritto 429.

globalization'.[364] Like the 1998 Declaration, it is a soft-law instrument that expresses the contemporary interpretation of the ILO's mandate against the background of the challenges brought by globalization, which is not merely focused on the adoption of international Conventions and promoting their ratification.

The concept of Decent Work, and the Decent Work Agenda received more global emphasis in 2015, with the adoption by the United Nations of the Sustainable Development Goal (SDG) no. 8, devoted to 'Decent Work and Economic Growth'. Finally, the Decent Work Agenda was re-endorsed in the context of the initiatives for the 100th anniversary of the ILO foundation. As the Centenary Declaration for the Future of Work establishes,

> 'It is imperative to act with urgency to seize the opportunities and address the challenges to shape a fair, inclusive and secure future of work with full, productive and freely chosen employment and decent work for all.'[365]

2.2 Domestic workers and international labour standards

The ILO has always been at the forefront of efforts to promote and protect the rights of domestic workers.[366] Indeed, the ILO has paid attention to domestic workers since its foundation. In 1948 and in 1965, the ILO adopted two Resolutions concerning the Conditions of Employment of Domestic Workers in which it underlined the 'urgent need' for standards for domestic workers that could ensure social justice for them. The latter resolution prompted the ILO to conduct and publish the first worldwide survey on the status of domestic workers, which was

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[364] ILO, *The Rules of the Game. An Introduction to the Standards-Related Work of the International Labour Organization* (n 360) 121.
[365] International Labour Organization, 'ILO Centenary Declaration for the Future of Work', adopted by the ILC at its 108th session, Geneva, 21 June 2019, I.
[366] Martin Oelz, 'The ILO's Domestic Workers Convention and Recommendation: A Window of Opportunity for Social Justice' (2014) 153 *International Labour Review* 143; Peggie R Smith, 'Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers' (2011) 15 Employee Rights and Employment Policy Journal 164; Adelle Blackett, 'Making Domestic Work Visible: The Case for Specific Regulation' (International Labour Office 1998) Working Paper No. 2.

published in 1970.[367] Significantly, the report found that 'On the whole the majority of domestic workers appear to be overworked, underpaid and under-protected.'[368]

Although no specific international instrument was devoted to establishing labour standards specifically to domestic workers until the historic adoption of the ILO Domestic Workers Convention in June 2011, it has been argued that unless they are specifically excluded, domestic workers fall within the scope of ILO Conventions.[369]

Likewise, in several opinions, the CEACR has affirmed the need for labour protection to be extended to domestic workers.[370] It has repeatedly stated that the specific nature of domestic work is not an adequate reason to exclude such workers from the protection of international labour standards. What is more, in the context of freedom of association, the CEACR has regularly emphasised the need 'to ensure not only that domestic workers are covered by the relevant legislation, but also that, in practice, they benefit from the guarantees set forth in the Convention.'[371]

Thus, most of the ILO Conventions, including the eight fundamental Conventions establishing international labour standards to ensure fundamental principles and rights at work, applied - and still apply- to domestic workers.[372] Domestic workers are therefore covered by the key Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105); the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment

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[367] ILO, 'The Employment and Conditions of Domestic Workers in Private Households' (International Labour Organization 1970) Survey.
[368] *ibid 400.*
[369] ILO, Office of the Legal Adviser, Legal Opinion of 29 July 2002. See also, Blackett, 'Making Domestic Work Visible' (n 366).
[370] ILO, 'Decent Work for Domestic Workers' (n 27) 16–20.
[371] ILO, 'Giving Globalization a Human Face. General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008' (Internat Labour Office 2012) 27., quoting, among others Mexico – CEACR, observation, 2005.
[372] Blackett, 'Making Domestic Work Visible' (n 366).

and Occupation) Convention, 1958 (No. 111) the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182).

In addition, domestic workers are covered by a number of Conventions that include international labour standards that are extremely significant in the regulation of domestic work, such as the Private Employment Agencies Convention, 1997 (No. 181), the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Maternity Protection Convention, 2000 (No. 183).

Yet, until 2011, the specificity of domestic work was only addressed to enable the exclusion of domestic workers from the scope of a number of Conventions. Indeed, some Conventions enable ratifying Members to exclude domestic workers from their application via flexibility clauses. A limited number of Conventions, such as the Minimum Age Convention, 1973 (No. 138) of workers explicitly allows for the exclusion of domestic workers.[373] Yet, a number of Conventions allow countries, after consultation with the representative organisations of employers and workers concerned wholly or partially to exclude limited categories of workers from their scope when their application would raise special problems of a substantial nature..[374] This is the case of the Minimum Wage Fixing Convention, 1970 (No. 131), the Occupational Safety and Health Convention, 1981 (No. 155), and the Termination of Employment Convention, 1982 (No. 158).

The existence of flexibility clauses makes it clear that, in a limited number of cases, the specific features of domestic work were indeed taken into consideration in order to exclude it from the instruments devised for an economic activity carried out in an industrial context, thus perpetuating the invisibility of domestic workers. Conversely, no initiative took into consideration the specific features of the work performed by domestic workers, nor addressed sector-specific decent work deficits in domestic work.

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[373] ibid.
[374] See, e.g., Article 2(2), ILO, Night Work Convention, 1990 (no. 171).

2.3 Beyond invisibility: putting domestic workers on the agenda

Despite the traditional invisibility of domestic work in labour law debates, and to the surprise of many commentators, in 2008 the Governing Body of the ILO decided to put domestic workers on the agenda for discussion in the 2010 and 2011 International Labour Conference. Accordingly, the *Report IV(1) on Decent Work for Domestic Workers*, commonly referred to as the 'Law and Practice Report', was commissioned to Adelle Blackett, to serve as a document upon which to base the discussion of the ILO members on the possibility of adopting international labour standards for domestic workers.[375]

Providing a review of the of laws applicable to 72 ILO members, the Law and Practice Report, adopted in 2010, is a remarkable document on this topic, acknowledging in a systematic and comprehensive way the numerous challenges to labour regulation of domestic work.

The Report clarifies the need for the specific regulation of domestic work as a reaction to the traditional invisibility, if not the overt exclusion of domestic workers in labour law frameworks.[376] And indeed, the report calls for decent work for domestic workers, a concept adopted to valorise, in a manner that is enabling and non-paternalistic, the domestic work relationship as a work relationship that

> 'must be imbued with values of human dignity and equality, free of the compulsion of forced labour and child labour, characterized by the exercise of agency through the effective recognition of freedom of association and collective bargaining rights.' [377]

Consequently, to react to the traditional exclusion of domestic work in labour law discussions, and to counteract the negation of domestic work as 'real work', the report aimed to reaffirm the compatibility of domestic work with the employment relationship and the full array of labour protections.

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[375] ILO, 'Decent Work for Domestic Workers' (n 27).
[376] The report, commissioned to labour law professor Adelle Blackett, builds on and develops an ILO Working Paper, issued in 1998, elaborated by Blackett herself, in which she made the case of specific regulation for domestic workers. See Blackett, 'Making Domestic Work Visible' (n 366).
[377] Adelle Blackett, 'The Decent Work for Domestic Workers Convention and Recommendation, 2011' (2012) 106 The American journal of international law 778, 11.

Putting domestic workers on the ILO agenda was indeed a way to challenge the assumption that the specific location of domestic work in the private household prevented it from being regulated.[378]

Hence, the report argues that labour standards should provide domestic workers with the same substantive labour rights as other workers, adopting an equality perspective that aim to reverse the traditional distinction of domestic workers from other labourers. In other words, the Conventions reject the exceptionalism in the labour treatment of domestic work, and powerfully affirm that domestic workers are entitled to standard employment protections, as domestic work is 'Work like Any Other'.

At the same time, however, the Report does not undermine the historically constructed speciality of domestic work, but tries to highlight and give visibility to the specific employment conditions of domestic workers. Indeed, it aims to unsettle and correct persisting inequalities, making visible the unequal and largely asymmetrical 'law of the household workplace', i.e., the variously embedded social and gendered norms, customs and informal institutions that regulate the provision of domestic service 'from below'.[379]

Basing on the idea that it is essential 'to move beyond the formal—but largely invisible—inclusion of domestic workers in labour legislation and toward the specific regulation of their employment and their real visibility,' the Report affirmed that specific international standards were required not only to regulate the increasingly significant but still invisible phenomenon not always considered "work", but also to unsettle the stark inequalities embedded in the domestic work

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[378] Blackett, *Everyday Transgressions* (n 248) 24.

[379] See ibid 11. According to Blackett, the law of the household workplace is indeed a form of reflexive law. 'The law of the household workplace does not require the state to enact legislation or a court to decide a case. In this sense, the law of the household workplace is to be understood in sociolegal terms. In the words of transnational law scholars Gregory Shaffer and Terrence Halliday, law establishes "generalized normative expectations understood and used by actors within a particular context for purposes of constraining and facilitating particular behaviors." In other words, focusing on the law of the household workplace is a way to recognize that the domestic work relationship has, over time and in particular places, generated its own law.'

relationship, rooted in global vestiges of servitude and discrimination based on gender, race, and class, as invisibly reproduced within the household.

For this purpose, the Report illustrates specific regulatory innovation and actual regulatory practice in domestic work, with the aim of providing technical expertise and guidance to the International Labour Conference, and argues for the adoption of a sectoral approach to address the constructed vulnerability of domestic work through specific and affirmative measures intended to root out structural discrimination.[380] Thus, specific labour standards are needed in order to run counter to the exploitative and socially marginalised history of domestic work,[381] and to mark a departure from traditional labour arrangements, which have regularised or normalised inequality in the domestic work relationship, addressing the particular sectoral disadvantage of those who have long lived and worked at the margins of labour law.[382]

In order to promote substantive equality for domestic workers in a transformative way, the report affirms domestic work as worthy of a sectoral approach, such reclaiming domestic work as 'Work Like No Other'.[383] The sectoral approach is adopted because it is considered necessary to correct the unjustified exclusion of a specific group of workers and to add special protection to groups that are especially vulnerable.[384] Yet, the provision of additional specific provisions to labour law in

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[380] Blackett, 'The Decent Work for Domestic Workers Convention and Recommendation, 2011' (n 377) 14; Blackett, 'Making Domestic Work Visible' (n 366).
[381] Blackett, 'Introduction' (n 8); Blackett, 'The Decent Work for Domestic Workers Convention and Recommendation, 2011' (n 377); Adelle Blackett, 'Regulatory Innovation on Decent Work for Domestic Workers in the Light of International Labour Organization Convention No. 189' (2018) 34 International Journal of Comparative Labour Law and Industrial Relations 141; Blackett, *Everyday Transgressions* (n 248).
[382] Blackett, *Everyday Transgressions* (n 248) 121; Albin and Mantouvalou (n 251).
[383] Although the adoption of a sectoral approach was generally welcomed (see, e.g. Albin (n 168).), it nevertheless met some criticism in the literature. In particular, Guy Mundlak and Hila Shamir warned against the precarious and unintended consequences that may emerge from the exceptional treatment of domestic work as 'work like no others', which may risk to reinforce an obsolete distinction. In their words, 'the risk is that exceptional regulative treatment of care work, even when it is aimed at protecting the care workers themselves and improving their working conditions, may lead to the unintended consequence of enhancing, rather than overcoming, sectoral disadvantages.' Mundlak and Shamir (n 42) 294. For the academic debate on the regulatory approach to adopt in the ILO standard setting process, see also below, §3.4.
[384] G Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 Oxford Journal of Legal Studies 543, 544–545.

general is not aimed at producing further differentiation but is a strategy for promoting equality and inclusion. In the words of Guy Davidov,

> 'the goal is to ensure that these workers enjoy the same level of labour rights, not more. Given the special barriers and vulnerabilities, unique treatment is needed to make this possible.'[385]

By combining these two regulatory approaches (Work like Any Other and Work like No Other), the Report clarifies that the specific features of domestic work is to be taken into account in order to address the specific decent work deficits arising in the context of domestic work and to provide specific protection to redress vulnerability in the sector.

3 Promoting decent work for domestic workers: the adoption of the ILO Domestic Workers Convention and Recommendation

On 16 June 2011, the General Conference of the ILO adopted the historic Domestic Workers Convention and Recommendation, 2011.[386]

The Convention comprises a Preamble, a definition and personal scope clause (Articles 1 and 2), and a number of articles establishing substantive and procedural labour standards (Articles 3-19). These elements are analysed sequentially below.

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[385] ibid 562. In this text the Author also noticed that to provide sectoral treatment was usually the function promoted by collective bargaining; however, due to the ever diminishing union density and bargaining coverage rates 'we can no longer rely on collective agreements to always produce this result'.

[386] The historical process and backstory of the adoption of the ILO Convention no 189 on Decent Work for Domestic Workers is brilliantly and exhaustively described by Blackett, who devoted a book on the subject. *See* Blackett, *Everyday Transgressions* (n 248)., especially Chapters 1 and 5.

3.1 Who are domestic workers? The personal scope of application of the Domestic Workers Convention

The Convention involved a reconceptualization of domestic work as 'real work'. In order to do so, the first issue taken into consideration by the Convention was to ensure clarity as regards the legal definition of domestic work while at the same time delineating a personal scope of application that is inclusive.

The definition of domestic work, as seen in Chapter 1, is a long-lasting problem. As the *Law and Practice Report* surveyed, much national legislation does not define domestic work.

Countries that provide a definition of domestic work most often rely on the nature and kind of tasks involved. For istance, France provides a list of specific job classifications, distinguishing between cleaning personnel, cooks, laundry personnel, housekeepers, house-servants or custodians, child-minders, elderly carers, caregivers to people with disabilities, drivers or chauffeurs, gardeners, security guards, and others. Likewise, other countries, such as Italy and Portugal, define domestic workers through a non-exhaustive list of the tasks they undertake.[387] However, the definition of domestic work through occupational categories or detailing tasks runs the risk of excluding some categories.

Similarly, attempts based on the location of the work, i.e., the private household, risks reinforcing the distinction between specific occupations that take place in the private household and similar occupations performed elsewhere. However, as the Report makes clear:

> 'There is no fundamental distinction between work in the home and work beyond it, and no simple definition of public-private, home-workplace and employer-employee. Caring for children and the disabled or elderly persons in the home or in a public institution is all part of the same regulatory spectrum.'[388]

[387] ILO, 'Decent Work for Domestic Workers' (n 27) 31.
[388] *ibid 11.*

Moreover, it may be difficult to include activities that take place outside the household, e.g., taking children to school or accompanying the elderly for a walk.

The Report shows that some legislative systems pay attention to and distinguish between kinds of employer in the domestic work relationship, who may be a "natural person", a household or an organization. Indeed, in some cases domestic workers who are employed by a third party, most often a private agency, do not fall within the scope of specific standards for domestic workers.

Against this background, the Convention aims to provide a broad and comprehensive definition of domestic workers.

In Article 1, the Convention states

> '(a) the term domestic work means work performed in or for a household or households;
> (b) the term domestic worker means any person engaged in domestic work within an employment relationship;
> (c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.'

The use of the expression 'in or for' a household or households hints at the fact that domestic workers may be required to perform domestic work that physically transcends the walls of the household (e.g., taking kids to school or shopping). Furthermore, it is used to cover workers not directly employed by the household but employed instead by a third party (e.g., an agency) in the context of a triangular work relationship. This definition has been defined by some as pivotal,[389] although other scholars have pointed out that this definition leaves out those performing domestic work only occasionally or sporadically, and not on an occupational basis.[390]

Indeed, one relevant category excluded from the scope of the Convention is that of young people working in the framework of "au pair" programmes. Au pair programmes aim to provide young people with a cultural exchange experience by

[389] Blackett, 'The Decent Work for Domestic Workers Convention and Recommendation, 2011' (n 377) 13.
[390] Albin and Mantouvalou (n 251).

allowing them to travel and live with a foreign family, which offers them board, lodging and pocket money in exchange for minor domestic services, such as providing assistance in childcare and housekeeping. As such, they are not considered workers but youngsters on cultural exchange. However, it has been reported that in many cases au pairs are required to perform laborious work and may even be subject to serious workplace abuse.[391]

Another expression that has been challenged is 'within an employment relationship', which was adopted after pressure from the Employers' group.[392] The use of such expression has been deemed to introduce a loophole in the coverage of the Convention, since the gateway of the 'employment relationship' may exclude many domestic workers who are actually self-employed or work in the informal economy.[393] However, Valerio De Stefano has recently argued against a literal interpretation of the expression 'within an employment relationship' in the context of domestic work, since the meaning of this expression varies in the ILO standards and should be determined from an analysis of the text and objectives of each convention, taking into consideration the views of ILO supervisory bodies.[394] Drawing on the observation of the CEACR, which has confirmed that 'regardless of the type of contract held by workers providing domestic services, the definition of domestic worker laid down in Article 1 of the Convention excludes only persons who perform domestic work occasionally or sporadically and not on an occupational basis.', [395] De Stefano believes the Domestic Workers Convention

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[391] Blackett, *Everyday Transgressions* (n 248) 23; Helle Stenum, 'Abused Domestic Workers in Europe: The Case of Au Pairs' (European Parliament - DG Internal Affairs 2011) Study requested by the European Parliament's Committee on Women's Rights and Gender Equality <https://ec.europa.eu/anti-trafficking/sites/default/files/abused_domestic_workers_in_europe_the_case_of_au_pairs_0.pdf> accessed 9 June 2021.

[392] Blackett, *Everyday Transgressions* (n 248) 23–24.

[393] ibid; Fredman, 'Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers' (n 8); Oelz (n 366) 154; Albin and Mantouvalou (n 251) 71.

[394] De Stefano (n 363) 433.

[395] Ireland – CEACR, direct request on C189, 2017, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3334374

applies to the self-employed and other workers outside the employment relationship.[396]

Moreover, Article 2 of the Convention provides for a flexibility clause, according to which limited categories of workers ('in respect of which special problems of a substantial nature arise') may be excluded from the scope of the Domestic Workers Convention. Yet again, according to the interpretation of the CEACR this provision must be interpreted restrictively, and these exclusions may only be provided after consulting with leading representative organizations of employers and workers including, where they exist, organisations specifically representing domestic workers or the employers of domestic workers.[397]

The Conventions thus generally cover all domestic workers, with the exclusion outlined above. Without specifically focusing on a particular category of workers, it applies to all domestic workers irrespective of whether they are part- time or full-time workers, nationals or migrants, living in or outside the household.

3.2 Work Like Any Other: reaffirming domestic work as work

In order to promote equality and react to the traditional invisibility and exclusion of domestic work from labour protection and social security coverage, the Convention powerfully reiterates that domestic workers are generally covered by international labour Conventions and Recommendations (Preamble).

Yet, Member States are required to take all the appropriate measures to ensure 'the effective promotion and protection' of the human rights of all domestic workers, and to respect, promote and realise the fundamental principle and rights at work of domestic workers (Article 3).

In line with the concept of decent work coined by the ILO, these fundamental rights and core labour standards have four dimensions of vital importance for the empowerment of domestic workers: freedom of association and the effective

[396] De Stefano (n 363).
[397] See, e.g, Germany – CEACR, direct request on C189, 2020; Switzerland - CEACR direct request on C189, 2017; Philippines – CEACR, direct request on C189, 2015.

recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in relation to employment and occupation (Article 3(2)).

Particular attention is paid to ensure that domestic workers are free to establish and join a trade union. Article 3(3) states that

> 'In taking measures to ensure that domestic workers and employers of domestic workers enjoy freedom of association and the effective recognition of the right to collective bargaining, Members shall protect the right of domestic workers and employers of domestic workers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing.'

