

The Many Faces of Slavery: The Example of Domestic Work

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Virginia Mantouvalou

Introduction

About a decade ago, most people in Europe would have assumed that extreme forms of labour exploitation, such as slavery and forced labour, constituted a phenomenon confined to the past. Working conditions at the end of the twentieth and beginning of the twenty-first century appeared to have little to do with such grave abuses. Scholars of human rights law would similarly have assumed that explicit legal prohibition of such conduct might be unnecessary as it no longer occurred in practice. The protection from slavery incorporated in human rights treaties might carry symbolic weight, but had no practical significance in present-day Europe.

The assumption that slavery and forced labour are concepts of only historic significance, and with no relevance in contemporary Europe, has been put into question in recent years. Judicial and legislative bodies have encountered extreme forms of exploitation in the employment relationship, causing them to develop the concept of “modern slavery” in legal documents and judicial decisions. Even though there is no generally agreed definition of “modern slavery” in law, instances that have been characterised as such in academic literature, legal documents and media reports very often refer to migrants who are trafficked from one country to another to work in agriculture, the sex industry, domestic labour and other sectors.

This article focuses on the abuse suffered by domestic workers and enquires whether it can be deemed a modern form of slavery. First, it examines the key features of domestic labour and highlights the special challenges that domestic workers face. Second, it considers the notion of slavery and the related notions of servitude and forced and compulsory labour, as they have been analysed in recent case law of the European Court of Human Rights. It then assesses whether the concept of modern slavery has been correctly approached therein, suggesting that it is a multifaceted concept which can include both *de jure* and *de facto* elements. Third, it discusses examples that show how national criminal law and international labour law have developed to address the problem of the abuse of migrant domestic workers. The paper closes with some concluding thoughts.

Working Conditions of Migrant Domestic Workers

Domestic workers typically work in private homes, performing various household tasks such as cleaning, gardening and caring for children or elderly people (these last are also known as “care workers”). This type of work is gendered, and is mostly done by women. Domestic work was delineated as a separate area when productive work (work outside the home, in the labour market) and reproductive work (work at home, such as child-rearing) became separated. In Victorian times, “menial or domestic servants” for middle- and upper-class families performed this type of work. With the decline in the employment of domestic servants the weekly cash-in-hand cleaner has become important for professional couples. In the post–Second World War period, a shift occurred in the model of the ideal family from one with a single wage-earning male head of household to one comprising dual wage earners. This shift required accommodations of new patterns of work and family life, whose results included an

increasing need for domestic labour.

The positive effect of paid domestic work for contemporary society cannot be overestimated. With changes in the labour market, including the growth of the service economy, the higher participation of women, the sharing of household tasks by men, and globalisation, it has become clear that having domestic workers is beneficial for family members, the employers and the market as a whole. In today's economic setting, domestic work is vital for the sustainability and functioning of the economy outside the household. Domestic labour can also be a desirable job for workers who are not highly skilled and might not easily be employable in other occupations. Not all domestic workers are low-skilled, though; some are educated, and migrate to work in the domestic labour sector in order to send income back to their home countries. Like other jobs, domestic work can be fulfilling: the worker develops a personal relationship of trust with the employer, sometimes to a greater degree than in other jobs, and may feel highly valued for the services provided.

Yet the particularities of domestic work set challenges, too. Much of the domestic labour workforce in Europe (and, indeed, globally) is composed of migrants who are often preferred by employers to a country's nationals, particularly if they are live-in domestic workers. The intimacy that often characterises the relationship between employer and domestic worker makes the latter seem like a family member not a worker. This sense of intimacy can be false, though, because the relationship between the domestic worker and the employer, who is a woman in most cases, is marked by a difference of status that the latter is often keen to maintain.¹ Moreover, domestic work is hard to regulate, being invisible because it is performed in the privacy of the employer's household. The location of domestic labour makes workers more vulnerable to abuse by employers. Domestic labour also has a stigma attached to it, because it is the poorest and neediest that perform this work, and because the tasks required of the workers are gendered and undervalued.² Domestic work is precarious for social reasons (gender, race, migration and social class), psychological reasons (intimacy and stigma), and also for economic reasons.

