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SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART III

MIGRANT DOMESTIC WORKERS AND CONTINUUMS OF EXPLOITATION: BEYOND THE LIMITS OF ANTITRAFFICKING LAWS

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Recent years have witnessed the expansion of human rights standards relating to migrant domestic workers. This includes, in particular, the adoption of the 2011 International Labour Organization (ILO) Convention on Decent Work for Domestic Workers (no. 189),[1] General Comments from UN human rights treaty bodies, and an expanding body of case law in domestic and regional courts. Migrant domestic workers have played central roles in these cases, engaging in the public sphere to advocate for law reform, and, in doing so, gradually expanding the field of global migration law.[2] This essay describes the emerging recognition evident in the approaches of UN human rights treaty bodies that axes of discrimination intersect and, in particular, that migration status and gender can be significant to the enjoyment of rights. This integrated approach is evident in the case law of international human rights bodies adjudicating the rights claims advanced by migrant domestic workers. The case law on Article 4 of the European Convention on Human Rights (ECHR) shows the potential for such integrated approaches to move beyond the usual fragmentation of human rights, labor, and migration laws, but that potential remains limited.

Of particular concern to any exploration of global migration law is the significance of collective organizing by migrants to secure legal reforms through the making of rights claims. Despite pessimism as to the impact of law, activists continue to frame their demands for change in the language and practice of human rights. At the same time, migration status, and the deportability of the alien continue to function as limits to the enactment of rights and to the effective vindication of human rights norms. Dejuridification, understood as the enactment of legal exceptions, is of particular significance in the domestic work context,[3] creating specific challenges for reform initiatives that promote decent work standards and more secure migration status and pathways. Such processes of dejuridification bring into question the potential of human rights laws to secure reforms that can withstand challenges from states. These challenges are linked to the continuing impact of a sovereignty-based global legal system, which situates migrant workers at its limits. Global migration law is pushing back at those limits, including through expanding the boundaries of human rights and international labor standards. From a relatively thin and fragmented base, it could be argued that a new domain of international law is beginning to emerge. Recognizing the significance of gender to migration status and rights, it is timely, therefore, to reflect on how migrant domestic

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[1] International Labour Organization, Convention Concerning Decent Work for Domestic Workers, C189, June 16, 2011.

[2] On the evolving definition of Global Migration Law, see Jaya Ramji-Nogales & Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL Unbound 1 (2017).

[3] On "dejuridification," see Seyla Benhabib, Dignity in Adversity: Human Rights in Troubled Times (2011).

workers are shaping this evolving legal domain, and whether the domain of global migration law recognizes the significance of compounded and intersecting forms of discrimination.

Law's Migration and Its Jurisgenerative Effects

Migrant domestic workers, as Joseph Carens notes, are "hard to locate on the map of democracy."[4] They are also hard to locate on the blurred lines of global migration law, at risk of double jeopardy—as migrants (often irregular) and as domestic workers. The expansion of decent work norms and international labor rights to the sphere of domestic work was intended to signal a transition from the "paternalistic conception of the 'good employer' acting out of a sense of *noblesse oblige*, to one that is founded on respect for domestic workers' rights."[5] This trajectory, one that has been characterized in other contexts as a movement from status to contract, is a familiar one. It is also a progress narrative that is often disputed. As the ILO itself points out, the vestiges of historical inequities in relation to domestic work remain "troublingly present."[6] The 2011 ILO Domestic Work Convention has little to say on the position of migrant domestic workers. The Global Forum on Migration and Development, while including a significant focus on domestic workers, remains at the margins of transnational lawmaking processes.[7] Bilateral negotiations between states are constantly vulnerable to the trade-offs that position migrant domestic workers as temporary, highly precarious migrants.

Where claims include a challenge to immigration law's exclusions, there is no guarantee that the outcome of human rights or fundamental rights litigation will secure progressive reform. Or to borrow from Jacques Rancière, it is far from certain that an egalitarian logic rather than a police logic will prevail.[8] This concern is particularly evident in the context of laws regulating the entry and stay of migrant domestic workers. Responses to the risks faced by migrant domestic workers are all too frequently confined to prosecutorial or criminal justice measures. Such measures have gained traction in particular through antitrafficking law and policy measures; women who are identified as victims of a serious human rights violation are positioned as victims but face difficulties in regularizing their presence within the host state.