The Convention points out that labour rights and protections are to be recognised for domestic workers without exception, reaffirming the applicability of international labour standards to domestic work. Namely, Article 4 reiterates that Member States shall abide by the ILO Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182) when regulating domestic work. With particular regard to domestic work performed by a child, Article 4(2) also affirms the importance that domestic work does not impinge on the right of education.

In the following articles, the Convention stipulates that Member countries shall take measures to ensure that domestic workers enjoy protection against all forms of abuse, harassment and violence (Article 5), enjoy fair terms of employment as well as decent working conditions (Article 6), are informed of their terms and conditions of employment, possibly through written contracts of employment (Article 7), and are covered by minimum wage setting systems (Article 11).

Moreover, Members shall ensure equal treatment between domestic workers and other workers in terms of working time regulation (Article 10), social security protection, including in relation to maternity (Article 14), and effective access to courts, tribunals or other dispute resolution mechanisms (Article 16).

3.3 Work Like No Other: enabling domestic workers to enjoy labour rights effectively

Beyond the formal equality approach, the Convention acknowledges the special features of domestic work and the need to address the specific decent work deficit in the domestic work sector. Due to its location in the household as well as its gendered and racialised nature and vestiges from servitude, the Convention acknowledges that domestic work is carried out under special conditions 'that make it desirable to supplement the general standards with standards specific to domestic workers so as to enable them to enjoy their rights fully' (Preamble).

Through this sectoral approach aimed at ensuring substantial equality for domestic workers, the Convention provides for specific measures that are deemed essential to ensure decent work for domestic workers by running counter to the conditions that contribute to exploitation related to this form of work (i.e., the provision of accommodation in the employer's home, the expectation of constant availability, the condition of invisibility and isolation in the household, the vulnerability related to labour migration, and others).

3.3.1 Working time and the wages of live-in domestic workers

Given the frequency of the live-in arrangement in domestic work, the Convention provides for specific provisions that establish the right to refuse live-in working arrangements (Article 9), to be remunerated when working 'on call' (Article 10(3)) and the right to receive a monthly wage in cash (Article 12).

The first specific provision hints at the fact that live-in arrangements are a common practice in the provision of domestic work. Yet, it is well known that live-in arrangements tend to be an extreme form of labour flexibility on the employer-side, to the great advantage of employers with family responsibilities,[398] while entailing (or exacerbating) a condition of dependency for domestic workers that severely

[398] International Labour Office, *Decent work for domestic workers*, p. 44.

hampers her autonomy and privacy.[399] Against this background, Article 9 of the Convention specifies that it is the right of the domestic worker to choose whether to accept a "live-in" arrangement. Simple as it may seem, this article is not pleonastic, since in some countries, such as Canada and the UK, it is a legal requirement that migrant domestic workers on a specific temporary work visa reside in the house of the employer.[400]

Two further provisions provide specific – and pragmatic – measures to improve the working conditions of live-in domestic workers. After stressing the equal treatment of domestic workers and other workers in relation to the regulation of working (Article 10(1)), Article 10(3) recognises – almost paradoxically - that

> 'Periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work to the extent determined by national laws, regulations or collective agreements, or any other means consistent with national practice.'

As noted in the literature,[401] paragraph 3 points to the practice of live-in arrangements that most often give rise to the expectation of constant availability and this seems almost to contradict paragraph 1, which instead establishes equality of treatment with other workers. However, it has been noted that, far from normalising a practice of constant availability, this additional paragraph further clarifies that whenever a live-in domestic worker is expected to be available outside its normal working hours, remaining at the disposal of the household, this is considered as working time, which must be remunerated accordingly.[402] Likewise, to counteract the expectation of constant availability of the live-in domestic worker, the Convention clarifies the rights of domestic workers in relation to rest periods and annual leave. Article 9(2) states that domestic workers 'who reside in the household are not obliged to remain in the household or with household members

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[399] This emerges as apparent within the extensive ethnographic literature reporting that – if possible – domestic workers tend to prefer the live-out arrangement
[400] See above, Chapter 2, §4.4.
[401] McCann and Murray (n 336).
[402] Blackett, *Everyday Transgressions* (n 248) 119.

during periods of daily and weekly rest or annual leave'. The Recommendations further clarify that '[t]ime spent by domestic workers accompanying the household members on holiday should not be counted as part of their paid annual leave.' (para 13).

In so doing, the Convention acknowledges the extent to which the household-workplace severely affects and frames the exercise of autonomy of domestic workers. In this vein, Article 6 of the Convention states that live-in domestic workers should be ensured 'decent living conditions that respect their privacy.' Moreover, the Recommendation generally calls Member States not only to address the work–life balance needs of domestic workers (para 25(b)), but also to 'ensure that the concerns and rights of domestic workers are taken into account in the context of more general efforts to reconcile work and family responsibilities.' (para 25(c)). As such, it acknowledges the market-enabling and essential function that domestic workers perform in ensuring that others can enjoy their work-life balance, thus disclosing the paradox that work-life balance rights are achieved by some workers only through the systematic and structural neglect of the same rights for domestic workers.[403]

Finally, another specific provision addresses the decent work deficit of live-in domestic work, this time in relation to wages. Article 12 of the Convention clarifies that only a limited proportion of the remuneration of domestic workers shall be provided in the form of payments in kind, i.e., as board and lodging, and that the monetary value attributed to them must be fair and reasonable. A specific provision on payment in kind was considered necessary to reverse the tendency of deducting accommodation and meals from the earnings of domestic workers, arbitrarily limiting payment in cash. This not only exacerbates the (economic) dependence of live-in workers to their employers, but also undermines the dignity of workers, who are infantilized through the payment of "pocket money".[404]

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[403] Further on distributional inequalities of work-life balance rights, see Chieregato (n 6).

[404] This is especially the case of young people performing domestic work through "au pair" programmes. Yet, it must be noted that, despite the various fundamental rights issues raised by au pair programs, *au pairs* have been excluded from the scope of Decent Workers Convention.

3.3.2 Occupational Safety and Health in the private household

Addressing the special location of domestic workers in the household, the Convention states that Members shall adopt effective measures to ensure the occupational safety and health of domestic workers (Article 13), and to enable labour inspections 'with due regard for the specific characteristics of domestic work' (Article 17).

It is indeed a common assumption that domestic work is safe because typical household activities are considered as not dangerous. However, as made clear in the *Law and Practice Report,* the household – on a par with other workplaces – is not exempt from occupational hazards, including occupation-specific risks such as the prolonged use of toxic cleaning products, significant exposure to dirt and dust, injury or wounds caused by hazardous or strenuous tasks (in particular in relation to Long-Term Care). [405] Moreover, the isolation in which domestic workers perform their work heightens the risk of developing psychosocial pathologies such as occupational stress and burn-out, as well as their exposure to sexual, verbal and physical harassment or abuse.[406]

Article 13 of the Convention attempts to counter this assumption, reaffirming that domestic workers have 'the right to a safe and healthy working environment', and that Member states shall take 'effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers'.

Through this article, the Convention goes beyond the traditional exclusionary approach: the alleged inability to fit domestic work into the traditional industrial regulatory framework cannot be used to justify gaps in health and safety protection.

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[405] ILO, 'Decent Work for Domestic Workers' (n 27) 61.

[406] A number of news articles have been written on the detrimental health conditions of Eastern European women after having been occupied as elderly carers in Italy. See, among others, Francesco Battistini, 'Romania, il male ignoto delle badanti: "Ansia e panico, è la sindrome Italia"' *Corriere della Sera* (7 April 2019) <https://www.corriere.it/elezioni-europee/100giorni/romania/> accessed 13 June 2019. In the sociological literature, see Francesca Alice Vianello, Veronica Redini and Federica Capponi, *Il Lavoro Che Usura: Migrazioni Femminili e Salute Occupazionale* (Franco Angeli 2020).

On the contrary, it transpires from the Convention that it is the responsibility of lawmakers to 'refashion the framework to address the occupation's unique concerns.'[407]

Moreover, the Convention acknowledges the difficulties of ensuring labour inspections in the case of domestic work, since they may be in conflict with the principle of privacy within the family and in the home of the employer. [408] However, Article 17 of the Convention requires Member States to develop and implement measures to ensure labour inspections and, under specific conditions, to provide access to household premises for labour inspections. Respect for the employers' privacy need not result in an absolute prohibition on inspections visits, but may simply require additional caution. An example specifically mentioned in the Recommendation (para 21(1)(b)) is the practice of pre-placement visits, i.e., conducting inspection visits before the start of the domestic work relationship, in order to identify in advance any occupational safety and health hazards.[409]

Simple though it is, this provision nonetheless disrupts the one of the most embedded assumptions about domestic work: that the work location in the private household (of the employer) renders labour inspections 'inappropriate'.[410] On the contrary, the Convention powerfully reaffirms that when the household becomes a workplace it should be subject to the usual rules of the workplace, including access to labour inspections, and that supervision of the effective enforcement of labour law legislation shall not simply be sacrificed before the altar of privacy, but a balance must be struck between the conflicting – but equally important - interests of domestic workers and employers.

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[407] Peggie R Smith, 'Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century' (2007) 92 Iowa Law Review 1837, 1881.
[408] ILO, 'Decent Work for Domestic Workers' (n 27) 76.
[409] *See* Smith, 'Aging and Caring in the Home' (n 407).
[410] It is worth noting that the UK motivated its lack of support to the Convention precisely for the 'inappropriateness' to extend inspections to private households. See, Albin and Mantouvalou (n 251) 77.

3.3.3 Migrant Domestic Workers and work intermediaries

Finally, the Convention specifically recognises the high risk of exploitative working conditions and forced labour experienced by migrant domestic workers. Acknowledging that labour migration is increasingly the most significant feature of domestic work, with up to 17 percent of the total domestic workforce comprising migrant domestic workers,[411] the Convention underlines that that the condition of migrant worker severely shapes and exacerbates the conditions of vulnerability of domestic workers. This notwithstanding, it is worth noting that the Domestic Workers Convention is not framed in terms of labour migration standards but is more generally an instrument of workers' rights. It has been argued that focusing on decent work for domestic workers as an issue of migrants' rights might paradoxically draw attention away from the broader conditions that affect the range of workers who undertake domestic work and the working conditions that are common to migrants as well as local domestic workers.[412] On the contrary,

> 'the point of the instruments—and, some would argue, their success— is that they regulate domestic workers, including migrant domestic workers, as workers.'[413]

The Preamble of the Convention recalls the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, expressly mandating states to ensure that migrant workers are not deprived of their rights because of irregularities in their status or employment. As such, the Convention includes some provisions aimed specifically at combatting practices (e.g., restrictive visa requirements) that shape and determine the conditions of vulnerability experienced by migrant domestic workers.

First, the Convention states that migrant domestic workers should be informed in writing of their working conditions prior to crossing national borders (Article 8(a)). This simple measure is nonetheless necessary to enable domestic workers to understand their working conditions in advance, with a written document against

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[411] See above, Chapter 1, §3.2.
[412] See Blackett, *Everyday Transgressions* (n 248) 122.
[413] ibid 123.

which to compare their actual working conditions, enabling them to enforce their labour rights.

Secondly, in light of the unfortunately many cases in which domestic workers are trapped in situations of forced labour, including being prevented from leaving the employer's home by acts of violence and/or threats of deportation, the Convention provides for the right of migrant domestic workers to be clearly informed of the conditions under which they can repatriate (Article 8(d)). And indeed, the CEACR has repeatedly expressed concern about the vulnerable situation of domestic workers regarding their freedom to terminate employment.[414]

Moreover, to prevent the risk of forced labour, the Convention reaffirms that fees charged by private employment agencies for placing migrant domestic workers shall not deducted from the remuneration of domestic workers, in accordance with the 1997 Private Employment Agencies Convention, No 181 (Article 15(1)(e)).[415]

Indeed, significant attention is paid to regulating private employment agencies, to combat the risk of - sadly widespread - abusive and fraudulent practices during the recruitment and placement process. In this regard, Article 15 of the Convention states that Member States must regulate the conditions governing the operation of private employment agencies that recruit and place domestic workers (para 1(a)), and ensure that adequate machinery and procedures exist for the investigation of complaints (para 1(b)), adopting all the necessary and appropriate measures to protect and prevent the abuse of domestic workers by private employment agencies (para 1(c)).

Moreover, pointing to the transnational dimension of domestic work, Article 15(1)(d) suggests that, when a care chain is established, States should consider concluding bilateral, regional or multilateral agreements to prevent abuse and fraudulent practices in the recruitment, placement and employment of domestic

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[414] ILO, 'General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008' (n 371) 122. quoting, as an example, Kuwait – CEACR, observation, 2011.
[415] ILO, 'Decent Work for Domestic Workers' (n 27) 69.

workers, recommending the development of transnational labour law instruments of bilateral cooperation and international solidarity.

Further measures are scattered throughout the text to counter regrettably widespread and normalised practices. Drawing from the example of legislative systems that explicitly forbid employers from retaining the passport of workers, [416] the Convention states loud and clear that domestic workers are entitled to keep their travel and identity documents (Article 9(c)) in their possession. In addition, Article 9(a) on live-in arrangements, which establishes that domestic workers are 'free to reach agreement with their employer or potential employer on whether to reside in the household', is also aimed at unsettling migration policies that require migrant domestic workers to reside in the employer's house, policies that contribute to creating working arrangements that are prone to abuse and exploitation.

In conclusion, the Convention is a powerful message that highlights the conditions of vulnerability experienced by migrant domestic workers. However, it does not do so in a patronising or protective way, but aims to promote and empower a framework for migrant domestic workers as labour law actors. The generalist approach adopted by the Convention is in line with the labour law approach to forced labour,[417] which acknowledges labour rights to all workers, be they migrants or nationals, legal or undocumented, and attempts to regulate labour intermediaries, seeking to ensure collective and institutional protections for labour rights. These provisions suggest that the vulnerability of migrant domestic workers is inherent neither in the sector nor in the migration status but is actively constructed through various practices (e.g., customs, intermediary practices, migration policies and restrictive visa requirements) that can and should be combatted and prevented. The extremely precarious conditions and vulnerability to abuse experienced by migrant domestic workers are anything but natural; rather, they are normalized and politically constructed to shift the risk to the most marginalized workers. In other

[416] ibid 71.
[417] As first advocated by Cathryn Costello. For full reference to this scholarship, see further above, Chapter 2, §4.4.

words, the Convention powerfully counteracts the usual victimising narrative about migrant domestic workers, and instead aims at empowering them and enabling them to enforce their rights as workers.

3.4 What is missing: limitations of the ILO Convention

Yet, like every instrument that comes into being, the process of establishing international standards has encountered many difficulties and has several limitations.

Concerns have been raised about the adoption of a sectoral approach. Some authors such as Guy Mundlak and Hila Shamir have raised concerns over the difficulties of adopting this, arguing that sector-specific standards risk unintentionally enhancing, rather than overcoming, the specific disadvantages and exclusions from common employment standards experienced by domestic workers.[418] On the contrary, other commentators, such as Einat Albin and Guy Davidov, have highlighted the importance of addressing and tackling the specific conditions in which domestic work is carried out and socially located, in line with the idea of domestic work as 'Work Like No Other', which must supplement the equal opportunity approach.[419] Yet, Albin found that, ultimately, the sectoral approach has not been developed fully in the Convention. [420]

Indeed, some problematic aspects revealed by the *Law and Practice Report* have nonetheless remained unaddressed by the Convention.

Discrimination

One problematic aspect is that the generic provision according to which discrimination against domestic workers should be reduced, without mentioning

[418] Mundlak and Shamir (n 42).
[419] Albin (n 168); Davidov, 'Setting Labour Law's Coverage' (n 384); Guy Davidov, 'Special Protection for Cleaners: A Case for Justified Selectivity?' (2015) 36 Comparative Labor Law Policy Journal 219.
[420] Albin (n 168) 231. In the same vein, see Silvia Borelli, 'Le diverse forme dello sfruttamento nel lavoro domestico di cura' [2021] Lavoro e diritto 281.

any specific measures, does not take into account the conditions of structural inequality and deeply embedded subalternity experienced by domestic workers. In fact, the traditional anti-discrimination framework, based on a comparative rationale, shows its conceptual limitation in addressing the structural discrimination of a strongly segregated occupation such as domestic work. In the context of a discrimination claim, the claimant needs to prove that she has been treated less favourably than a person in a comparable situation, the so called 'comparator'. The comparator, who can be either an actual person or hypothetical) is evoked to establish a standard of adequate treatment against which less favourable treatment is ascertained, and to show whether the alleged grounds of discrimination have actually caused less favourable treatment.[421] Yet, to identify a comparator may be particularly hard for domestic workers for a series of reasons.

One the one side, the requirement to find a comparator who is similarly situated to the domestic employer may be extremely difficult to fulfil for workers outside the traditional workplace, who may be the only employee of a private household. Moreover, this requirement limits the effectiveness of anti-discrimination claims for equal pay in sectors in which racialised, migrant women predominate.[422]

On the other side, for migrant domestic workers it may also be difficult to find a ground of discrimination on which basing their claim. The development of the concept of intersectionality by Kimberlé Crenshaw indeed moved from the condemnation of the inadequacy of anti-discrimination legislation to account for the complex discriminatory experience of Black women.[423] In line with this theory, the traditional single-axis framework on which anti-discrimination law is based seems unable to tackle a phenomenon that involves the interplay – or actually better,

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[421] Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context: Text and Materials* (1st ed, Sweet & Maxwell 2008) 276.

[422] Catherine Barnard, *EU Employment Law* (Fourth Edition, Oxford University Press 2012) 303; Einat Albin, 'From "Domestic Servant" to "Domestic Worker"' in Judy Fudge, Kamala Sankaran and Shae McCrystal (eds), *Challenging the Legal Boundaries of Work Regulation* (Bloomsbury Publishing 2012). See also Vera Pavlou, 'Domestic Work in EU Law: The Relevance of EU Employment Law in Challenging Domestic Workers' Vulnerability' (2016) 41 European Law Review 379.

[423] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U. Chi. Legal F. 139.

the intersection – of discrimination on multiple grounds, such as gender, race, national origins and citizenship, social status, and education.[424]

Protection against dismissal

In addition, there is no mention of specific protection against discriminatory dismissal in the Convention, or to dismissal protection more generally. This lack seems to reiterate the widespread social assumption that the termination of employment of domestic workers follows different rules than those of other workers due to the expected higher level of trust and intimacy in the domestic work relationship.[425] However, this limitation in the Convention is striking, considering that the lack of clear protection against unfair dismissal has an enormous detrimental effect on the exercise of other fundamental rights at work. Moreover, in the specific case of live-in domestic workers, the lack of clear norms forbidding discriminatory or unfair dismissal exacerbates further the condition of vulnerability of domestic workers in relation to the termination of employment. As highlighted in the Report, in case of termination live-in domestic workers not only lose their jobs but also their place of residence. For migrant worker, the loss of employment may even lead to losing the right to reside in the country, or being deported.

Due to these serious consequences in the life of domestic workers, legislation should require employers to provide for reasonable and sufficient notice periods, and allow for summary dismissal to very few cases of serious misconduct.[426] Yet, the Convention does not mention the need for termination to be based on a valid ground for dismissal. Only the lenght of notice period is addressed in the (non-binding) Recommendation,[427] which merely recommends that,

> 'In the event of termination of employment at the initiative of the employer, for reasons other than serious misconduct, live-in domestic workers should be

[425] Pavlou, 'Domestic Work in EU Law' (n 422) 40.
[426] ILO, 'Decent Work for Domestic Workers' (n 27) 53–56.
[427] Borelli (n 420) 284.

> given a reasonable period of notice and time off during that period to enable them to seek new employment and accommodation.' (para 18)

Multi-party employment relationships

Finally, in the context of labour migration, many commentators have found that the Convention leaves too much discretion to private agencies and states in the management of multi-party employment relationships.[428] As noted by Sandra Fredman, the Convention falls short in dealing with the allocation of responsibilities in the triangular relationship between worker, employer, and agency, raising issues of joint liability in the care chain and giving rise to situations prone to forced labour.[429]

4 Assessing the dual regulatory approach of the ILO

Beyond the specific content of the Convention, and its inevitable limitations, the Domestic Workers Convention and accompanying Recommendation is a landmark in the recognition and revaluing of domestic work and represents a ground-breaking and unprecedent development in the legal regulation of domestic workers. As observed in the Report of the Committee on Domestic Workers:

> 'New standards on domestic work would present an unprecedented opportunity for the ILO to bring into its mainstream workers who were once deemed to be outside its constituency, and to provide guidance and incentives to member States to facilitate access to decent employment conditions for this historically disadvantaged group, mainly comprising women and girls. Many domestic workers around the world were either excluded from national labour

[428] In the current labour law scholarship, the issue of multi-party work relationship and the consequences in terms of labour protection for workers within such relationship have been the object of burgeoning attention. See, among others, ILO, 'Multi-Party Work Relationships: Concepts, Definitions and Statistics' (ILO 2018) ICLS/20/2018/Room document 9 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_636045.pdf> accessed 21 March 2021.

[429] Fredman, 'Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers' (n 8).

> laws or worked under loosely regulated conditions. Where legal protection existed, it was often little known and poorly implemented. Domestic workers remained hidden and faceless, and outside the outreach of regulatory mechanisms, thus vulnerable to abuse. (…)
>
> New international labour standards therefore meant recognizing that domestic workers deserved both rights and respect. (…)'[430]

The adoption of these instruments was indeed an historical moment: surprisingly, the international standard-setting process included a category of workers long considered outside its scope, and it did so thanks to the active and unprecedented involvement of domestic workers' social movements.[431]

By the tenth anniversary of its adoption, a significant number of countries had ratified the Convention.[432] Yet, the effects of the Convention have extended well beyond simple ratification, providing significant momentum to the review of the labour conditions of domestic workers and influencing a plethora of reforms to international, regional and domestic laws in relation to domestic workers.[433]

Counteracting stereotypes, stigma and deep-rooted vestiges of servitude and colonialism, the Convention reaffirms the dignity and significance of domestic work in the contemporary economy, recognising that domestic workers are entitled and should be able to enjoy the full array of labour rights and protections. Indeed, the Convention is a human rights treaty that reaffirms the global role of domestic workers as workers in an empowering and non-patronising manner. Furthermore, it acknowledges that the specific conditions under which domestic work is carried out

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[430] ILO, 'Provisional Record of the 99th Session of the International Labour Conference (Fourth Item on the Agenda: Decent Work For Domestic Workers)' para 10 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_141770.pdf>.

[431] The setting of domestic workers in the ILO agenda, and the subsequent adoption of international labour standards, was widely advocated by grassroot domestic workers' movement, namely the 'International Domestic Workers' Network' (IDWN), which later became the 'International Domestic Workers Federation' (IDWF). For a broader overview, see Celia Mather, *'Yes, We Did It!': How the World's Domestic Workers Won Their International Rights and Recognition* (WIEGO 2013); Jennifer Natalie Fish, *Domestic Workers of the World Unite! A Global Movement for Dignity and Human Rights* (New York University Press 2017).

[432] The Convention has been ratified by 8 EU Member States: Belgium, Finland, Germany, Italy, Ireland, Malta (in which it will enter into force on 14 May 2022), Portugal and Sweden.

[433] Blackett, *Everyday Transgressions* (n 248) 133.

and the importance and urgency of ensuring decent working conditions for domestic workers, seeking to capture the specificity of domestic workers without underscoring their equal membership of the paid labour force.[434] In other words, under the powerful slogan 'Work Like Any Other, Work Like No Other', the ILO adopted an innovative, dual approach that reaffirms the value of domestic work as real work, and the right of domestic workers to be included in labour law, while at the same time grappling with the specificity of domestic work.

The process of establishing labour standards recognises that workers beyond the traditional industrial model should have the same rights and protections as workers have thus far been at the centre of the labour law framework. Given the traditional undervaluation of domestic work, to affirm that domestic work is 'Work Like Any Other' represents a powerful challenge to deeply rooted societal exclusions expressed through law, reaffirming the right of domestic workers to be included in labour law.[435]

However, the powerful claim that domestic workers are to be treated just like other workers does not minimise the speciality of domestic work. Beyond the the mere legislative extension of labour law norms to domestic workers, it is assumed that the existing labour framework would not represent an appropriate tool to promote decent working conditions in such a marginalised and historically laden occupation, where the risk of re-entrenching old hierarchies is high. Moreover, this strategy itself has been considered by some authors as outdated in response to contemporary regulatory challenges raised by the globalised and post-industrial labour market.[436]

On the contrary, in the international norm setting process it was argued that domestic work is "Work Like No Other", highlighting the unequal conditions in which domestic work was – and is – carried out, in order to affirm substantive equality. By making visible the specific conditions under which domestic work is

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[434] Fredman, 'Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers' (n 8).
[435] Blackett, 'Introduction' (n 8) 17.
[436] In this sense, see Adelle Blackett, 'Promoting Domestic Workers' Human Dignity through Specific Regulation' in Antoinette Fauve-Chamoux (ed), *Domestic Service and the Formation of European Identity: Understanding the Globalization of Domestic Work, 16th-21st Centuries* (Peter Lang Publishing 2005).

carried out - the so called unequal law of the household - the Convention aims to depart from these conditions, allowing an alternative and 'transgressive' transnational legal order on decent work of domestic workers to emerge.[437]

In the words of the Committee of Domestic Workers,

> 'Delivering decent work for domestic workers required setting a regulatory framework that went beyond the conventional industrial relations approach, and identified and addressed the special context in which domestic work was carried out. It demanded imagination, innovation and a capacity to think "outside the box".'[438]

Hence, as Adelle Blackett powerfully argued, the ILO standard-setting process was 'part of a rethinking of labor law's boundaries': [439] whereas historically the specificity of domestic work has been magnified and relied upon to justify a limited regulatory approach based on 'exceptionalism', the ILO Convention and Recommendation on Domestic Workers relied on this specificity to propose sector-specific labour laws to ensure the protection of domestic workers' rights and the promotion of their dignity at work beyond formal coverage under labour law.[440] In so doing, the recognition of the specific features of domestic work offered an opportunity to overcome the limitations inherent in a theorisation of labour law still based on the industrial workplace model, with great potential for generating innovative regulatory strategies for a more inclusive labour law. [441]

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[437] Blackett, *Everyday Transgressions* (n 248) 12.
[438] ILO, 'Provisional Record of the 99th Session of the International Labour Conference (Fourth Item on the Agenda: Decent Work For Domestic Workers)' (n 429) para 10.
[439] Blackett, *Everyday Transgressions* (n 248) 22.
[440] Blackett, 'Making Domestic Work Visible' (n 366).
[441] McCann (n 334).

5 Summary

This chapter illustrates the adoption of the landmark ILO Convention on Domestic Workers, 2011 (No. 189) and accompanying Recommendation (No. 201) as a seismic shift in the regulatory approach toward domestic work.

After discussing the structure and role of the ILO, the Chapter focuses on the standard-setting process which led to the adoption of international labour standards for domestic workers, and analyses their rationale and content.

Particular attention is paid to the dual regulatory approach pioneered by the ILO, summarised under the significant slogan 'Work Like Any Other, Work Like No Other'. On the one hand, the Chapter analyses the equal treatment approach adopted in order to correct the long-standing unjustified exclusion of domestic workers; on the other, it presents the case for a sectoral approach, which was endorsed as a means of addressing the specific conditions of vulnerability in the domestic work sector. It is argued that the long process culminating in the adoption of the ILO Domestic Work Convention and Recommendation clarified the advantages in adopting a selective, sectoral approach in specific sectors that have traditionally been considered too divergent from the standard employment relationship to be fully included in labour law.

In conclusion, the Chapter evaluates the ILO regulatory project as a ground-breaking and unprecedented development in the recognition of domestic work as a site of legal regulation, with great potential for generating innovative regulatory strategies. One decade after its adoption, what is the impact of the momentum generated by the ILO Convention for the legal regulation of domestic workers at the national and regional level? The next Chapter focuses specifically on the European Union legal framework.

Chapter IV

The regulation of domestic work in EU employment law

1 Introduction

Whereas the legal treatment of domestic workers has traditionally received scant attention within European legal scholarship, in recent years there has been a significant growth in scholarly interest on this topic, stimulated most notably by the remarkable case law of the European Court of Human Rights and by the international debate leading to the historic adoption of the ILO Domestic Workers Convention, 2011 (no. 189).[442] In European scholarship, most attention has been paid to migrant domestic workers and to the severe forms of labour exploitation the domestic work sector is prone to. In contrast, very few contributions have focused on the legal position and the working conditions of domestic workers in Europe from a labour law perspective.[443]

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[442] Deirdre McCann, 'New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Non-Standard Work Norms' (2012) 34 Comparative labor law and policy journal. 167; Albin and Mantouvalou (n 251); Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (n 329); Mantouvalou, 'What Is to Be Done for Migrant Domestic Workers?' (n 274); Murphy (n 298); Triandafyllidou (n 271); Fredman, 'Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers' (n 8); Siobhan Mullally, 'Migration, Gender, and the Limits of Rights' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014).
[443] Cf. Pavlou, 'Domestic Work in EU Law' (n 422); Tonia Novitz and Phil Syrpis, 'The Place of Domestic Work in Europe: An Analysis of Current Policy in the Light of the Council Decision Authorising Member States to Ratify ILO Convention No. 189' (2015) 6 European Labour Law Journal 104.

Against this backdrop, this chapter aims to critically evaluate the legal position of domestic workers in the EU system of employment protection, taking into consideration the evolution of EU employment law over the last decade. In particular, after presenting the traditional invisibility of domestic workers in EU labour law, this Section analyses the small but significant shift in the policy approach towards domestic workers of European Institutions. For this purpose, the Chapter first reviews the gradual establishment of the jurisprudential concept of worker in EU employment law, endorsed by the latest Directives adopted in the social policy field. It then presents the more 'inclusive' policy approach adopted in legislative and non-legislative instruments in the wake of the proclamation of the European Pillar of Social Rights, and the impact that the constitutionalisation of fundamental social rights could have in challenging persistent legislative exclusions. Finally, it assesses the shift in the European policy approach to domestic workers against the background of the broader EU regulatory strategy to (re)regulate non-standard work.

2 The legal regulation of domestic workers in EU law in the wake of the ILO Domestic Workers Convention

Despite the growth of paid domestic work in Europe over the past decades, no specific legislative or policy measure has been adopted at the EU level.

Some concern for the working conditions of domestic workers was demonstrated by the European Parliament as early as 2000, with the adoption of the Resolution 'Regulating domestic help in the informal sector'.[444] Despite the use of the rather demeaning term 'domestic help', the Resolution was significant since it made numerous recommendations in the area of both employment protection and immigration law. The Resolution underlined the 'need to establish a special legal

[444] European Parliament, Resolution on regulating domestic help in the informal sector (2000/2021(INI)), 30 November 2000.

framework which affords all domestic employees the protection of labour legislation and the subjective rights deriving from there', and called for European rules on the social rights of domestic workers. It took the view that paid domestic work falls within the scope of existing EU directives on employment and requested EU institutions to consider 'the specific work situations and employment relationships of domestic workers' when drawing up directives and other legislation. Moreover, it called on Member States to promote sectoral social dialogue, proposed regular work permits for migrant domestic workers, and called for the adoption of measures to fight undeclared work.[445]

Despite its political significance, these recommendations were not followed up by EU institutions, and the legal regulation of domestic work has remained in the regulatory shadows. Due to the growing evidence of labour exploitation and human rights abuses in the sector, as emerged with dramatic clarity in the *Siliadin* case brought before the European Court of Human Rights, the EU has initiated action to address labour exploitation and forms of modern slavery in the domestic sector. Indeed, some consideration to domestic servitude and labour exploitation for the purpose of providing domestic work can be found in the context of EU law in the area of legal migration and criminal justice.

Labour exploitation was tackled by the Employer Sanctions Directive 2009/52/EC, which aimed to prevent illegal migration by punishing employers for resorting to migrant workers. [446] The Directive also obliges EU Member States to criminalise situations where third-country nationals without permits are subjected to 'particularly exploitative working conditions' (Article 9). The exploitation of migrant workers is also tackled in the Anti-Trafficking Directive 2011/36/EU,[447] which acknowledges explicitly that trafficking in human beings may be motivated by the intention to exploit workers in the domestic sector. With reference to this

[445] On this Resolution, see also Novitz and Syrpis (n 442) 110; Pavlou, 'Whose Equality? Paid Domestic Work and EU Gender Equality Law' (n 330) 44.
[446] Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.
[447] Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

form of trafficking, the Directive specifically talks of 'domestic servitude'.[448] Yet, it has been argued that both Directives are inspired by a repressive rationale: criminal sanctions are elevated to the main tool used by EU labour migration regulatory systems to prevent exploitation,[449] and limited protective measures are provided to victims of abuse. It is worth noting that the word 'worker' is not used in either Directive, which on the contrary focus on the category of the 'illegally employed third-country national' or the 'victim of trafficking'. [450] As analysed in Chapter 2, the adoption of a criminal law approach to labour exploitation, and its lack of attention to the need to extend and ensure labour rights to undocumented migrant workers, has been strongly opposed in the labour literature.[451] And indeed, beyond these few instruments adopted as part of the EU strategy on criminal justice and labour migration, no measures have been taken to regulate domestic work in the field of labour law.

For a long time, the labour regulation of paid domestic work has been neglected and almost invisible in many national labour regimes, including in EU labour law. It is no exaggeration to say that it was the adoption of the ILO Domestic Workers Convention, on 16 June 2011, that generated the momentum on decent work for domestic workers. The landmark adoption of international labour standards for domestic workers represented a ground-breaking development that led to an outpouring of reforms of international, regional, and domestic laws and, including at the European level, stimulating greater scrutiny of the treatment of domestic workers in law and practice.

As a consequence, as early as in 2012, the European Commission stressed the role of the implementation of the Domestic Workers Convention in improving working conditions in the domestic sector. In its 2012 Employment Package, [452] the European Commission recognised the crucial role of paid domestic workers, here

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[448] Directive 2011/36/EU, Recital no. 3.
[449] Laura Calafà, *Migrazione economica e contratto di lavoro degli stranieri* (Il Mulino 2014) 171.
[450] As noted by Laura Calafà, *ibid* 181.
[451] See above, Chapter 2, §4.4.
[452] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards a job-rich recovery /* COM/2012/0173 Final */

defined as workers in the Personal and Household Services (PHS) sector,[453] in improving work-life balance and increasing female participation in the labour market, creating job opportunities 'for the relatively low-skilled', and improving the quality of care. Consequently, improving working conditions in the paid domestic work sector was included in the policy agenda, and the European Commission urged Member States to ratify the ILO Domestic Workers Convention.[454]

In 2014, with Decision 2014/51/EU, the Council authorised Member States, in the interests of the Union, to ratify the ILO Domestic Workers Convention,[455] in line with the 'preliminary procedure' established by the Council aimed at, avoiding the risk of potential contradictions and inconsistencies between EU and international norms.[456] At the moment of writing, eight EU Member States have ratified the Convention: Italy, Germany, Ireland, Finland, Belgium, Portugal, Sweden and Malta.

It is worth noting that the Decision authorising the ratification of the ILO Convention acknowledged that 'most of the rules' under the Convention 'are covered to a large extent by Union *acquis* in the areas of social policy, anti-

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[453] The PHS sector is defined as comprising 'a broad range of activities that contribute to well-being at home of families and individuals: child care, long-term care (LTC) for the elderly and for persons with disabilities, cleaning, remedial classes, home repairs, gardening, ICT support, etc.' Cf. European Commission, Staff Working Document on exploiting the employment potential of the personal and household services, SWD (2012) 95 final, 4.

[454] European Commission, Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189) /* COM/2013/0152 final - 2013/0085 (NLE) */

[455] Council Decision 2014/51/EU of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189). OJ L 32, 1.2.2014, p. 32–32.

[456] This has been the case of other Conventions adopted in the last decades, i.e. the Maritime Labour Convention 2006, the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185); and the Work in Fishing Convention, 2007 (No. 188). On the relationship between EU labour law and international norms, see Sophie Robin-Olivier, 'The Relationship between International Law and European Labour Legislation and Its Impact on the Development of International and European Social Law' (2020) 159 International Labour Review 483; Giuseppe Casale, 'International Labour Standards and EU Labour Law' in Mark Freedland and Nicola Countouris (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013). See also, European Commission, 'Analysis – in the Light of the European Union Acquis – of the ILO Conventions That Have Been Classified by the International Labour Organisation as up to Date' (Publications Office of the European Union 2014) Report prepared by Ergon Associates <https://data.europa.eu/doi/10.2767/60921> accessed 1 May 2020.

discrimination, judicial cooperation in criminal matters and asylum and immigration', [457] suggesting that the EU *acquis* already provided extensive protection of domestic workers' labour standards. And indeed, the European Commission itself affirmed that '[o]n many issues, EU law is more protective than the Convention.'[458]

In so doing, however, the Decision hinted at the fact that some issues remained for which EU law did *not* offer the same level of protection as the ILO Convention. Indeed, many scholars had already pointed out that EU law was not in line with the ILO Convention, [459] noting in particular the blatant exclusion of domestic 'servants' (*sic*) from the personal scope of the Directive 89/351/EC on safety and health at work.[460]

Similar concerns were expressed in April 2016 by the European Parliament, in a new Resolution on 'women domestic workers and carers in the EU',[461] which recommended a number of measures considered necessary to fill the gap in protection for domestic workers. This instrument focused on the professionalisation of the domestic work sector and the improvement of working and living conditions for domestic workers across Europe. Specifically, it recommended that measures should be taken at both national and EU level to implement the principle of non-discrimination between domestic workers and other categories of workers. It called for Member States to overcome their reluctance to legislate for the private sphere and 'to include domestic workers and carers in all national labour, healthcare, social care, insurance and anti-discrimination laws'. Furthermore, the Resolution urged the European Commission 'to consider revising any EU directives which exclude domestic workers and carers from rights that other categories of workers enjoy.'[462]

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[457] Decision 2014/51/EU, Recital no. 2.
[458] European Commission, 'Social Agenda' (European Union 2013) 05/2013, no. 33 4.
[459] Among others, see Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (n 329); McCann (n 441); Murphy (n 298); Novitz and Syrpis (n 442).
[460] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. OJ L 183, 29.6.1989, p. 1–8, Article 3(a).
[461] European Parliament, Resolution of 28 April 2016 on women domestic workers and carers in the EU (2015/2094(INI)).
[462] *Ibid.,* para 15

Likewise, in September 2016, at its own initiative, the European Economic and Social Committee (EESC) issued its opinion on 'The rights of live-in care workers',[463] focusing specifically on the working conditions of the growing number of domestic workers who provide LTC services and live in the private households of the employer/care recipient. Among the various specific measures recommended, the EESC urged Member States to ratify and implement the ILO Domestic Workers Convention. It also called for the EU to work in close cooperation with Member States to bring all relevant EU directives into line with the Convention, and to include the rights of live-in carers and their care recipients in revisions of European and Member States' legislation.