The question of status for victims of human trafficking is one that goes to the heart of states' wider reluctance to recognize rights to be within its borders, particularly in the context of irregular migration. As Audrey Macklin has argued, the provision of secure immigration status could be viewed as a human rights remedy and not merely as benevolence on the part of the host country or as "a contingent benefit conditional upon cooperation with legal authorities."[9] As yet, however, states have not accepted a positive obligation to provide secure residence and safe migration routes as human rights remedies. At the same time, states continue to resist attempts to strengthen the enforcement of international labor standards for migrant workers, including migrant domestic workers.

These difficulties are likely to persist in the context of negotiations on the Global Compact for Safe, Orderly and Regular Migration. The commitments made in the 2016 New York Declaration for Refugees and Migrants to victims of human trafficking, extend only to possible consideration of "providing assistance, including temporary or permanent residency, and work permits, as appropriate."[10] The Declaration notes that the Global Compact

[4] Joseph Carens, *Live-In Domestics, Seasonal Workers, and Others Hard to Locate on the Map of Democracy*, 16 J. Pol. Phil. 419 (2008).

[5] International Labour Organization, Decent Work for Domestic Workers 13, International Labour Conference, 99th Sess., Report IV (1) (2010).

[6] *Id.*

[7] *See* Global Forum on Migration and Development.

[8] Jacques Rancière, Disagreement: Politics and Philosophy (1999).

[9] Audrey Macklin, *Dancing Across Borders: "Exotic Dancers," Trafficking, and Canadian Immigration*, 37 Int'l Migration Rev. 464 (2003).

[10] New York Declaration for Refugees and Migrants, para 8 (l), UN Doc. A/71/L.1, Annex II, (Sept. 13, 2016).

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could include provision for the protection of labor rights and those in precarious employment, including specific protection of women migrant workers in all sectors.[11]

Obstacles to securing legal safeguards remain, however. For migrant domestic workers, processes of dejuridification are evident in the denial of socioeconomic rights claims that encroach upon the household. This denial draws upon a wider family law exceptionalism that positions the family and laws relating to the family as "occupying a unique and autonomous domain—as exceptional."[12] As Halley and Rittich note, such normative and descriptive exceptionalism produces a range of disciplinary effects: from "habits of domestic architecture," to modes of delivery of social security and to limited powers and functions of labor inspectorates.[13] These disciplinary effects impact on the domain of domestic work, evident in repeated references, for example, in the 2011 ILO Domestic Work Convention to the specificity of domestic work and the domain of the household.

The Convention also leaves open the possibility for state parties to exclude specific categories of domestic workers, including agency workers, domestic workers in diplomatic households, irregular migrant domestic workers and au-pairs.[14] The only provision in the Convention relating directly to migration is found in Article 8, which provides that written job offers or contracts of employment are to be provided to domestic workers in advance of departure from their country of origin. No further requirements are imposed, however, as to the terms and conditions of their employment, reflecting a continuing willingness to allow for exceptionalism in the sphere of migration.

Integrated Approaches and the Work of UN Human Rights Treaty Bodies

In contrast with this pushback from states, the spread of international human rights norms continues to infuse global solidarity movements. In the context of the expansion of human rights norms from the international to the local (and back), law's migration is accompanied by complex processes of democratic iterations that seek to enact rights in both strong and weak public spheres—not only in courts and legislatures, but also through the claims of social movements. This enlarged moral conversation forms part of a dynamic process of transnational lawmaking, engaging multiple layers of norm production/reproduction. Whether or not the transformative potential of such public claim-making will be realized turns to some extent on the continuing development of integrated approaches to human rights and labor norms and on their jurisgenerative effects at international and local levels.

An integrated approach is increasingly evident in the work of UN human rights treaty bodies, which have sought to move beyond limits imposed by inherited texts and drafting compromises. The UN Committee on the Elimination of Racial Discrimination (CERD) has recommended that Governments ratify the ILO Domestic Work Convention and reform labor legislation to better safeguard the rights of domestic workers.[15] The UN Migrant Workers Committee's General Comment on Migrant Domestic Workers includes reference to the wider scope of human rights guarantees for migrants found in the International Covenant on Economic Social

[11] *See* Global Compact for Migration, International Organization for Migration.

[12] Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 Am. J. Comp. L. 753 (2010).

[13] *Id.*

[14] International Labour Organization, Convention Concerning Decent Work for Domestic Workers art. 2, C189, June 16, 2011.

[15] Committee on the Elimination of Racial Discrimination, Concluding Observations, Qatar para. 13, UN Doc. CERD/C/QAT/CO/13-16 (Mar. 9, 2012); Committee on the Elimination of Racial Discrimination, Concluding Observations, Kuwait para. 16, UN Doc. CERD/C/KWT/CO/15-20 (Mar. 9, 2012). *See generally* Committee on the Elimination of Racial Discrimination, UN Office of the High Commissioner for Human Rights.