Hence, the endorsement by EU institutions of the adoption of the ILO Domestic Workers Convention left considerable room for discussing further EU action in reaction to the invisibility and/or blatant exclusion of domestic workers from the EU system of employment protection.[464] Whereas no specific measures were taken to more forcefully promote decent work for domestic workers, and a significant role for EU law in relation to domestic work has long been considered politically unlikely,[465] the Sections below review the extent to which the revamping of Social Europe stimulated by the proclamation of the European Pillar of Social Rights has nonetheless provided the opportunity to acknowledge domestic workers among other categories of workers in non-standard employment, thus (partially) bringing them out from the regulatory shadows.

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[463] European Economic and Social Committee, The rights of live-in care workers (rapporteur: Adam Rogalewski, expert Karol Florek). SOC/535, adopted on 21/09/2016.
[464] In this sense, see Novitz and Syrpis (n 442).
[465] For a long time it has seemed impossible that the EU could lead a broader reregulation of non-standard workers, given the functionality of maintaining cheap, precarious (and gendered) labour to EU employment policies. On this topic, see generally Johanna Kantola and Emanuela Lombardo (eds), *Gender and the Economic Crisis in Europe. Politics, Institutions and Intersectionality.* (Palgrave Macmillan, 2017); Rubery (n 103). With particular regards to the consequences of the EU employment policies on the (lack of) regulatory attention towards domestic workers, see Novitz and Syrpis (n 442); Borelli (n 7).

3 The concept of worker in EU law

Before turning to an analysis of the inclusion of domestic workers in EU labour law, it is worth illustrating more generally the personal scope of the Directives adopted in the social policy field.

In particular, this Section pays particular attention to the recent autonomous definition of worker in EU employment law and in the case law of the Court of Justice of the European Union, which is fundamental to contextualise the policy shift regarding domestic workers.

3.1 The concept of worker in free movement case law

Originally EU law did not provide a definition of 'worker', since it was considered a prerogative of Member States. However, the term 'worker' is the very cornerstone of [now] Article 45 TFEU, establishing one of the fundamental freedoms of the EU, the free movement of workers. Thus, it became increasingly necessary to come to a shared (and autonomous) definition of worker to ensure the proper functioning of the internal market and the uniform application of the principle of freedom of movement.

In the absence of a definition of worker in EU statutory law, the Community concept of 'worker' has been shaped and developed by the CJEU over the years.

As early as in the *Hoekstra*,[466] and *Levin* cases,[467] the Court stated that the term 'worker' under Article 45 TFEU may not be interpreted differently according to the law of each Member State, but has a Community meaning, independently of national legal definitions. Yet, in the famous *Lawrie-Blum* case[468] the Court established some criteria for the definition of "worker" for the purpose of the free movement of workers. In this case, which involved a trainee teacher undergoing a

[466] CJEU, Case C-75/63, *Mrs MKH Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* [1964] ECR 177.
[467] CJEU, Case C-53/81 *D. M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035.
[468] CJEU, C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 02121.

period of service in preparation for the teaching profession under the direction and supervision of the school authorities, the Court stated that

> 'the essential feature of an employment relationship … is that for a certain period of time a person performs services for and under the direction of another person in return for which [s]he receives remuneration.' [469]

These criteria, the so-called 'Lawrie-Blum formula',[470] have been consolidated in CJEU case law and enabled the Court gradually to include various forms of work within the definition of worker. And indeed, the Court held that the *sui generis* nature of the employment relationship under national law does not affect the qualification of a worker for the purposes of Community law,[471] and asserted that part-time work, on-call work, casual work, as well as traineeships and apprentices fall within the scope of application of Article 45 TFEU. [472]

In so doing, the CJEU developed a rather broad concept of worker, with the aim of preventing social dumping and favouring the uniform application of freedom of movement within the internal market.[473] As noted by many commentators, the rather comprehensive notion of worker developed in the case law regarding the free movement of workers has helped to construe and allowed the functioning of the common market. Indeed, the notion of worker developed and consolidated in the case law of the CJEU conceptualises the worker as an economic actor. Yet, this notion of 'worker' is very far from the concept of worker in national labour law

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[469] *Lawrie-Blum*, para 17.
[470] The expression has been coined by Martin Risak and Thomas Dullinger, *The Concept of 'Worker' in EU Law: Status Quo and Potential for Change* (ETUI 2018).
[471] See CJEU, Case C-344/87 *I. Bettray v Staatssecretaris van Justitie* [1989] ECR 01621, para 16; Case C-188/00 *Bülent Kurz, né Yüce v Land Baden-Württemberg* [2002] ECR I-10691, para 32; Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-07573, para 16.
[472] See CJEU, *Levin*; Case C-357/89 *J. M. Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-01027; Case C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-02421; Case C-196/87 *Udo Steymann v Staatssecretaris van Justitie* [1988] ECR 06159.
[473]Cfr. Catherine Barnard, *EU Employment Law* (Fourth Edition, Oxford University Press 2012); Emanuele Menegatti, 'Taking EU Labour Law beyond the Employment Contract: The Role Played by the European Court of Justice' (2020) 11 European Labour Law Journal 26.

systems, centred on the necessity to clearly identify who is to be included in its system of employment protection. [474]

Likewise, the notion of worker developed in the framework of Article 45 TFEU was later extended to the area of equal treatment. Indeed, as in the area of free movement, the principle of equality between men and women was conceived to assist the functioning of the common market and to limit social dumping. In the famous *Allonby* case, [475] which involved a self-employed lecturer claiming the violation of the principle of equal pay for men and women, the Court stated that the term worker under [now] Article 157 TFEU on the equal pay between men and women 'cannot be defined by reference to the legislation of the Member States but has a Community meaning,' pursuant to the Lawrie-Blum formula.[476]

3.2 The concept of worker in employment case law

The approach of the Court has been more cautious in the field of employment and social policy, where it has not put forward an autonomous definition of worker, but refers to the definition of worker elaborated at the national level.

In the same period of time of the *Lawrie-Blum* case, the CJEU ruled on the *Danmols* case,[477] involving the interpretation of Directive 77/187/EEC on the safeguards of employees in the transfer of undertakings.[478] In this judgement, the Court rejected the existence of an autonomous notion of worker in the field of social policy, stressing the difference between this field and the area of freedom of movement. In fact, according to the Court, the Directive on Transfers of Undertaking

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[474] Cf. Stefano Giubboni, 'Being a Worker in EU Law' (2018) 9 European Labour Law Journal 223, 224; Barnard, *EU Employment Law* (n 472); Brian Bercusson, *European Labour Law* (Second, Cambridge University Press 2009) 31–32.
[475] CJEU, Case C-256/01 *Debra Allonby v Accrington & Rossendale College and Others* [2004] ECR I-873.
[476] *Allonby*, paras 66-67.
[477] CJEU, C-105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* [1985] ECR 02639.
[478] Now repealed by the Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. OJ L 82, 22.3.2001, p. 16–20.

> ‘is intended to achieve only partial harmonisation essentially by extending the protection guaranteed to workers … it is not however intended to establish a uniform level of protection throughout the community on the basis of common criteria.’[479]

It follows that the Directive only applies to those who are recognised and protected as workers by the legal system of a Member State.

This judgment is symptomatic of a more cautious approach adopted by EU law-makers in the field of employment and social policy. In light of the fact that the notion of worker is one of the thorniest and most debated questions in every labour law system, most EU Directives have adopted a ‘subsidiary notion of employment’.[480] In other words, in spite of the various formulations used, these Directives explicitly refer to the national definition of worker or employee.[481]

The most striking example is provided by Directive 2001/23/EC on Transfers of Undertaking, which applies to all employees, defined as ‘any person who, in the Member State concerned, is protected as an employee *under national employment law.*’ [482] Crucially, the Directive states that its application ‘shall be without prejudice to national law as regards the definition of contract of employment or employment relationship. [483] Likewise, Directive 2008/104/EC on Temporary Agency Work[484] adopts the same definition (but referring to workers instead of employees), and Directive 2002/14/EC on Information and Consultation Rights[485] refers to those ‘protected as an employee under national employment law and in accordance with national practice.’[486]

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[479] *Danmols,* para 26.
[480] Giubboni (n 473) 226.
[481] It must be noted that the “worker” and “employee” are used interchangeably at the EU level, as it is apparent by the fact that the French version of all these Directives refer only to “*travailleurs*”. See Risak and Dullinger (n 469) 25.
[482] Directive 2001/23, Article 2(1)(d). (emphasis added)
[483] Directive 2001/23, Article 2(2).
[484] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.
[485] Directive 2002/14 of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.
[486] Directive 2002/14, Article 2(d).

Similarly, Directive 91/533/EEC (also known as the Written Statement Directive),[487] Directive 97/81/EEC on Part-Time Work,[488] Directive 99/70/EEC on Fixed-Term Work[489] and Directive 2010/18/EU on Parental Leave,[490] all use a similar definition, as they apply to all workers 'who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.'[491]

Finally, Directive 2008/94/EC, on the protection of employees in the event of the insolvency of their employer,[492] does not provide a definition but specifies that it 'is without prejudice to national law as regards the definition of the term 'employee'.'[493]

Also worth mentioning is Directive 96/71/EC on posted workers.[494] In the same logic, this instrument adopts a subsidiary notion of worker, though it rests on the concept of workers 'which applies in the law of the Member State to whose territory the worker is posted.'[495] Yet, this Directive is fundamentally related to the freedom to provide services in the internal market, as enshrined in Article 56 TFEU. Therefore, it is plausible that the term worker under this Directive refers to the broad notion of worker that emerges from the case law on the free movement of workers.[496]

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[487] Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.
[488] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC. OJ L 14, 20.1.1998, p. 9–14.
[489] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. OJ L 175, 10.7.1999, p. 43–48.
[490] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.
[491] Directive 97/81/EC. Article 2(1).
[492] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer. OJ L 283, 28.10.2008, p. 36–42.
[493] Directive 2008/94/EC, Article 2(2).
[494] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. OJ L 18, 21.1.1997, p. 1–6.
[495] Directive 96/71/EC, Article 2(2).
[496] Risak and Dullinger (n 469) 23.

Yet, not all social policy directives refer to a subsidiary, national notion of worker, deferring to national legal systems for the definition of their personal scope of application.[497]

This is the case, most notably, of Directive 89/31/EEC establishing a framework in the area of occupational health and safety,[498] which applies to 'any person employed by an employer, including trainees and apprentices but excluding domestic servants.'[499] In so doing, the Directive provides its own, although rather generic, definition of worker. Furthermore, Directive 98/59/EEC on Collective Redundancies,[500] Directive 92/85/EEC on the protection of pregnant workers[501] and Directive 2003/88/EC on the organisation of working time[502] do not refer to Member State definitions of workers, but do not establish their own definitions either.

It is thus possible to distinguish between two groups of Directives in the field of social policy, differentiating between the Directives resting on a 'subsidiary notion of employment', i.e., deferring to the definition of worker adopted at the national level, and those that do not provide a definition of worker. The most recent Directives adopted do not fall within this two-fold categorisation and form part of a third, 'hybrid' group. This categorisation is summarised in Table 2.

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[497] Following Nicolas Countouris, the article proposes a two-fold classification of Directives adopted in the social policy area, distinguishing between Directives making explicit reference to the national definition of worker and those not providing for a definition. Nicola Countouris, 'The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope' (2018) 47 Industrial Law Journal 192. Other Authors have provided for more detailed categorizations. Cf. Risak and Dullinger (n 469); Menegatti (n 472).
[498] Directive 89/391/EEC.
[499] Directive 89/391/EEC, Article 3(a).
[500] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.
[501] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
[502] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

Table 2: Classification of Social Policy Directives

Reference to the national definition of worker	Council Directive 94/33/EC on the protection of young people at work
	Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer
	Directive 96/71/EC concerning the posting of workers in the framework of the provision of services
	Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex Framework agreement on part-time work
	Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP
	Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses
	Directive 2008/104/EC on temporary agency work
	Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community
No definition of worker	Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding
	Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work
	Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
	Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
	Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
	Directive 2003/88/EC concerning certain aspects of the organisation of working time
	Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies
Hybrid definition	Directive (EU) 2019/1158 on Work-life balance for parents and carers
	Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union

Since the second group Directives do not provide a definition of worker, this has been developed by the CJEU over the past years. The first of a series of relevant decisions is the *Kiiski* case,[503] which concerned the scope of application of the Pregnant Workers Directive. Ms Kiiski was a teacher on parental leave who applied to alter the duration of her parental leave in order to take maternity leave. She appealed against her principal's refusal, claiming the violation of her right to maternity leave and the related benefit. In coming to its decision, the Court was first asked to define whether a worker on parental leave was to be considered a 'pregnant worker' within the scope of the relevant Directive. The Court affirmed that the EU legislator 'intended to give the concept of "pregnant worker" a Community meaning,' even if an element of that definition, such as that relating to the method of communication of the pregnancy to the employer, refers back to national legislation and/or practice. Additionally, the Court affirmed that '[a]s to the concept of worker, it must be borne in mind that, according to settled case-law, it may not be interpreted differently according to each national law but has a Community meaning,'[504] in accordance with objective criteria and pursuant to the definition developed for the purpose of article 45 TFUE. The Court used the *Lawrie-Blum* formula, establishing that the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which s/he receives remuneration. Likewise, in the later *Danosa* case,[505] which also concerned the application of the Pregnant Workers Directive, the Court stretched the concept of worker so much as to include a member of the Board of Directors of a capital company.[506]

The second decision of the Court related to the personal scope of application of the Working Time Directive. In the *Union syndicale Solidaires Isère* case,[507] which concerned a person performing casual and seasonal activities in holiday and leisure

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[503] CJEU, Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-07643.
[504] *Kiiski*, paras 24-25.
[505] CJEU, Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECR I-11405.
[506] Vincent Février, 'The Concept of "Worker" in the Free Movement of Workers and the Social Policy Directives: Perspectives from the Case Law of the Court of Justice' (2021) 12 European Labour Law Journal 177, 182.
[507] CJEU, Case C-428/09 *Union syndicale Solidaires Isère v Premier ministre and Others* [2010] ECR I-09961.

centres, in the framework of an 'educational commitment contract', the Court had to assess whether the person had the right to a minimum daily rest period and thus fell within the scope of the Working Time Directive. The Court established that persons employed under this type of contract, or other types of fixed-term contracts, fall within the scope of the EU Directive. Indeed, it significantly held that 'for the purposes of applying Directive 2003/88, that concept [of worker] may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to European Union law.'[508]

Lastly, the recent *Balkaya* case[509] concerned the personal scope of the Directive on Collective Redundancy. In this occasion, the Court held that the Directive applies equally to a person working in a senior managerial position and to an unpaid trainee. Crucially, in its judgement, the CJEU stated that

> 'the concept of 'worker', referred to in Article 1(1)(a) of Directive 98/59, cannot be defined by reference to the legislation of the Member States but must be given an autonomous and independent meaning in the EU legal order.'[510]

In all these cases, the Court took advantage of the absence of an explicit reference to the national definition of worker in these three Directives to establish the autonomy of the EU notion of worker. However, rather than coming up with a new definition of worker, it decided to invoke the *Lawrie-Blum* formula and align with free movement case law.[511]

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[508] *Isère*, para 28. Accordingly, see more recently, Case C-147/17 *Sindicatul Familia Constanţa, Ustinia Cvas and Others v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa* ECLI:EU:C:2018:926, para 41.
[509] CJEU, Case C-229/14 *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* ECLI:EU:C:2015:455.
[510] *Balkaya,* para 33.
[511] According to Stefano Giubboni, the decision of the Court to rely on the existing *Lawrie-Blum* formula was motivated by 'functionalist harmonisation', meaning that the Court's main objective was justified by the willingness to ensure the smooth functioning of the internal market and avoid social dumping. Cf. Giubboni (n 473); Février (n 505) 184.

3.2.1 Against arbitrary exclusions: limiting Member States' discretion

The step-by-step full acceptance of the Lawrie-Blum definition of worker in all the cases relating to Social Policy Directives that do not provide a definition of worker could not be extended to those Directives that make explicit reference to the national definition of worker. Indeed, it seems that Directives that specifically refer to the national concept leave Member States free to determine the personal scope of application of these instruments. This was the dominant line of reasoning of the Court of Justice in its early case law as seen in the *Danmol* case illustrated above. In this decision, the Court established that the Transfer of Undertakings Directive only aims to bring about a 'partial' harmonisation, and it did not intend 'to establish a uniform level of protection throughout the community on the basis of common criteria.'[512] This 'minimalist' approach[513] has long been predominant in CJEU case law, to the extent that Nicola Countouris coined the term '*Danmol* orthodoxy'.[514]

However, over the last decade, a new line of reasoning has emerged in the case law of the Court of Justice. In a number of recent judgments, the Court has made clear that the discretion of Member States defining the concept of worker when converting an EU Directive into national law limited. In a large number of cases, the Court has resorted to the argument of '*effet utile*' to significantly limit the discretion granted to Member States to define the personal scope of application of these instruments, so far as to overcome the textual reference to the national definitions of workers. I will now briefly analyse these cases.

O'Brien[515] concerned the holder of a judicial office who was working part-time and was remunerated on a daily fee basis. According to national legislation, a person performing this job (a judge) is an 'office holder' and not a worker; hence not a part-time worker for the purpose of the Part-Time Work Directive.

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[512] Menegatti (n 472).
[513] Countouris (n 496) 201.
[514] ibid.
[515] CJEU, Case C-393/10 *Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs* ECLI:EU:C:2012:110.

In its ruling, the Court confirmed that it is for the Member States to define the concept of worker for the purpose of the Part-Time Directive; however, tellingly, it established that

> 'the discretion granted to the Member States by Directive 97/81 in order to define the concepts used in the Framework Agreement on part-time work is not unlimited … certain words used in that agreement may be defined in accordance with the national law and practices on condition that they respect the effectiveness of the directive and the general principles of European Union law.
>
> In that regard, *Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness* …
>
> In particular, a Member State cannot remove at will, in violation of the effectiveness of Directive 97/81, certain categories of persons from the protection offered by that directive and the Framework Agreement on part-time work.'[516]

Thereby, the Court considered that judges may be excluded from the rights provided in the Part-Time Work Directive only if the specificity of their relationship is, by nature, substantially different from the relationship between employers and their employees.

This position was further developed by the Court in a recent case concerning the position of *giudici di pace* (i.e, honorary judges) under Italian law. Like office holders in the UK, these honorary judges perform the duties of ordinary judges but are paid on a fee basis and are not worker. In the *UX* case,[517] to the relevant extent, the Court recognised that these justices fall within the scope of the Fixed-Term Work Directive. In particular, it clarified that

> 'While … directive [1999/70/EC] leaves Member States free to define the terms 'employment contract' or 'employment relationship' used in that clause in accordance with national law and practice, *the discretion granted to the Member States in order to define such concepts is nevertheless not unlimited.*

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[516] *O'Brien,* paras 34-36 (Emphasis added).
[517] CJEU, Case C-658/18 *UX v Governo della Repubblica italiana* ECLI:EU:C:2020:572.

> Such terms may be defined in accordance with national law and practices on condition that they respect the effectiveness of that directive and the general principles of EU law.'[518]

Against this background, the Court held that it is not possible for Member States to remove at will certain categories of worker from the protection granted by the Fixed Term Directive. Any such exclusion can only be allowed if it is not arbitrary and the nature of the employment relationship concerned is 'substantially different from the relationship between employers and their employees which fall within the category of 'workers' under national law'.[519]

In the same vein, the Court used a purposive interpretation to clarify that the EU concept of worker includes migrant workers, including undocumented migrants. In the 2014 *Tümer* case,[520] the Court was asked to clarify the personal scope of application of the EU's Insolvency Directive. Mr Tümer, an irregular migrant working in the Netherlands, was denied the right to an insolvency benefit in the event of his employer's insolvency, as provided for in the EU Directive, because irregular migrants fall outside the national definition of employees. In this regard, the Court noted that although the Insolvency Directive leaves the definition of employee and employment relationship to the discretion of Member States, the discretion enjoyed by Member States is nevertheless not wholly unfettered. In particular, the CJEU restates that the personal scope clause of the Insolvency Directive

> 'must be interpreted in the light of the social objective of that directive, which is to guarantee employees a minimum of protection at EU level in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period. Member States therefore cannot define at will the term 'employee' in such a way as to undermine the social objective of that directive.'[521]

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[518] *UX,* para 117.
[519] *UX,* para 123.
[520] CJEU, C-311/13 *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* ECLI:EU:C:2014:2337.
[521] *Tümer*, para 42.

Therefore, a notion of employee that excludes workers only because they are not lawfully resident and has the effect of limiting the protection provided for under the Insolvency Directive runs counter to the social objective of the Directive.

In all the cases analysed, the CJEU limited the discretion of Member States in order to ensure the effectiveness of the protection offered by EU labour law. In doing so, however, it did not actually depart from the national concept of worker, but only suggested national courts in their interpretation of national law in a way that ensures the effectiveness of the Directives.

On the contrary, a departure from the reference to the national concept of worker can be found in the *Betriebsrat der Ruhrlandklinik* case,[522] which concerned nursing staff in a healthcare institution deemed members of a non-profit association and therefore not in an employment contract under national law. The nursing staff claimed that they were being denied the protection granted by the Temporary Agency Work Directive because they did not hold an employment contract with a temporary work agency but were members of an association. In this judgment, the Court abandoned the textual reference to the national definition of worker, and affirmed that

> 'neither the legal characterisation, under national law, of the relationship between the person in question and the temporary-work agency, nor the nature of their legal relationships, nor the form of that relationship, is decisive for the purposes of characterising that person as a 'worker' within the meaning of Directive 2008/104.[523]

The Court significantly underlined that a person cannot be excluded from the concept of worker within the meaning of that directive on the sole ground that he or she does not have the status of worker under national law, even though the text of the Directive is to be without prejudice to national law as regards the definition of worker. In fact, the Court crucially states that this reference to the definition of worker in national legislation 'cannot be interpreted as a waiver on the part of the

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[522] Countouris (n 496) 192. CJEU, Case C-216/15 *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* ECLI:EU:C:2016:883.
[523] *Ruhrlandklinik,* para 29.

EU legislature of its power itself to determine … the scope *rationae personae* of that directive.'[524]

Thus, it follows that the Directive covers all situations in which a person carries out services for and under the direction of another person, for a certain period of time and in return for remuneration. In so doing, the Court made reference to the autonomous concept of worker in free movement case law as in the *Lawrie-Blum* formula.

3.3 Towards a statutory definition of worker in EU Law?

Despite the fragmented approach and the different interpretations of jurisprudence,[525] in recent years there has been a clear trend towards unifying the personal scope of application of all directives in the field of labour law, including those that do refer to the national notion of worker. On the one hand, there is a gradual unification of the concept of worker in various areas of EU law, with the concept of worker emerging from free movement case law gradually applied in the social field.[526] On the other, there has been an attempt to establish an autonomous, jurisprudential notion of worker at the EU level, borrowing from free movement case law. These trends are due to the desire to ensure the effectiveness of the protection provided by EU law and to fill the gaps in protection for growing numbers of workers in non-standard forms of employment.

Over the past few years, the trends have culminated in a parallel attempt to promote an autonomous EU concept of worker at the regulatory level. Indeed, the ongoing transformation of work and the growing precariousness of employment, along with the emergence of new models of work in the framework of the so-called 'gig economy', have revitalized the need to update the social *acquis* in order to fill the

[524] *Ruhrlandklinik,* para 32.
[525] See Countouris (n 496); Risak and Dullinger (n 469).
[526] See Countouris (n 496); Risak and Dullinger (n 469); Menegatti (n 472). who show concerns over the legitimacy and desirability of adopting the concept of worker elaborated in the framework of the free movement in the social field. *Contra,* see Giubboni (n 473).

gaps in protection and to extend minimum standards to new kinds of employment relationships in the policy debate.

In the framework of the most recent regulatory initiatives, the European Commission proposed an EU statutory definition of worker, codifying the criteria developed by the CJEU in the *Lawrie-Blum* formula.

In the framework of the proclamation of the European Pillar of Social Rights,[527] the Commission proposed a Directive on Transparent and Predictable working conditions in the European Union[528] with the literal aim of improving working conditions for workers with unpredictable working patterns and non-standard forms of employment. To clarify its personal scope in line with the parameters developed by the CJEU and to fill the gaps in protection, the proposed directive crucially includes a statutory definition of worker, without reference to national definitions.

Article 2(a) of the Proposal, called a worker ‘a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration.’ The definition codified the *Lawrie-Blum* formula in the case law of the CJEU, as analysed in depth above. And indeed, according to the text of the Proposal, the statutory definition was based on CJEU case law ‘since case C-66/85 *Lawrie-Blum*, as most recently recalled in C-216/15 *Ruhrlandklinik*.’ [529] As clarified in the Explanatory memorandum, this regulatory effort was deemed necessary since

> ‘the scope of application of the Written Statement Directive varies among Member States depending on their concepts of 'employee', 'employment relationship' and 'employment contract', and risks excluding growing numbers of workers in non-standard forms of employment, such as domestic workers, on-demand workers, intermittent workers, voucher-based workers and platform workers.’ [530]

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[527] Interinstitutional Proclamation on the European Pillar of Social Rights, OJ C 428, 13.12.2017, p. 10–15.
[528] Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union. COM/2017/0797 final - 2017/0355 (COD).
[529] *Ibid.*, p. 11.
[530] *Ibid.*

However, the text was downsized in the legislative process, and the statutory definition of worker removed in order to reach consensus within the Council. Therefore, the Directive on Transparent and Predictable working conditions finally adopted in 2019 (Directive (EU) 2019/1152)[531] does not provide a statutory definition of worker. Nonetheless, owing to the key role of the European Parliament in the negotiations, it still makes significant and explicit reference to CJEU case law. Under Article 1(2), the Directive (EU) 2019/1152 applies to every worker in the Union who

> 'has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State *with consideration of the case law of the Court of Justice.*'[532]

In combining consideration of the criteria of the Court of Justice with the traditional deference to the national definition of worker, it has been argued that this clause somehow provides a 'hybrid' definition, creating uncertainty as to how it will be implemented by Member States.[533] It can be observed here that, whereas the Directive still makes reference to the national definition of worker, the simultaneous reference to the case law of the Court suggests that the personal scope of application of the Directive may not be interpreted so as to arbitrarily exclude anyone who is not genuinely self-employed, and may thus apply to a larger workforce than that covered under national labour law.[534] In this vein, Paragraph 8 of the Preamble clarifies that, where they meet the criteria established by the CJEU for determining the status of a worker, a wide range of atypical workers such as 'domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices', may fall within the scope of the Directive. Moreover, it also asserts that those who are not genuinely self-

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[531] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union. OJ L 186, 11.7.2019, p. 105–121.
[532] Directive (EU) 2019/1152, Article 1(2) (emphasis added).
[533] Bartłomiej Bednarowicz, 'Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union' (2019) 48 Industrial Law Journal 604, 619. Cf. also Menegatti (n 472).
[534] Chieregato (n 6).

employed, in cases of abuse of the status of self-employed persons as defined in national law, should fall within the scope of this Directive.

The Directive on Transparent and Predictable Working Conditions is not isolated. The same hybrid definition was adopted in Directive (EU) 2019/1158 on Work-Life Balance, on the same day in June 2019.[535] Moreover, it is likely that this way of drafting personal scope provisions will be used in future Social Policy Directives, as seems clear from the adoption of this formulation in the most recent Proposal for a Directive on adequate minimum wages in the European Union, currently under negotiation.[536]

To conclude, before turning to the next section, it is important to note that domestic workers have been cited and considered in the most recent attempt to establish an EU notion of worker, with the aim – it would seem - not only of pushing back against the previous trend of neglecting domestic workers in EU law but of limiting the discretion of Member States in excluding domestic workers from the personal scope of application of national legislation applying EU labour law. This trend is analysed in more depth in the next two sections.

4 Either invisible or explicitly excluded: the position of domestic workers in EU Labour Law Directives

After analysing the evolution of the definition of 'worker' under EU labour law, Sections 4 and 5 focus specifically on domestic workers and their inclusion within the personal scope of application of EU law.

This Section analyses the traditional exclusionary approach adopted by the EU legislator since the development of EU social policy, with the blatant exclusion of

[535] The wording is almost identical. According to its Article 2, Directive 2019/1158 applies 'to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, *taking into account* the case-law of the Court of Justice'.
[536] Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union. Brussels, 28.10.2020, COM/2020/682 final, Article 2.

domestic workers from the personal scope of application of the Occupational Safety and Health Framework Directive, the alleged exclusion from the Pregnant Workers Directive and the Working Time Directive, and the possibilities to exclude domestic workers in national legislation through the use of 'flexibility clauses' or reference to the national definition of workers.

4.1 The explicit exclusion from the Occupational Safety and Health Framework Directive

Directive 89/391/EEC on occupational safety and health applies to 'any person employed by an employer', including trainees and apprentices, but excluding domestic 'servants'.[537] Domestic workers, who in the text are still referred to with the rather obsolete term 'servants', are the sole category explicitly excluded from the personal scope of application of the Directive.

Domestic workers have thus been singled out in the first legislative measure adopted under [now] Article 153 TFEU. Yet, far from being an isolated case, the exclusion of domestic workers from the scope of the Directive appears to be in line with the traditional parameters of national health and safety legislation at the time.[538] As analysed in the previous chapters, domestic work has traditionally been excluded from Member State frameworks of safety and health at work, due to the assumption that private households are considered unable to ensure stringent health and safety standards to domestic workers. In fact, while the original Commission proposal provided an inclusive definition of workers;[539] the explicit exclusion of domestic workers was added during the legislative process at the request of Member States.

It has already been argued in the previous chapters that the special nature of domestic work, performed in the household, does not justify a clear-cut and full exclusion from the occupational safety and health framework. Indeed, domestic

[537] Directive 89/391/EEC, Article 3(a).
[538] See McCann (n 441) 182.
[539] European Commission, Proposal for a Council Directive on the introduction of measures to encourage improvements in the safety and health of workers at work. OJ C 141, 30.5.1988, p. 1–6.

workers are extremely vulnerable to the impacts of OSH risks owing to the characteristics of their work, including chemical, ergonomic, physical, psychosocial and biological hazards. Moreover, due to the specific location of the workplace and the high feminisation rate of the sector, domestic workers are extremely vulnerable to violence and harassment, including sexual harassment.

Although some of the specific requirements laid down in the OSH Framework Directive are designed for the industrial environment, this does not justify the wholesale and sole exclusion of domestic work. The situation of domestic workers actually requires specific attention or sectoral regulation, in line with the approach endorsed by the ILO Domestic Workers Convention. Indeed, Article 13 of the Convention establishes that domestic workers enjoy the right to a safe and healthy working environment, with due regard for the specific characteristics of the occupation.

The enduring exclusion of domestic workers from the scope of Directive 89/391 has important consequences for the regulation of domestic work at the national level. First and foremost, it resulted in more than half of the Member States excluding domestic workers from occupational safety and health policies and regulations. According to the last implementation report of the Framework Directive,[540] more than half of the Member States (notably Italy and Spain) do not include domestic workers in their OSH frameworks. This persistent exclusion had further detrimental consequences during the COVID-19 pandemic: domestic workers have worked as 'essential workers' at the frontline of the pandemic, facing a high risk of infection, aggravated by the lack of adequate access to personal protective equipment (PPE) and the lack of appropriate guidance on OSH standards to be adopted within the household.[541]

The exclusion of domestic workers from the OSH Framework Directive has had another set of consequences, with some arguing that domestic workers should also

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[540] Evaluation of the Practical Implementation of the EU Occupational Safety and Health (OSH) Directives in EU Member States. Synthesis Report. (Report by COWI), 23 Nov 2015, 18.
[541] On the impact of the pandemic, see ILO, 'COVID-19 and Care Workers Providing Home or Institution-Based Care' (n 54); ILO, *Making Decent Work a Reality for Domestic Workers* (n 39) 231 ff.

be excluded from the personal scope of the other Directives adopted within the occupational safety and health framework, such as the Pregnant Workers Directive 92/85/EEC, the Working Time Directive 93/104/EC, later repealed by the Directive 2003/88/EC, and the Young Workers Directive 94/33/EC.

4.2 The exclusion of domestic workers from the Pregnant Workers Directive and the Working Time Directive

Following the adoption of Framework Directive 89/391/EEC, the EU has issued more than 30 directives implementing the general principles of occupational health and safety in specific sectors and workplaces and for certain groups of workers. These instruments concern a wide range of risks such as physical hazards and chemical and biological agents, and general workplace requirements, work and personal protective equipment, workloads and display screens. The individual Directives have tellingly been renamed 'Daughter Directives'.[542]

According to Article 16(3) of Framework Directive 89/391/EEC, its provisions 'shall apply in full to all the areas covered by the individual Directives.' Hence, it has generally been held that the personal scope of application of the Framework Directive holds sway over that of the individual Directives, with the consequence that domestic workers are excluded from the Daughter Directives as well.[543] In the individual Directives, some instruments regulate substantial working conditions, such as the Pregnant Workers Directive 92/85/EEC, the Working Time Directive 93/104/EC, later repealed by Directive 2003/88/EC, and the Young Workers Directive 94/33/EC.[544]

According to Catherine Barnard, the Pregnant Workers Directive 92/85/EEC, adopted as the tenth individual Directive within the meaning of Article 16(1) of Directive 89/391, applies to all workers falling within the definition developed by

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[542] According to a definition used by Barnard, *EU Employment Law* (n 472) 523.
[543] See Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (n 329); McCann (n 441); Barnard, *EU Employment Law* (n 472) 537.
[544] Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work. OJ L 216, 20.8.1994, p. 12–20.

the CJEU in the area of free movement of workers and equal pay,[545] as is apparent from the Court decisions in *Kiiski* and *Danosa,* analysed above.[546]

However, it is not clear whether the scope of application of the Directive includes domestic workers due to the alleged dependency of the Pregnant Workers Directive on the Framework Directive 89/391.

In this regard, Deirdre McCann strongly argues that the former Directive does not apply to domestic workers. In her opinion, this exclusion is also evident in the legislative process aimed at updating and amending the legal protection of pregnant workers,[547] launched in 2008.[548] In the first reading position of the Proposal of a Directive amending the Directive 92/85/EEC,[549] the European Parliament recalled the importance of explicitly including domestic work as part of the overall effort to improve the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding.[550] Hence, the European Parliament amended the definition of "pregnant worker", "worker who has recently given birth" and "worker who is breastfeeding" to include all 'workers employed under any type of contract, *including in domestic work.'*[551] However, the proposed Directive was withdrawn, and the 1992 regulation of maternity leave and employment protection of pregnant workers has not been modified.

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[545] Barnard, *EU Employment Law* (n 472) 411. *See* also Eszter Kovács and Christina Hießl, '1992/85/EEC: Maternity Protection' in Monika Schlachter (ed), *EU labour law: a commentary* (Kluwer Law International 2015) 289.
[546] See *above*, §1.2.
[547] McCann (n 441).
[548] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (COM/2008/0637 final - COD 2008/019).
[549] European Parliament, Legislative Resolution of 20 October 2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding - (COM(2008)0637 – C6-0340/2008 – 2008/0193(COD))
[550] The European Parliament saw a debate specifically addressing the needs of precarious women. See European Parliament, Improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding - Precarious women workers. Debate (CRE 18/10/2010 - 13).
[551] European Parliament, Legislative Resolution, Art 1(2). (emphasis added) It must be noted that this amendment was not welcomed by the Commission. See Commission Communication on the action taken on opinions and resolutions adopted by Parliament at the October I and II 2010 part-sessions. SP(2010)8657/2 (emphasis added).

Doubts have not been dispelled by the Court, which seems to uphold the dependency of the Directive on pregnant workers based on the personal scope of the Framework Directive. In the *Rosselle* case,[552] the Court affirmed that

> 'the provisions of the latter directive [89/391], except for Article 2(2) thereof, apply in full to the whole area covered by Article 1(1) of Directive 92/85 … Article 3(a) of Directive 89/391 defines a 'worker' as any person employed by an employer, including trainees and apprentices but excluding domestic servants.'

However, this interpretation has been disputed in recent years on the basis of various factors, and especially of CJEU case law.

Vera Pavlou disputes the assumption that domestic workers are excluded from the labour protection accorded to other workers with regard to working time and pregnancy. In her view, this assumption is challenged by Commission practice itself, as clear from the implementation Report of the Pregnant Workers Directive 92/85/EEC, according to which the instrument applies to all pregnant workers, workers who have recently given birth and workers who are breastfeeding in all fields and occupations, with no exceptions.[553] In particular, the Commission explicitly considered 'the exclusion of certain groups of women from the Directive's scope,' such as the implementing measures in Greece that did not cover domestic workers, to be against EU law.[554] According to Nicola Countouris and Mark Fredland, the exclusion of domestic workers raises doubts over the compatibility with the broad concept of pregnant worker emerging from *Kiskii,* comparable to the concept developed in the case law on the free movement of workers.[555] Moreover, it is also relevant to recall that the Directive 92/85 not only aims to protect the health and safety of pregnant workers, but also to promote the essential principle of the equal treatment of men and women in matters of

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[552] CJEU, Case C-65/14 *Charlotte Rosselle v Institut national d'assurance maladie-invalidité (INAMI) and Union nationale des mutualités libres (UNM)* ECLI:EU:C:2015:339, para 37.
[553] Pavlou, 'Domestic Work in EU Law' (n 422).
[554] *See*, Report of the Commission on the implementation of Council Directive 92/85, COM(1999) 100 final, p. 7.
[555]Nicola Countouris and Mark R Freedland, *The Personal Scope of the EU Sex Equality Directives. Report of the European Network of Legal Experts in the Field of Gender Equality* (European Union 2012) 12 <https://data.europa.eu/doi/10.2838/39037> accessed 10 April 2020.

employment and occupation. As such, any less favourable treatment of a woman related to pregnancy or maternity leave constitutes direct discrimination on the grounds of sex, as prohibited by Directive 2006/54. Therefore, an interpretation of the Directive 92/85 enabling the complete exclusion of domestic workers would be at odds with the principle of equality between men and women as enshrined in the Treaties.