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and Cultural Rights (ICESCR) and CERD treaties.[16] The Committee on the Elimination of Discrimination against Women has stated that state parties to the Convention on the Elimination of All Forms of Discrimination Against Women are required to ensure that occupations dominated by women migrant workers, such as domestic work, are protected by labor laws regulating wages and working times, health and safety, and vacation leave entitlements.[17] On the accessibility of justice systems, the Committee recognizes the impact of discriminatory laws linked to migration status. These requirements do not include the concessions or repeated appeal to the specificity of domestic work found in the ILO Domestic Work Convention.

The UN Committee on Economic Social and Cultural Rights, in its General Comment on Non-Discrimination, reiterates its position that nationality should not limit the enjoyment of human rights, which are guaranteed to "everyone" regardless of legal status.[18] In its General Comment on the Right to Social Security, the Committee again notes the prohibition of discrimination on grounds of nationality and the absence of any "jurisdictional limitation" in the Covenant.[19] The Committee has repeatedly interpreted the general prohibition of discrimination to include legal status based discrimination.[20] In its General Comment on Just and Favourable Conditions at Work, the Committee highlights "abusive labour practices" that tie migrant workers to a specific employer, or otherwise give control to the employer over the worker's residence status.[21] Recognizing the intersections of discrimination linked to gender and migration status or ethnicity, the Committee calls for adequate means of monitoring domestic work, including through labor inspections and effective access to remedies.[22] In its 2017 Statement on the Duties of States Towards Refugees and Migrants, the Committee notes that specific measures may be required to prevent abuse of undocumented migrants.[23] This concern is also reflected in the 2017 OHCHR-UN Women Draft Principles and Guidelines on the Human Rights of Migrants and Refugees in Vulnerable Situations, where repeated reference is made to the importance of securing firewalls between complaints mechanisms, labor inspections services, and immigration enforcement authorities.[24]

Combined, these standards potentially raise significant challenges to states' default sovereigntist prerogatives and to the exceptionalism that has persisted in the domains both of migration law and domestic work. Moving into the wider field of global migration law, however, and reflecting on the 2016 New York Declaration as a

[16] Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, General Comment No. 1 on Migrant Domestic Workers, UN Doc. CMW/C/GC/1 (Feb. 23, 2001).

[17] Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers para. 26(b), UN Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008).

[18] Committee on Economic, Social and Cultural Rights, General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights (Article 2, Para. 2 of the International Covenant on Economic, Social and Cultural Rights) para. 30, UN Doc. E/C.12/GC/20 (July 2, 2009). The Committee notes, however, that this requirement is "without prejudice to the application of art. 2, para. 3, of the Covenant, which states: 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.'"

[19] Committee on Economic, Social and Cultural Rights, General Comment No. 19 on the Right to Social Security (Article 9 of the International Convenant on Economic, Social and Cultural Rights) para. 36, UN Doc. E/C.12/GC/19 (Feb. 4, 2008).

[20] *See* Committee on Economic, Social and Cultural Rights, Duties of States Towards Refugees and Migrants Under the International Covenant on Economic, Social and Cultural Rights paras. 5-6, UN Doc. E/C.12/2017/1 (Mar. 13, 2017).

[21] Committee on Economic, Social and Cultural Rights, General Comment No. 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/23 (Apr. 27, 2016).

[22] *Id.* at para. 47(f).

[23] Committee on Economic, Social and Cultural Rights, *supra* note 20, at para. 13.

[24] Global Migration Group Working Group on Human Rights and Gender Equality, Principles and Guidelines, Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations Within Large and/or Mixed Movements 41-42.

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foundational document, it is notable that UN human rights bodies expressed concern at the limited commitments made to human rights standards in the Declaration.[25] Against the background of negotiations on a global compact for safe, orderly, and regular migration, it is timely also to recall the limited ratifications of the UN Convention on the Rights of Migrant Workers and their Families (Fifty-one state parties, the majority of which are migrant-sending states), and the continuing marginalization of the ILO within the evolving architecture of global migration law.[26]