Likewise, for a long time there has been consensus on the fact that domestic workers are excluded from the Working Time Directive 2003/88/EC. The reliance on the personal scope clause of the Framework Directive seems apparent from its text, as it states that it 'shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC.'[556] And indeed, for a long time it has been argued that the Working Time Directive applies to 'workers', as defined in Article 3 of the Framework Directive, and thus the same exemptions apply.[557]

However, the dependence on the personal scope of the Framework Directive has been questioned by the CJEU in a remarkable case concerning the Working Time Directive 2003/88. In the *Union Syndical Solidaires Isère* decision, the Court stated that

> 27. … while the concept of a 'worker' is defined in Article 3(a) of Directive 89/391 to mean any person employed by an employer, including trainees and apprentices but excluding domestic servants, Directive 2003/88 made no reference to either that provision of Directive 89/391 or the definition of a 'worker' to be derived from national legislation and/or practices.[558]

In so doing, the Court expressly affirmed the autonomy of the concept of worker used in the Working Time Directive from that of the Framework Directive 89/391/EC, and thus rejected any assumption about the dependency of the personal scope of application of the daughter directive on the latter.

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[556] Directive 2003/88, Article 1(3)
[557] Barnard, *EU Employment Law* (n 472) 537; McCann (n 441) 183.
[558] *Isère,* para 27. This opinion overcomes a previous orientation of the CJEU. Cf. Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry* [2001] ECR I-4881, Opinion of AG Tizzano, para 5.

Also supporting the thesis on the independence of the personal scope of the individual Directives is the language of working time limitation as a fundamental right, enshrined in Article 31(2) of the Charter. As will be analysed further in the next section, over the past years the CJEU has strengthened the importance of the Charter as an interpretative tool in the field of labour law, favouring an inclusive interpretation of the Working Time Directive ensuring all workers the fundamental social right to a limitation of working time, to daily and weekly rest, as well as to paid annual leave.

Finally, in the same vein, the text of the Young Workers Directive 94/33/EC itself provides arguments against the view that domestic workers are excluded from the personal scope of all Daughter Directives. The Young Workers Directive, enacted in the framework of the Directive 89/391, explicitly enables Member States to exclude from the scope of the Directive occasional work or short-term working involving domestic service in a private household.[559] This measure was meant to enable Member States to exclude babysitting from the limitations provided by the Directive. However, the explicit exclusion would be redundant if domestic workers were already excluded from the scope of application of all Daughter Directives.

For all these reasons, it is possible to argue that the Daughter Directives, particularly the Pregnant Workers Directive 92/85 and the Working Time Directive 2003/88 but other daughter directives as well, apply to domestic workers insofar as they meet the criteria to be considered as workers.

However, the lack of clarity in the personal scope of these instruments still affects their implementation by Member States, with the result that domestic workers remain excluded from the transposition laws of a number of Member States. For example, some restrictions to maternity protection apply to live-in domestic workers in Austria,[560] and to part-time domestic workers in the Netherlands.[561]

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[559] Directive 94/33, Article 2(2)(a).
[560] Maternity Protection Act §24-§27. See Nada Bei, 'Austria' in Nicola Countouris and Mark R Freedland (eds), *The personal scope of the EU sex equality directives. Report of the European Network of Legal Experts in the field of Gender Equality* (European Union 2012) 25..
[561] Article 7:629CC. See Rikki Holtmaat, 'The Netherlands' in Nicola Countouris and Mark R Freedland (eds), *The personal scope of the EU sex equality directives. Report of the European Network of Legal Experts in the field of Gender Equality* (European Union 2012) 169..

Domestic workers are not covered by the legislation protecting against dismissal on the grounds of pregnancy in Italy, as reaffirmed in a case decided by the Court of Cassation in 2015.[562] Furthermore, domestic workers are entirely or partially excluded from the working time legislation in Belgium, Greece, Luxembourg, Sweden.[563]

4.3 The exclusion of domestic workers in national legislation implementing EU law

4.3.1 The use of derogatory clauses

Beyond the overt exclusion in Directive 89/391, other Directives allow Member States to provide general exemptions or specific derogations in their implementing legislation, which can have a significant effect on domestic workers.

An example is offered by the Working Time Directive 2003/88 itself, where some of its obligations may be derogated in cases in which the specific characteristics of the activity performed raise difficulties in measuring or predetermining the working hours of workers. According to its Article 17,

> 'With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6 [on minimum daily and weekly rest period], 8 [on night work] and 16 [on reference period] when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves.'[564]

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[562] Cassazione civile, sez. lav., 02/09/2015, no. 17433, *Giust. civ. Mass.* 2015. See also Simonetta Renga, 'Italy' in Nicola Countouris and Mark R Freedland (eds), *The personal scope of the EU sex equality directives. Report of the European Network of Legal Experts in the field of Gender Equality* (European Union 2012) 118–119.

[563] European Commission, Report to the European Parliament, the Council and the European Economic and Social Committee on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time. SWD(2017) 204 final, 4. The report also refers to the UK as a country in which (live-in) domestic workers are excluded from working time regulation.

[564] Directive 2003/88, Article 17.

Given the special nature of domestic work, the derogation of Article 17(1) has been invoked by some Member States specifically to exclude domestic workers from the provisions limiting maximum weekly working time, night work, and rest periods.[565]

Similarly, the Written Statement Directive 91/533, enables Member States to exclude from the scope of the Directive both employees working for less than a month and/or less than eight hours per week, employees in a casual occupation or carrying out an activity of special nature 'that can justify its non-application.'[566] 15 Member States out of 27 have used these exemptions, and some of them – notably Italy, the Netherlands, and Sweden - have specifically excluded domestic employment.[567] As will be analysed in the next subsection, the Directive has recently been repealed by the Transparent and Predictable Working Conditions Directive 2019/1152, which has limited the cases in which domestic workers can be excluded from the rights provided to other workers.

In addition, the Insolvency Protection Directive 2008/94 lists some categories of employee who may, by way of exception, be excluded from its application. These include 'domestic servants employed by a natural person.'[568] As a consequence, domestic workers are excluded from the implementing legislation of numerous Member States, including France, Malta, the Netherlands, Poland and Spain.[569]

4.3.2 The reference to the national concept of worker

Although domestic workers are not mentioned, and thus not explicitly excluded, in many EU Directive, domestic workers can nonetheless be excluded due to the reference in many directives to the national definition of worker. This is the case of the Directives regulating atypical work, i.e., the Part-Time Directive 97/81/EEC,

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[565] As for the UK, cf. Working Time Regulations 1998, Part III, Regulation 19: 'Regulations 4(1) and (2), 6(1), (2) and (7), 7(1), (2) and (6) and 8 do not apply in relation to a worker employed as a domestic servant in a private household'. Cf. Novitz and Syrpis (n 442) 112.
[566] Directive 91/533, Article 1(2).
[567] Cf. European Commission (2016), REFIT Study to support evaluation of the Written Statement Directive 91/533/EEC. Final Report, 25.
[568] Directive 2008/94, Article 1(3)(a)
[569] Cf. Pavlou, 'Domestic Work in EU Law' (n 422) 389.

the Fixed-Term Directive 99/70/EEC and the Temporary Agency Work Directive 2008/104, as well as the revised Parental Leave Directive 2010/18/EU.

As analysed above (section §1.2), these Directives are based on a 'subsidiary' notion of workers, meaning that domestic workers fall within their scope insofar as they are considered workers under national labour legislations. Yet, as in *O'Brien* and *Ruhrlandklinik,* the Court has tried to limit the discretion of Member States in relation to those who can be excluded from the scope of the Directives on atypical work. However, the implementation reports of these Directives do not mention any case of exclusion of domestic workers from the personal scope of the implementing national legislations.

Likewise, the revised Parental Leave Directive 2010/18 applies to all workers, men and women alike, as defined in the national legal system. The Directive clarifies that no exclusions or derogations are allowed. The directive applies to all workers, including atypical workers such as 'part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency.'[570] As the CJEU has recently reaffirmed, the personal scope of the Directive 2010/18 is conceived in broad terms, encompassing all workers, as is evident from the fact that this Directive is intended to promote the equal treatment of men and women in the field of employment and work, a principle that applies generally.[571] It follows that Member States should not be allowed to make any exceptions or exclusions to the broad scope of application of the Directive. However, at least one Member State, Italy, has excluded domestic workers from its legislation on parental leave.[572]

Moreover, it should be noted that the Directive allows Member States to limit the access to parental rights and/or related benefits for people who have been employed

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[570] Directive 2010/18/EU, cl. 2.
[571] See CJEU, Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010] ECR I-08489, paras 29-30.
[572] Indeed, the Italian Consolidated Law on Maternity and Paternity law clarifies that domestic workers are granted paid maternity leave, but remain silent with regards to parental leave. Cf. Law 151/2001 (*Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità),* Article 62.

for a - rather significant - minimum working period of up to one year.[573] The issue of the subjection of parental rights and/or related social security benefits to some eligibility criteria, such as a minimum duration of the employment contract, was mentioned in the report of the Directive,[574] which suggests that eligibility criteria at the national level could constitute a barrier for atypical workers, such as fixed-term workers.[575] More recently, increased attention has been paid to inequalities in the accessibility and availability of parental rights for workers of different family types and at different levels of occupation.[576] All these measures may have a considerable impact on domestic workers, who are situated at the intersection of various axes of inequality.[577]

The Directive has recently been replaced by the Work-Life Balance Directive 2019/1158; however, as will be analysed below, the inclusiveness issues remain.[578]

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[573] Directive (EU) 2019/1158, Article 5(4). It must be noted that the European Parliament had proposed that the upper limit be reduced to only 6 months, but its proposal has not been incorporated into the final text. See Draft Legislative Resolution of the European Parliament on the proposal for a directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. COM(2017)0253 – C8-0137/2017 – 2017/0085(COD). Amendment no. 64.

[574]Maria do Rosàrio Palma Ramalho, Petra Foubert and Suzanne Burri, *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries. Report of the European Network of Legal Experts in the Field of Gender Equality* (European Union 2012) 8–9 <http://publications.europa.eu/resource/cellar/a18aacad-e133-42bf-a072-9b7e8e80606f.0001.01/DOC_1> accessed 15 April 2020.

[575] The report refers to France and Malta, as well as to Liechtenstein. See *Ivi,* 9.

[576] *See* Ivana Dobrotić and Sonja Blum, 'Inclusiveness of Parental-Leave Benefits in Twenty-One European Countries: Measuring Social and Gender Inequalities in Leave Eligibility' (2020) 27 Social Politics: International Studies in Gender, State & Society 588; European Institute for Gender Equality., *Gender Equality Index 2019: Work–Life Balance.* (Publications Office 2020) 72–79 <https://data.europa.eu/doi/10.2839/319154> accessed 25 January 2020. According to the latest data by, one in ten workers in the EU are not eligible for family-related leaves, with great variation between groups of workers of different ages, levels of education, occupation and sector of employment. Several Member States require a minimum period of employment of up to twelve months in order to be eligible for parental leave or to claim the related benefits. Moreover, the minimum length of service may be required as an uninterrupted period, which will disadvantage those with less stable working arrangements. Finally, some Member States make access to WLB entitlements contingent upon a certain length of residency, or on citizenship, which has detrimental effects for migrant workers.

[577] See Chieregato (n 6).

[578] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

In conclusion, it can be affirmed that the partial or total exclusion of domestic workers from national legislation is an established practice that has long been tolerated by the European Commission, partly due to the lack of clarity in the personal scope of the Directives. Moreover, no case concerning domestic workers has ever been brought before the Court of Justice of the European Union.

However, it is highly unlikely that these exclusions would continue to be considered legitimate under EU law,[579] given the gradual establishment of a jurisprudential concept of worker in EU employment law, the inclusive approach adopted in the framework of the European Pillar of Social Rights, and the constitutionalising of fundamental social rights. The next section focuses on these recent phenomena.

5 Towards inclusion? The position of domestic workers in the most recent EU labour law initiatives

Against the background of the persistent exclusion of domestic workers from EU and/or national legislation, there has been a noteworthy shift in the policy approach of European Institutions to domestic workers. Although very few legislative reforms have been implemented, the idea that domestic workers are covered by EU labour law has steadily gathered support.

This Section illustrates how the topic of domestic workers has gained visibility in the latest regulatory documents adopted in the wake of the European Pillar of Social Rights, to the extent that EU labour law has been considered an important resource challenging the vulnerability of domestic workers.[580]

[579] Specifically on the Working Time Directive, see Kirsten Scheiwe, 'Domestic Workers, EU Working Time Law and Implementation Deficits in National Law - Change in Sight?' (EUI 2021) EUI Working Papers 2021/03 <https://www.ssrn.com/abstract=3811306> accessed 19 June 2021.
[580] Pavlou, 'Domestic Work in EU Law' (n 422).

5.1 Revamping Social Europe: the proclamation of the European Pillar of Social Rights

The European Pillar of Social Rights (the Social Pillar),[581] proclaimed at the Social Summit for Fair Employment and Growth in Gothenburg on 17 November 2017, represents a crucial initiative aimed at reviving and renewing EU social policy.[582] Designed 'as a compass for a renewed process of convergence towards better working and living conditions',[583] the Pillar is a high-profile political document that 'expresses principles and rights essential for fair and well-functioning labour markets and welfare systems in 21st century Europe.'[584] In reaction to the largely deplored 'social displacement' of the EU,[585] caused by the Eurozone crisis and its governance through the adoption of austerity measures, along with the development of a case law favouring EU economic freedoms over social rights,[586] the Social Pillar has been considered 'the most encompassing attempt to raise the profile of social policy in two decades.'[587]

In a narrow sense, the Pillar reaffirms and consolidates 20 key principles and rights[588] in the area of equal opportunities and access to the labour market, fair working conditions, social protection and inclusion. However, the Pillar can be

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[581] Interinstitutional Proclamation on the European Pillar of Social Rights, OJ C 428, 13.12.2017, p. 10–15.

[582] For the first comments on the Pillar, see Zane Rasnača, 'Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-Level Policymaking' (2017) European Trade Union Institute–Working Paper 2017/05; Sacha Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 European Constitutional Law Review 210; Sacha Garben, 'The European Pillar of Social Rights: An Assessment of Its Meaning and Significance' (2019) 21 Cambridge Yearbook of European Legal Studies 101; Frank Hendrickx, 'The European Social Pillar: A First Evaluation' (2018) 9 European Labour Law Journal 3.. See also, Stefano Giubboni, 'L'insostenibile leggerezza del Pilastro europeo dei diritti sociali' [2018] Politica del diritto 557..

[583] European Commission, Commission presents the European Pillar of Social Rights, Press Release, 26.04.2017. https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1007 (accessed Apr 23, 2020).

[584] European Pillar of Social Rights, Recital no. 14.

[585] The term has been introduced by Claire Kilpatrick, 'The Displacement of Social Europe: A Productive Lens of Inquiry' (2018) 14 European Constitutional Law Review 62.

[586] As seen most notably in the famous CJEU Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I-10779; and Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

[587] Ania Plomien, 'EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights' (2018) 17 Social Policy and Society 281, 292.

[588] Although it is the European Pillar of Social *Rights,* this document refers to principles indeed. See Catherine Barnard, 'Are Social 'Rights' Rights ?' (2020) European Labour Law Journal.

broadly considered a social action plan, which aims to restore the EU's social credentials and to revive its social dimension.[589] Although some commentators have criticised the unclear legal status of the Pillar, as well as its continuity with developments in post-crisis governance,[590] more recently it has been praised and recognised as a highly welcome initiative for its potential to update and "upgrade" EU social .

The Pillar created a new momentum and proposed a broad social plan for Europe, to be achieved through a wide range of legislative and non-legislative initiatives, cooperation mechanisms in economic governance and funding actions, as well as through the creation of new institutions.[591] According to Sascha Garben, the Pillar can serve as an indication of the content and direction of the 'implementation' of the rights and principles it contains, as a source of inspiration in the interpretation by the CJEU of the rights and principles laid down in other instruments, and as a facilitator of the advancement of the social *acquis*.[592]

In this regard, the Social Pillar was an expression of the necessity to promote a more inclusive EU labour law, ensuring minimum labour and social rights to a broader range of atypical workers. According to Paragraph 15 of the Preamble, the Pillar calls workers 'all persons in employment, regardless of their employment status, modality and duration.' It has been argued that throughout the text the Pillar demonstrates a concern with the personal scope of application of EU law, demonstrating awareness of the growing barriers that impinge on employment and social protection for atypical workers.[593]

Following the impetus of the Pillar, in recent years the European Commission has taken initiatives to deliver on the principles of the Pillar and to provide fresh guidance in the interpretation and correct implementation of the EU social *acquis*.

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[589] Garben, 'The European Pillar of Social Rights' (n 581).
[590] Cf. Sara Benedi Lahuerta and Ania Zbyszewska, 'EU Equality Law after a Decade of Austerity: On the Social Pillar and Its Transformative Potential' (2018) 18 International Journal of Discrimination and the Law 163; Plomien (n 585).
[591] Among the various initiatives adopted in the framework of the Social Pillar, it is worth quoting the Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority. OJ L 186, 11.7.2019, p. 21–56.
[592] Garben, 'The European Pillar of Social Rights' (n 581).
[593]Countouris (n 496).

Some of these initiatives are explicitly informed by the willingness to fill the gaps in protection of atypical employment and new forms of work, including the Transparent and Predictable Working Conditions Directive and the Recommendation on access to social protection for workers and the self-employed.[594]

5.2 Beyond speciality: acknowledging domestic workers among non-standard workers

The new initiatives adopted within the framework of the European Pillar of Social Rights demonstrate renewed attention to domestic workers as non-standard workers to be included in labour law.

While no specific measures have been adopted for their labour protection, domestic workers have nonetheless gained significant visibility in most of the recent initiatives of the European Commission, signalling a substantial – and as yet scarcely noticed – shifts in the EU position to their position.[595]

In this subsection I review this policy shift by examining a series of EU legislative instruments and non-legislative documents which are emblematic of the departure from the traditional exclusionary approach toward domestic workers.

5.2.1 Domestic workers as non-standard workers

In order to concretely deliver on the principles enshrined in the Social Pillar, the European Commission accompanied the text of the Social Pillar with two legislative proposals for a Directive on work-life balance for working parents and carers and for a Directive on transparent and predictable working conditions. After lengthy negotiation, both Directives were adopted in June 2019.

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[594] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed. 2019/C 387/01, ST/12753/2019/INIT. OJ C 387, 15.11.2019, p. 1–8.
[595] The shifting position of EU institutions towards the position of domestic workers within EU working time regulation has recently been noticed by Scheiwe (n 578).

The latter Directive is particularly relevant to this discussion. As the proposal explains, the Directive was proposed with the specific aim of addressing the weaknesses in the personal and material scope of Written Statement Directive 91/533/EEC, as well as the gaps between the existing EU social *acquis* and recent developments in the growing flexibilisation of the labour market.[596] Thus, it aimed to extend and ensure minimum standards for old and new forms of employment, regardless of the type of employment contract or relationship, in order overtly to 'provide protection for the widest categories of workers and in particular the most vulnerable workers.'[597]

As mentioned in the previous Section, the Proposal provided a statutory definition of worker, based on the criteria adopted in CJEU case law on free movement. As explained in the text of the Proposal:

> This article [no. 2] lays down criteria for establishing worker status for the purpose of the proposed Directive. These criteria are based on the case law of the CJEU as developed since case C66/85 *Lawrie-Blum*, as most recently recalled in C-216/15 *Ruhrlandklinik*. It is necessary to specify such criteria in view of the findings of the REFIT evaluation that the scope of application of the Written Statement Directive varies among Member States depending on their concepts of 'employee', 'employment relationship' and 'employment contract', and risks excluding growing numbers of workers in non-standard forms of employment, such as *domestic workers*, on-demand workers, intermittent workers, voucher-based workers and platform workers. The proposed Directive would apply to such workers, as long as they fulfil the criteria set out above.[598]

The text later adopted as the Transparent and Predictable Working Conditions Directive 2019/1152 refers specifically to domestic workers as one of the categories of workers in non-standard employment.

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[596] Proposal for a Directive on transparent and predictable working conditions, 2.
[597] ETUC position on the draft Transparent and Predictable Working Conditions Directive. 7-8 March 2018, p. 2. Available at https://www.etuc.org/sites/default/files/document/files/etuc_position_on_the_draft_transparent_and_predictable_working_conditions_directive_updated.pdf (last accessed 15 May 2020).
[598] Proposal for a Directive on transparent and predictable working conditions, p. 11. (emphasis added)

Moreover, in its Preamble, the Directive states that '*domestic workers,* on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of the Directive, in case they meet the criteria laid down by the CJEU,'[599] thereby clarifying that domestic workers are workers falling within the scope of labour law. And indeed, despite the fact that after long negotiations within the Council, the statutory definition of worker was withdrawn, Article 1(2) of the Directive still provides a definition of worker based on the case law of the CJEU.

Directive 2019/1152 is also significant since it repeals the Written Statement Directive, which allowed substantial exemptions for domestic workers.[600] Indeed, the Directive still allows some derogations for domestic workers; however, these exclusions are specifically tailored and limited to obligations considered too stringent for private households employing domestic workers, such as the obligation to consider requests for different types of employment, to provide mandatory training without charge and to provide for redress mechanisms based on favourable assumptions where information is missing.[601]

The same personal scope clause was adopted in the Work-Life Balance Directive 2019/1158, which repeals the Parental Leave Directive. However, unlike in Directive 2019/1152, in the Preamble of this Directive there is no explicit recognition of the need to ensure minimum rights to atypical workers. Furthermore, no reference is made to domestic workers. This is striking and rather paradoxical: although the role of domestic workers in enabling other workers to participate in the labour market and to achieve a satisfactory work-life balance has long been acknowledged, their work being crucial to meet the growing care needs of families who can afford to outsource a share of their family responsibilities,[602] they are not themselves considered workers entitled to work-life balance rights. This paradox was stressed in the ILO Domestic Workers Recommendation (No. 201), which calls

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[599] Directive (EU) 2019/1152, Recital no. 8. (emphasis added)
[600] *See* above, §4.3.1.
[601] Directive (EU) 2019/1152, Article 1(7).
[602] Blackett 2011.

for 'the concerns and rights of domestic workers [to be] taken into account in the context of more general efforts to reconcile work and family responsibilities.'[603]

Although a discussion of social protection falls outside the scope of this analysis, it is worth recalling that domestic workers are mentioned in the 2019 *Recommendation on access to social protection for workers and the self-employed,*[604] which specifically aims to improve the effective coverage and ensure access to adequate social protection for all workers and self-employed persons. The initiative is extremely significant, since it calls for social protection systems to evolve following developments in the world of work, to ensure protection for all workers and the self-employed in comparable conditions. The expression 'all workers, regardless of the type of employment relationship,' in the Recommendation crucially refers to

> '[a] variety of employment relationships and forms of self-employment' that 'exist in Union labour markets alongside full-time open-ended employment contracts. Some of them have existed in the labour market for a long time (such as fixed, temporary, part-time, *domestic work*, or traineeships), whereas others, such as on-demand work, voucher-based work and platform work, have developed more recently and increased in importance since the 2000s.'[605]

That domestic work is explicitly quoted in the Preamble of the Recommendation as one of the various atypical employment relationships deserving of social protection is significant because it hints at an inclusive approach to domestic workers, in overt contrast to the longstanding tradition of invisibility and exclusion. However, the lack of reference to domestic workers in the work-life balance strategy involves some ambiguity in the EU commitment to domestic workers' rights.

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[603] ILO, Recommendation concerning Decent Work for Domestic Workers, no. 201 of 16 June 2011 (Domestic Workers Recommendation), Article 25(1)(c).
[604] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed. 2019/C 387/01. OJ C 387, 15.11.2019, p. 1–8.
[605] *Ibid*., Recital no. 11.

5.2.2 Occupational Safety and Health

Only a few months before the publication of the Social Pillar and the Proposals of the two Directives, domestic workers were mentioned in a non-legislative document. The Communication on the 'Modernisation of the EU Occupational Safety and Health Legislation and Policy', adopted in January 2017,[606] signalled new and unexpected attention to domestic workers. Based on the results of the REFIT evaluation of the EU legislative framework on occupational safety and health, the Communication recalled that

> 'workers have the right to a high level of protection of their health and safety at work [as well as] the right to a working environment adapted to their professional needs and which enables them to prolong their participation in the labour market.'[607]

In this Communication, the Commission encouraged Members States to provide broad coverage of the Occupation Safety and Health framework to categories of workers usually excluded, such as the self-employed and - most significantly - domestic workers, defined here as 'persons employed for household work in private households.'[608]

Crucially, the Communication devotes one of its sections to domestic workers, signalling a meaningful shift from the former silence on this group of vulnerable workers. Despite the explicit exclusion of these workers from the scope of application of the EU occupational safety and health legislation, the Commission nonetheless points to the importance of ensuring that domestic workers have the right to a safe and healthy working environment, in accordance with Article 13 of the ILO Domestic Workers Convention. It also urges that this significant sector of

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[606] European Commission, Communication on Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy. Brussels, 10.1.2017. COM(2017) 12 final.
[607] European Pillar of Social Rights, Principle no. 10.
[608] The European Parliament has long advocated for a more inclusive occupational health and safety framework. Cf. European Parliament. Report on the on the EU Strategic Framework on Health and Safety at Work 2014-2020 (2015/2107(INI)) – 26.10.2015. Para 36, in which the Parliament called the Commission and the Member States to extend health and safety entitlements to the at-risk professions and recalled the importance of taking into account 'work in the domestic sector' to improve occupational safety and health across Europe.

work be considered by all Member States, and encourages the ratification and the 'pragmatic implementation' of the ILO Convention based on the best practice of those Member States with occupational safety and health rules in place covering domestic workers.[609] Indeed, the Commission recommends that '[t]heir experience may help in bringing about across Member States comparably high standards as regards the health and safety at work protection of the estimated 2.5 million such persons in the EU.'[610]

This unprecedent reference to domestic workers and the need to include them in the OSH framework is extremely significant. However, the same effort was not replicated in the most recent Strategic framework on health and safety at work 2021-2027, adopted in June 2021, in which domestic workers are regretfully not mentioned.[611] Some attention has nonetheless been devoted to addressing gender inequalities in access to a healthy and safe workplace, and Member States have been urged to acknowledge the 'risks in occupations that have long been overlooked or considered as 'light work' (e.g. carers or cleaners)'.[612] The hope is that attention to carers and cleaners will include those performing work in or for a private household.

5.2.3 Working Time

Two further non-legislative documents adopted in the wake of the European Pillar of Social Rights are extremely significant for domestic workers: the Interpretative

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[609] As anticipated in the Communication, the Commission, together with the ILO, held in 2018 a joint conference on domestic workers and Occupational Safety and Health to discuss about the challenges in (and possible solutions for) extending the OSH protection to domestic workers. The Conference represented an attempt to promote an exchange of views and experience and good practices on the topic, as well as to encourage the ratification of the ILO Convention by Member States. *See* EC-ILO Joint Conference on domestic workers and Occupational Safety and Health. Brussels, 12-13 October 2018. Available at <https://ec.europa.eu/social/main.jsp?langId=en&catId=88&eventsId=1360&furtherEvents=yes> (last accessed 25 Feb 2020).

[610] *Safer and Healthier Work for All,* 15.

[611] European Commission, EU strategic framework on health and safety at work 2021-2027 Occupational safety and health in a changing world of work. Brussels, 28.6.2021, COM(2021) 323 final.

[612] *Ibid*., 13.

Communication on the Working Time Directive,[613] and the Implementation Report of the same Directive,[614] adopted and published in April and May 2017. These non-binding documents are part of the new non-legislative approach of European institutions to ensuring the 'effective enforcement' of existing minimum standards contained in the EU Working Time Directive.[615] In fact, after a series of unsuccessful attempts by EU institutions to review the Working Time Directive between 2004 and 2009,[616] in 2017 the European Commission released these documents with the aim of clarifying the content and obligations of the Working Time Directive. It was considered necessary due to 'the unclarity of some of its provisions, including its derogations, the volume of already existing case-law and the interaction of the text with ongoing changes to the world of work.'[617] In fact, the Directive has spurred more than 50 judgments of the CJEU (and continues to create abundant case law).

According to its stated aim, the Interpretative Communication provides significant guidance on the personal scope of the Directive. In particular, in this document the Commission significantly rejects the idea that the personal scope of the Framework Directive 89/391/EEC influences that of the Working Time Directive. Rather, on the basis of the notorious *Isére* case, in which the Court affirmed that 'the Directive 2003/88 made no reference to either that provision [of the concept of 'worker'] of Directive 89/391 or the definition of a 'worker' to be derived from national legislation and/or practices,'[618] the Commission argued that the word 'worker' for the purposes of Directive 2003/88/EC refers to the interpretations developed in CJEU case law in the context of the free movement of workers. In other words,

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[613] European Commission, Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time. C/2017/2601, OJ C 165, 24.5.2017, p. 1–58.
[614] European Commission, Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time. Brussels, 26.4.2017. COM(2017) 254 final.
[615] *Ibid*.
[616] See Ania Zbyszewska, 'Reshaping Eu Working-Time Regulation: Towards a More Sustainable Regime' (2016) 7 European Labour Law Journal 331.
[617] Interpretative Communication, p. 6.
[618] Judgment of 14 October 2010, *Union syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612, para 27.

> 'it is not the status of the person under national law that is decisive for the applicability of the Working Time Directive. On the contrary, its applicability will depend on whether the person concerned qualifies as a 'worker' according to the EU jurisprudential definition of worker.'[619]

It is in the Implementation Report of the Working Time Directive, however, that specific mention is made of domestic workers. Domestic workers are referred to for the first time in these five-yearly recurring reports, signalling a significant change in policy, not anticipated in most scholarly analysis.[620] Tellingly, the document says the exclusion of domestic workers from working time regulations is common practice, for example in Belgium, Greece, Luxembourg, Sweden and the UK. However, the exclusion is not consistent with EU law:

> 'in some Member States, categories of workers are excluded from the scope of the legislation. … As for the private sector, several Member States exclude domestic workers. Such exclusions are not consistent with the requirements of the Working Time Directive, unless transposition of the Directive's provisions is ensured by collective agreements.'[621]

Hence, EU institutions adopted an interpretation of the personal scope of application of the EU in line with the ILO Convention, thereby totally rejecting the assumption - long prevalent also in EU labour law scholarship - according to which domestic workers are not covered by the Working Time Directive.

This shift in interpretation raises issues as to the compatibility with EU law of the many exceptions for domestic workers made in the legal frameworks of Member States.

Albeit not legally binding, the fact that domestic workers are mentioned in (some of) the latest regulatory initiatives is of great importance and signals a small but

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[619] Interpretative Communication, p. 10.
[620] An exception being Pavlou, 'Domestic Work in EU Law' (n 422)., who already in 2016 argued for the applicability of EU working time law to domestic workers on the basis of the *Isére* case. See above, §4.2.
[621] European Commission, Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time. Brussels, 26.4.2017. COM(2017) 254 final, 4.

extremely significant shift in the policy approach to the working conditions of domestic workers.[622]

Once invisible and marginalised in labour law discussion, domestic workers have now became a visible (at least, in policy-making) category of workers in non-standard forms of employment, along with on-demand workers, intermittent workers, voucher-based workers and platform workers. In the framework of the discussion of the increasingly precarious nature of employment and the difficulties of labour law in providing a minimum degree of protection to new forms of work, it is noteworthy that this – indeed very old – form of work has gained some visibility, highlighting the risk not only that these atypical workers are excluded from, but also invisible in, the discussion of the need to ensure labour protection beyond the standard employment relationship.

5.3 Against exceptional exclusions: labour rights as fundamental rights for 'every' worker

Although there has been a remarkable (albeit not unambiguous) shift by EU institutions towards greater attention to domestic work in the wake of the proclamation of the European Pillar of Social Rights, it has not been accompanied by significant legislative reform.

Whereas the explicit exclusion of domestic workers from the personal scope of the Framework Directive remains, considerable doubts have been raised over the legitimacy of this legislative exception under EU law, in particular under the Charter of Fundamental Rights of the European Union. In recent years, the Court of Justice of the EU has delivered some notable judgements, considered by many a tremendous development towards the constitutionalisation of social and labour rights in the EU legal framework. Due to this impressive development, it is my contention here that the Charter can offer an avenue for questioning the legitimacy of the explicit exclusions of domestic workers from occupational safety and health and safety regulations and working time entitlements, and ultimately for ensuring

[622] In this sense, cf. Scheiwe (n 578).

and extending minimum labour rights to atypical workers and, specifically, to domestic workers.

5.3.1 The 'constitutionalisation' of social rights

Solemnly proclaimed in 2000, the Charter of Fundamental Rights in the EU[623] reaffirms and consolidates the fundamental rights and principles in EU law, derived from the constitutional traditions and international obligations common to Member States. With the Lisbon Treaty, in 2009, the Charter was elevated to the status of EU primary law and became legally binding.[624]

The Charter represented a landmark step in the process of constitutionalisation of labour rights in the EU legal framework. In its controversial Title IV on 'Solidarity', the Charter proclaims a wide range of social and employment rights, such as the right to be protected against unjustified dismissal (Article 30); the right to fair and just working conditions (Article 31); the prohibition of child labour and protection of young people at work, (Article 32) as well as the right to combine family and professional life (Article 33). Despite the presence of social and economic rights with civil and political rights in the same bill of rights, the traditional subordination of the former to the latter apparently persists. Indeed, under Article 51(1) of the Charter, a distinction is drawn between "rights" that should be respected and "principles" that should only be observed.[625] It has generally been argued that the provision in Title IV provides for principles, which cannot create a legal situation that is directly enforceable by individuals but must be implemented at the Member State level.[626] This appears to be confirmed in the controversial case *AMS,*[627] on the application of Article 27 of the Charter, in which the Court clarified that

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[623] Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012, p. 391–407.
[624] TEU, Article 6(1).
[625] According to Article 52(5) of the Charter, articles containing principles are not directly enforceable by individuals, but may be implemented by legislative and executive acts taken by institutions of the Union and of Member States. See also Explanatory Note to Article 51.
[626] Cf. Barnard, 'Are Social 'Rights' Rights ?' (n 586). More extensively on the distinction between rights and principle, cf. Tobias Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 Common Market Law Review 1201..
[627] CJEU, Case C-176/12 *Association de médiation sociale (AMS) v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2.

> 'the facts of the case may be distinguished from those which gave rise to Kücükdeveci in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.' [628]

On the contrary,

> '*Article 27 of the Charter* cannot, as such, be invoked in a dispute, … since that article *by itself does not suffice to confer on individuals a right which they may invoke as such*.'[629]

However, in its recent case law, the CJEU seems to have departed from the binary opposition between civil and political *rights* and social *principles*.[630]

In November 2018, the CJEU delivered three seminal judgements on the topic of paid annual leave, as enshrined in Article 31(2) of the Charter. In *Kreuziger,*[631] *Max-Planck-Gesellschaft* [632] and - in particular - *Bauer et al,* [633] the CJEU meaningfully recognised that the entitlement to paid annual leave is a fundamental social right enshrined by the Charter. According to the Court, 'the right to paid annual leave, as a *principle* of EU social law, is not only particularly important,'[634] but is also 'now expressly enshrined *as a fundamental right* in Article 31(2) of the Charter.'[635]

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[628] *AMS*, para 47.
[629] *AMS*, para 49 (emphasis added).
[630] Barnard, 'Are Social 'Rights' Rights ?' (n 586) 8.
[631] CJEU, case C-619/16 *Sebastian W. Kreuziger v Land Berlin* ECLI:EU:C:2018:872.
[632] CJEU, case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* ECLI:EU:C:2018:874.
[633] CJEU, cases C-596/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* ECLI:EU:C:2018:871. For the earliest comment on this case, see Filippo Fontanelli, 'You Can Teach a New Court Mangold Tricks – the Horizontal Effect of the Charter Right to Paid Annual Leave' (*EU Law Analysis*, 11 November 2018) <http://eulawanalysis.blogspot.com/2018/11/you-can-teach-new-court-mangold-tricks.html> accessed 2 May 2020. See also See also Eleni Frantziou, '(Most of) the Charter of Fundamental Rights Is Horizontally Applicable: ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, Bauer et Al' (2019) 15 European Constitutional Law Review 306; Maria Antonia Panascì, 'The Right to Paid Annual Leave as an EU Fundamental Social Right. Comment on *Bauer et al* .: Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn* , EU:C:2018:871' (2019) 26 Maastricht Journal of European and Comparative Law 441..
[634] *Bauer*, paras 51.
[635] *Bauer*, paras 58 (Emphasis added).

The three cases clarified the constitutional status of the fundamental right to paid annual leave, based on the Charter and given concrete expression in Article 7 of the Working Time Directive; as such, they also contributed to the debate on the constitutionalising of social rights in the EU legal framework.

This clarification is not just a terminological correction: the fact that the right to paid annual leave is granted the status of fundamental right has profound implications.