Litigating Article 4 ECHR

Turning then to the cases that have arisen before the European Court of Human Rights under Article 4 ECHR, a key question to explore is whether this process of testing or verifying the promise of human rights norms is one that can secure reforms, including enactment and enforcement of decent work standards for migrant domestic workers. To date, the jurisprudence of positive obligations at the Court has focused primarily on states' duties to criminalize the rupture that takes place when the core democratic values protected by Article 4 ECHR are violated. Dominic Thomas, commenting on *Siliadin v. France*,[27] and writing on Afoka Siliadin's docutestimony "Une esclave moderne," speaks of the duty to "culpablise" the state and wider society.[28] As he notes, however, recognition of culpability would require a broader acknowledgment of the role that law plays in creating or sustaining exploitation, including through its migration law and policy. The Court recognizes Siliadin's undocumented migration status as a factor in her vulnerability to abuse, dependence and ultimately in its finding of servitude. However, the Court fails to probe the wider culpability of the state linked to migration law regimes.[29]

In *Rantsev v. Cyprus and Russia*,[30] we see a tentative acknowledgment of the nexus between a state's immigration laws and human rights violations. The Court found that Article 4 requires states to, "put in place adequate measures regulating businesses often used as a cover for human trafficking" and further that a state's immigration rules must address concerns relating to encouragement, facilitation, or tolerance of trafficking.[31] The relevance of migration status to the Court's analysis of Article 4 can be seen also in later cases. In *C.N. v. U.K.*, the Court recognized domestic servitude as a specific offence, "which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance."[32] And in *C.N. and V. v. France*, the Court specifically noted that threats to report a migrant's undocumented status to immigration authorities can constitute the "penalty" for the purpose of determining labor to be "forced" and in violation of Article 4 ECHR.[33]

The Court's recognition of subtle forms of coercion and the specific vulnerability of irregular migrants was significant also in the recent judgment of *Chowdhury v. Greece*.[34] The Court was critical of the restrictive

[25] *See* "Human Rights Are for All, Even for Migrants"—Rights Experts Remind Participants to Upcoming UN Summit, Office of the High Commissioner for Human Rights (Sept. 16, 2016).

[26] *See* Status of Ratification Interactive Dashboard, Office of the High Commissioner for Human Rights.

[27] Siliadin v. Fr., App. No. 73316/01, (Eur. Ct. H.R., July 26, 2005).

[28] Dominic Thomas, Black France: Colonialism, Immigration and Transnationalism 122, 125 (2006).

[29] More recently, in the case of L.E. v. Greece, App. No. 71545/12 (Eur. Ct. H.R., Jan. 21, 2016), the Court found failings by Greece of its positive obligations under Article 4, specifically with regard to the delays endured (nine months) in granting the legal status of victim of trafficking, and further inadequacies in the preliminary inquiry and subsequent investigation of the case.

[30] Rantsev v. Cyprus and Russ., App. No. 25965/04 (Eur. Ct. H.R., Jan. 7, 2010).

[31] *Id.* at para. 284.

[32] C.N. v. U.K., App. No. 4239/08, para. 80 (Eur. Ct. H.R., Nov. 13, 2012).

[33] C.N. v. Fr., App. No. 67724/09, paras. 77–79 (Eur. Ct. H.R., Oct. 11, 2012).

[34] Chowdhury v. Greece, App. No. 21884/15, (Eur. Ct. H.R., Mar. 30, 2017).

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interpretation of trafficking by the domestic courts, in particular the failure to acknowledge that seasonal migrant workers—in this case, Bangladeshi farm workers—can also be victims of forced labor and trafficking though not experiencing servitude as such.[35]

Concluding Remarks

In the context of migration, law's sanctions are frequently deployed at the margins, the extremes of abuse, but not the everyday of permissible exemptions from minimum wage regulations, rights to collective organizing, or social security protections. As the cases above illustrate, the trickling up or ascending rights claims of migrant domestic workers may serve to expand the "constricted referential universe"[36] within which human rights and antitrafficking law has functioned. Combined with the integrated approaches of human rights bodies, there is the potential for global migration law to be transformative from a migrant rights perspective. Any such transformation, however, will require sustained political engagement and a continuous enactment/reenactment of rights claims to move beyond the limits of sovereignty based legal systems. A tentative acknowledgment of the significance of migration status, and of states' immigration laws and policies can be seen in the jurisprudence of the European Court of Human Rights on Article 4, and in references to more subtle forms of coercion faced by migrant workers particularly in the less visible domain of domestic households. The intersections, and overlapping axes of discrimination arising from gender, race, and migration status, however, are not yet fully acknowledged.

[35] *Id.* at para. 100.

[36] Patricia J. Williams, The Alchemy of Race and Rights 424 (1992).

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