First, it has consequences for its enforceability in vertical and horizontal disputes. In the second part of the judgement, the Court affirmed that the right to paid annual leave is judicially cognizable by individuals in private disputes, as it is

> 'both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right.'[636]

Furthermore, recalling the *Egenberger* case, the Court affirmed that the fact that certain provisions of primary law are addressed principally to Member States does not preclude the application of the Charter to relations between individuals. In other words, by declaring the horizontal effect of (some) Charter provisions beyond the field of non-discrimination, in this judgement the Court clarified the *Mangold* approach and mainstreamed it in the field of social rights.[637]

After *Bauer*, the CJEU strengthened its interpretation in *CCOO,*[638] regarding the limitation of maximum working time. Although the CJEU was more cautious in this case, not going so far as to affirm that the right to the limitation of maximum

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[636] *Bauer*, para 85.
[637] On the horizontal effects of the Charter, cf. Barnard, 'Are Social 'Rights' Rights ?' (n 586); Elise Muir, 'The Horizontal Effects of Charter Rights given Expression to in EU Legislation, from Mangold to Bauer' (2020) 13 Review of European Administrative Law 185. A noteworthy clarification has also been timely proposed by Lucia Serena Rossi, 'The Relationship between the EU Charter of Fundamental Rights and Directives in Horizontal Situations' (*EU Law Analysis*, 25 February 2019) <http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html> accessed 22 May 2020.
[638] CJEU, Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SA*E ECLI:EU:C:2019:402.

working hours and to daily and weekly rest periods can have horizontal effects, [639] it nonetheless specified that Member States must take active measures 'to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the *fundamental rights* enshrined in Article 31(2) of the Charter.'[640]

Second, by its judgement in *Bauer*, the Court definitively clarified the relationship between EU primary and secondary law. Pursuant to the principle of conferral, the Charter does not extend the responsibilities of the EU as defined in the Treaties, which only applies in the areas of EU .[641] Therefore, the existence of secondary legislation – i.e. the Working Time Directive – is essential in ensuring the competence of EU law on this topic and, consequently, is a prerequisite for the application of the Charter.[642] Yet, it is the fundamental right to paid annual leave, enshrined in the Charter and given concrete expression in the Working Time Directive, to be directly applied in this case. In other words, in recognising the legal character of Article 31(2) as fundamental right, the Court confirmed that the Charter is the final standard of legality against which national legislation and secondary law on working conditions are to be assessed. [643]

5.3.2 Fundamental labour rights for 'every worker': challenging illegitimate exclusions

This outstanding development was made possible by the wording of Article 31 itself. Indeed, it is worth noting that Article 31, on fair and just working conditions, affirms that '*every worker* has the right to working conditions which respect his or

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[639] Cf. Barnard, 'Are Social 'Rights' Rights ?' (n 586).
[640] *CCOO,* para 60 (emphasis added).
[641] TEU, Article 6(2); Article 51 Charter.
[642] Aristea Koukiadaki, 'Application (Article 51) and Limitations (Article 52(1))' in Filip Dorssemont and others (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) 105. See also the contribution by Lucia Serena Rossi, according to whom 'The recent ECJ case-law shows how directives and the Charter, notably in horizontal situations, mutually benefit from the respective legal effects in this respect … It is therefore clear that while directives can be assessed, interpreted and applied in the light of the Charter, the latter could not extend the scope of the former, in particular where its own scope is defined by those directives.' Rossi (n 635).
[643] See also Klaus Lorcher, 'Article 31 CFREU - Fair and Just Working Conditions' in Filip Dorssemont and others (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) 548.

her health, safety and dignity,'[644] and that '*every worker* has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'[645] Unlike other provisions, such as Article 27 and Article 28, this Article has a broad scope of application, as it does not refer merely to 'workers', nor does it mention 'the cases and under the conditions provided for by Community law and national laws and practices.'[646] It follows that

> 'Article 31(2) of the Charter reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave.'[647]

This case law also has a profound impact on the working conditions of domestic workers. In 2015, Tonia Novitz and Philp Syrpis wondered whether Article 31 of the Charter could be invoked by domestic workers to challenge their manifest exclusion from coverage by most of the social policy Directives.[648] Reviewing CJEU case law as it was then, i.e., the case law from *Mangold* to *AMS*, they concluded that it was unlikely that issues for domestic workers regarding health and safety as well as working time could be resolved through human rights-based litigation. And indeed, at that time, the question was inconceivable.

Yet, in the wake of the most recent case law of the CJEU, the landscape seems to have changed. Today, any exclusion of domestic workers, be it in national legislation or in the Directives giving concrete expression to fundamental rights enshrined in Article 31 of the Charter, must comply with the strict proportionality test specified in Article 52(1) in order to be legitimate under EU law. Therefore, the explicit exclusion of domestic workers in the Occupational Safety and Health Directive, as well as the unclear coverage of domestic workers within the scope of

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[644] CFREU, Article 31(1) (emphasis added).
[645] CFREU, Article 31(2) (emphasis added).
[646] *Bauer*, para 84. In this sense, see also Alan Bogg, 'Article 31 – Fair and Just Working Conditions' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (Nomos 2014) 851..
[647] With regards to the right to paid annual leave, see *Bauer,* para 59; *Max-Planck-Gesellschaft,* para 54; with regards also to periods of daily and weekly rest, see CJEU, Case C-147/17 *Sindicatul Familia Constanţa, Ustinia Cvas and Others v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa* ECLI:EU:C:2018:926, para 83.
[648] Novitz and Syrpis (n 442).

the Working Time Directive, constitute a limitation to the right to paid annual leave, as well as to the right to a limited maximum number of working hours, to daily and weekly rest periods and to safe working conditions, which are all enshrined in Article 31. As such, they must comply with the strict proportionality test to be legitimate under EU law.

In Article 52(1), the Charter provides for a generic proportionality test, according to which,

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[649]

The proportionality test provides for five criteria, according to which any limitation to the rights and freedoms enshrined in the Charter must (*i*) respect the principle of legality, (*ii*) respect for the essence of these rights or freedoms, (*iii*) respect the principle of proportionality, (*iv*) respect the principle of necessity, and (*v*) be functional to meet a legitimate objective.

The CJEU has resorted to the test on a few occasions,[650] but it has not developed a consistent methodology.[651] However, it seems difficult to argue that the total exclusion of domestic workers from the EU legal framework on safety and health at work, as well as derogation from the Working Time Directive through Article 17 would pass the strict proportionality test specified in Article 52(1).[652] Indeed, although it goes without saying that the statutory exclusion of domestic workers would respect the principle of legality (criteria *i*), would this exclusion respect the

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[649] CFREU, Article 52(1).
[650] Lastly, see Case C-230/18 *PI v Landespolizeidirektion Tirol* ECLI:EU:C:2019:383. See also CJEU, C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:972, para 70.
[651] On the proportionality test enshrined in Article 52, see Steve Peers and Sacha Prechal, 'Article 52 – Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (Nomos 2014).
[652] Indeed, only in few cases the CJEU has gone through all the 'analytical stages' of the test in the field of social policy. *See* Koukiadaki (n 640).

essence – the 'hard core' of the fundamental rights to paid annual leave and to a limited maximum number of working hours, to daily and weekly rest periods and to safe working conditions (criterium *ii*)?[653] Whereas the provision admits some limitations to the exercise of a fundamental right, these are only legitimate if they do not result in the suppression of a right.

Furthermore, can this wholesale exclusion be justified because it genuinely meets a legitimate objective, such as a general interest of the EU or is it necessary to protect the freedom of others (criterium *v*)? And above all, is this exclusion proportionate or necessary (criteria *iii* and *iv*), meaning that no less onerous measures could have been taken to ensure the protection of the fundamental right to working conditions which respect the health, safety and dignity of the worker?

In conclusion, it seems highly doubtful that the indiscriminate exclusion of a category of non-standard workers – domestic workers - from occupational safety and health rights and/or working time regulation can be considered legitimate under EU law and does respect the fundamental rights enshrined in the Charter.[654]

In so doing, the Charter forcefully supports the interpretation according to which domestic workers are covered by EU working time laws, and provides an avenue to challenge the persistent exclusion of domestic workers from EU laws relating to occupational health and safety, even in the absence of specific and explicit legislative reforms.

6 Assessing the potential of the EU policy shift

The previous section analyses the emergence of a notable shift in the EU policy approach to domestic workers.

[653] More generally on the essence of fundamental rights, see Bruno Veneziani, 'Del Contenuto Essenziale Dei Diritti Dei Lavoratori : Spunti per Una Ricerca' [2016] Diritti lavori mercati 229.
[654] Novitz and Syrpis (n 442).

Far from trivial, I argue that this policy shift has significant implications. Whereas until a few years ago, EU labour law was not seen as an instrument promoting decent work for domestic workers,[655] the current shift in the policy approach to domestic workers - with the reaffirmation (although not devoid of ambiguities) that they fall within the EU notion of workers and are workers to the full corpus of EU labour protection, and the parallel process of constitutionalisation of labour rights, to be recognised to 'every worker' - could play a more consistent role in improving the legal position of domestic workers at the national level.

Indeed, this trend can help to challenge a conceptualisation of domestic work as special within national labour law frameworks. By acknowledging that domestic work is a form of atypical work to be regulated along with other forms of non-standard work, this new policy orientation challenges traditional theorisation based on the exceptionality of domestic workers. As argued in the literature, domestic work is no more singled out for its exceptionalism but, in line with a broader process of erosion of labour rights, is considered as part and parcel of an increasingly precarious workforce presumed to be continuously available for the needs of the employer, and extremely flexible with regard to both their working time and workplace.[656] As such, against this 'neoliberal unravelling of the standard employment relationship',[657] the perceived mismatch between the traditional labour regulatory frameworks and the domestic work relationship is no more unique, but can be found in a plethora of non-standard working relationships.

It is in this direction that we can situate the policy shift towards the inclusion of domestic workers in the broader regulatory project on atypical work. The EU regulatory project on atypical work is based on the extension of generally applicable labour entitlements to non-standard workers (in particular those that have been recognised as fundamental) through an equal treatment approach.[658] In this broader

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[655] A notable exception being Pavlou, 'Domestic Work in EU Law' (n 422).
[656] This idea is drawn from Blackett, *Everyday Transgressions* (n 248) passim.
[657] ibid 142.
[658] This is most evident in the three Atypical Work Directives: the Part-Time Work Directive 97/81/EC, the Fixed-Term Work Directive 1999/70/EC, and the Temporary Agency Work Directive 2008/104/EC, which forbids employers to treat atypical workers less favourably than permanent workers as regards their employment conditions (including pay, leave, notice periods and other rights and benefits linked to their employment).

project, the recognition of domestic workers as non-standard workers to be included in labour law regimes has enabled not only the affirmation of the position of domestic workers as workers under labour law, but also the challenge to the current exclusion from labour entitlements through the adoption of an equal treatment approach.[659]

Despite its significance, the extension of labour rights through the equal treatment approach nonetheless needs to be supplemented with a regulatory approach based on sector-specific regulation for domestic workers, as suggested in the international arena. Indeed, the mere inclusion of domestic workers in the existing framework is crucial and momentous, but may not be sufficient to challenge the recurring hierarchies and customary norms relating to domestic work. In contrast, the adoption of a specific, sectoral regulatory approach may be crucial in fragmented labour markets to address the specific conditions of vulnerability of this individual non-standard form of work.[660] A significant example of a sector-specific approach to non-standard work is the recently announced EU Initiative to improve the working conditions of people in the platform economy, which is expected to be issued by the end of 2021 with the aim of ensuring fair working conditions and adequate social protection to platform workers.[661]

7 Summary

This Chapter analyses the evolving position of domestic workers within EU labour law, paying particular attention to the shift in policy approach in the wake of the proclamation of the European Pillar of Social Rights.

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[659] Cf. McCann (n 441) 177–178.
[660] The adoption of a sectoral approach has long been advocated by Adelle Blackett, as it is possible to see in her 1998 contribution. Cf. Blackett, 'Making Domestic Work Visible' (n 366). In a more general sense, see McCann (n 334) 516.
[661] European Commission, Communication 'Commission Work Programme 2021 - A Union of vitality in a world of fragility', Brussels, 19.10.2020. COM(2020) 690 final, 4.

It first focuses on the endorsement by EU institutions of the ILO Convention, 2011 (No. 189) on decent work for domestic workers.

Second, it reviews the gradual, yet fragmented, approach of the Court of Justice in coming to an autonomous concept of worker for the purpose of EU labour law, and reviews the latest regulatory strategies that establish a broad and inclusive concept of worker, as evident in the legislative process of the Transparent and Predictable Working Conditions Directive (EU) 2019/1152.

Third, it examines in more depth the position of domestic workers in EU employment law, assessing the explicit exclusion of domestic workers in the OSH framework, and the consequences that this exclusion has had on the extension of working time legislation and pregnancy protection to domestic workers. It also reviews the cases in which EU labour law allows Member States to exclude domestic workers in their implementation legislation, either through expressed derogation clauses or by reference to the national concept of worker. In all these cases, the implementation of EU labour law across Member States is briefly illustrated to assess the consequences of this unclear framework on the position of domestic workers at the national level.

The Chapter continues by presenting the latest regulatory innovations prompted by the proclamation of the European Pillar of Social Rights, which renewed the attention to the issue of inclusiveness of employment protection against the background of the growth in atypical, non-standard forms of employment. Some attention has specifically been devoted to domestic workers in the latest initiatives adopted by the European Commission. This shift in policy approach may be strengthened by the role of fundamental rights litigation in extending labour protection to domestic workers. Indeed, following recent CJEU case law on the right to paid annual leave, the legitimacy of the derogations and exclusions in EU employment directives has been questioned under the Charter of Fundamental Rights, demonstrating the role that the constitutionalising of social rights could play in extending labour rights to domestic workers.

Finally, it has been argued that these trends represent a promising avenue to challenge the perceived ‘speciality’ of domestic work and promote equal treatment

for domestic workers; however, this needs to be supplemented with a regulatory approach based on specific and sectoral regulation for domestic workers, as suggested in the international arena and recently endorsed by the European Commission with regard to platform work.

Conclusions

General conclusions and results

This thesis explores the contemporary legal treatment of domestic workers from a labour law perspective.

The main rationale behind the whole research project is to shine a spotlight on the daily violations of labour and fundamental rights experienced by domestic workers, which occur in the invisibility of many private households and have long been broadly tolerated in many labour law regimes.

In this sense, the above thesis has aimed to critically contest the 'speciality' of domestic work in labour law, which has been used as a means to justify non-intervention regarding the domestic work relationship and to exclude domestic workers from (some) labour law entitlements and protections. Where domestic work has traditionally been perceived as unfit for regulation, the thesis seeks to reverse this assumption in order to show that the exclusion of domestic work from labour law is motivated by the fact that it troubles the traditional legal categories and norms of employment law. In other words, the thesis reaffirms that the speciality of domestic work is not inherent in this form of employment, but is constructed and reproduced by labour law because of the divergence of domestic labour from the standard employment relationship that labour law itself assumed as its main reference. In other words, domestic work, as a profoundly gendered and atypical form of employment, performed in the isolation of the private household with non-continuous and atypical working hours, poses too many regulatory challenges to a labour law theory developed and still based on the (rather outdated) Fordist industrial model. Not only does domestic work disrupt the public/private divide on which labour law is predicated, being located in the private sphere of the

household, but it also challenges the productivist bias of labour law, by involving deeply gendered and racialised activities that have traditionally been devalued because they are (to be) performed within the family, on an unpaid basis.

However, the thesis does not express a criticism of the instrument of labour law *in se*; on the contrary, it aims powerfully to reaffirm the role that a more inclusive labour law could, on the other hand, play in proactively contrasting the vulnerability of domestic workers and and other marginalised workers, thus promoting decent working conditions within the contemporary economy. Although law is a limited instrument to promote social transformation, it can potentially combat and promote alternative and counterhegemonic understandings and modes of knowledge.[662]

Against this background, this thesis seeks to show the extent to which labour law can actively combat the vulnerability of the historically laden sector of domestic work. For this purpose, the thesis presents the landmark adoption of the ILO Domestic Workers Convention, 2011 (no. 189) and accompanying Recommendation, 2011 (No. 201) as a historic development in the recognition of domestic work as a site of legal regulation, which has remarkably challenged the assumption that the location of domestic work within the private household precludes regulation. What is more, it has been argued that the international standard contributed to moving domestic workers away from the margins of labour law to the centre of the regulatory stage, and in so doing challenged the scope and boundaries of labour law. This has been made possible through the innovative dual regulatory approach adopted by the ILO, summarised under the powerful slogan 'Work Like Any Other, Work Like No Other: on the one hand, this aimed to reaffirm the dignity and significance of domestic work as real work in the contemporary economy, recognising that workers beyond the traditional industrial model are worthy of the same rights and protections as other workers. On the other hand, the specific conditions under which domestic work is carried out are acknowledged in order to draft measures able to provide additional protection of

[662] As suggested by Blackett, *Everyday Transgressions* (n 248) 13–14.

domestic workers' rights, reacting against the deep-rooted legacy of servitude and vulnerability to abuse in the domestic work sector.

Following the momentum generated by the ILO Convention, the thesis has explored the legal position of domestic workers within the EU system of employment protection, taking into consideration the evolution of EU employment law over the last decade. In so doing, it illustrates the rather unexplored and untapped potential of EU labour law in improving the working conditions of domestic workers across Europe. Whereas domestic work has traditionally remained invisible in EU labour law, the thesis demonstrates that there has been a small yet significant shift in the policy approach towards domestic workers. Indeed, the recognition of domestic work within EU regulatory strategy on atypical work, along with the constitutionalisation of labour rights as fundamental rights for 'every worker', represent a promising avenue to challenge the exclusions of domestic workers at the national level. In so doing, ultimately, this shift in the EU policy approach could contribute to disseminating the alternative legal order pioneered through international labour standards on domestic workers.

Implications: the contribution of the domestic work debate to the wider labour law discussion

The significance of this research goes beyond its specific focus on domestic workers. Indeed, an exploration of domestic work is of great importance in the discussion of the crisis of coverage of labour law and, in particular, on the scope of employment protection measures.[663] As the basic definitions of labour law are nowadays being challenged by digitalisation, the dematerialisation of the workplace and the increasingly blurred separation between private and professional life, focusing on a sector whose specificity lies in the distance from the traditional

[663] For a broad overview of the current crisis of coverage of labour law, cf. Davidov, 'The Goals of Regulating Work' (n 325). A myriad scholarly contributions have focused on the crisis of labour law. Cf., among others, the various chapters in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011). See also, Nicola Countouris and MR Freedland, *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013); Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Hart Publishing 2019).

industrial workplace and the standard employment relationship offers a significant contribution to the ongoing debate in labour law scholarship.

Indeed, discussing domestic work as a neglected form of work can contribute to the broader discussion on the regulatory approach to non-standard work. As Deirdre McCann has significantly recognised, 'the project of domestic work regulation is also the single most significant contemporary attempt to engage with the regulatory demands of profoundly casualised and informal working relations.'[664] As such, she recognised the potential that this regulatory project could have in generating innovative regulatory strategies and in demonstrating the value of sector-specific regulation as a strategy to secure decent work conditions for everyone. To analyse the regulatory approach adopted in the domestic sector, defined as 'one of the critical regulatory projects of the early twenty-first century',[665] may therefore provide inspiration for the re-regulation of non-standard work.

The focus on domestic work as the subject of labour law also enables the appreciation of the potential of feminist labour law methodology, and the analytical and conceptual contribution that feminist scholarship can make to the current debate on the future of labour law. Feminist methodologies in law have generally been demeaned as a matter of morals and mere equality concerns; however, it is worth recalling that adopting a feminist approach to the analysis and assessment of labour law is not an instrumental deployment of labour law for the purposes of pursuing gender equality. Conversely, as Judy Fudge has persuasively argued in one excellent contribution on the topic, the feminist approach to labour law is a 'complex and multi-dimensional understanding of the *relationship between law and society* in which gender features as a constructed, contested and differentiated social relationship'. As such, gender generates new questions and can transform research agendas, giving new impetus to the wider debate on the nature, purpose, and potential of labour law in the contemporary economy.

For example, in apprehending and criticising the public/private divide, feminist labour law methodologies may contribute to the discussion of the regulatory

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[664] McCann (n 334) 511.
[665] ibid 518.

challenges posed by telework in the context of the post-pandemic transformation of work. Indeed, it is my contention that focusing on the regulatory strategies deployed for domestic workers may be a useful starting point for a discussion of the private house as a workplace. Although the conditions of teleworkers differ greatly from those of domestic workers, some of the regulatory challenges posed by telework coincide with those of domestic work, such as health and safety standards and the boundaries between work and non-work for those working in a home.

In conclusion, by engaging with feminist scholarship in labour law it is possible not only to highlight the exclusionary scope of labour law, whose productivist lens overlooks the importance of social reproduction, but also to challenge the boundaries of the field of labour law as traditionally conceptualised, in order to reconceive the subject and remit of labour law in the post-industrial and post-pandemic world.[666] In other words, focusing on the inclusion of domestic work within labour law is a general call for a more inclusive labour law, in which even the most marginalised workers matter.

[666] Miriam Kullmann, Ania Zbyszewska and Alysia Blackham, 'Introduction' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Bloomsbury Collections 2019).

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