Sadly, abuse of domestic workers is widespread. A recent report by Kalayaan, a non-governmental organisation (NGO) working on migrant domestic workers in the United Kingdom, said that in 2010, 60 per cent of those who registered with it were not allowed out unaccompanied, 65 per cent had their passport withheld, 54 per cent suffered psychological abuse, 18 per cent suffered physical abuse or assault, 3 per cent were sexually abused, 26 per cent did not receive adequate meals, and 49 per cent did not have their own room. Working conditions were exploitative: 67 per cent worked seven days a week without time off, 58 per cent had to be available "on call" twenty-four hours a day, 48 per cent worked at least sixteen hours a day, and 56 per cent received a weekly wage of £50 or less.³

Domestic work is vital to today's world. Yet the regulation of domestic labour is challenging for the reasons described above. The complexities have led to the exclusion of domestic workers from protective labour legislation in some national settings. This may be described as the "legislative precariousness" of domestic workers, their special vulnerability because of their exclusion from protective laws or their lower degree of legal protection compared to other workers. Examples of such full or partial exclusions are ample the world over: domestic workers are excluded

from or afforded lower protection in legislation on the minimum wage, maximum working hours, trade union representation, and labour inspection. In addition, migration schemes have a significant impact on the vulnerability of domestic workers.

The living and working conditions of migrant domestic workers have often been described as appalling. Can their situation ever be classified as “modern slavery”, though?

Human Rights Law and Modern Slavery

Until recently, even though the problems associated with domestic labour were analysed in disciplines such as sociology, little protection was afforded to this group of workers in law. In Europe, the problem of domestic labour was touched upon in non-binding documents of the Council of Europe, the most important supranational human rights organisation in the region, when the Parliamentary Assembly, the council’s main political body, started to link instances of the abuse of domestic workers to modern forms of slavery.⁴

Yet it was not until 2005 and a judgement of the European Court of Human Rights, the judicial organ of the Council of Europe that monitors compliance with the European Convention on Human Rights, that the phenomenon attracted significant attention. The key judgement was *Siliadin v. France*.⁵ The facts of the case, which is by no means an isolated example, illustrate the cruelty of the social problem. The applicant was a Togolese national who was brought to France to work and be educated, but was instead kept at home as a domestic worker. She had to clean the house and the employer’s office, and look after three children. She slept on the floor in the children’s room, rarely had a day off, and was almost never paid. When she escaped from her employers, she faced the fact that French law did not criminalise this treatment. She was only awarded some compensation in respect of arrears of salary, holiday leave and notice period. Having exhausted domestic remedies, she took her case to the European Court of Human Rights in Strasbourg. She claimed that the lack of criminal legislation to deal with the abuse she suffered constituted a violation of article 4 of the European Convention on Human Rights, which states in part:

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.

In dealing with the case, the European Court of Human Rights took two steps. First, it stated that Siliadin’s situation was not “slavery”. The court considered that a right of legal ownership is a constitutive element of slavery. It referred to the 1926 Slavery Convention of the League of Nations for support, which declares that “slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. In the view of the court, Siliadin’s employers did not own her in the way that slaves were owned in the past, so this aspect of article 4 was not at stake here.

Even though the court ruled that Siliadin was not a slave, it classified her situation as “servitude”, which does fall within the scope of article 4. On servitude, it said that

what is prohibited is a “particularly serious form of denial of freedom” ... It includes, “in addition to the obligation to perform certain services for others ... the obligation for the ‘serf’ to live on another person’s property and the impossibility of altering his condition”.⁶

Being a minor at the time, the applicant migrant domestic worker, *Siliadin*, had to work almost fifteen hours a day, seven days per week. She had not chosen to work for her employers, she had no resources, was isolated, had no money to move elsewhere, and “was entirely at [the employers’] mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred”.⁷ She was almost never free to leave the house, nor did she have any free time. Even though she had been promised that she would be sent to school, this never happened, so she had no hope that her life would improve.

Second, the court found that article 4 imposes positive obligations on state authorities. It does not require only that the state refrain from keeping individuals in exploitative labour conditions. It also imposes a state duty to criminalise private conduct that is classified as falling within the scope of article 4. Lack of criminal legislation penalising grave labour exploitation by private employers, in other words, is incompatible with the European Convention on Human Rights.

The *Siliadin* judgement accepted that a right of legal ownership is a constitutive element of slavery and that such a relationship of ownership did not exist in this case. However, a more recent judgement, *Rantsev v. Cyprus and Russia*,⁸ attempted a more expansive interpretation of the provision, which is in line with the character of the European Convention on Human Rights as a “living instrument” that ought to be interpreted in light of present-day conditions.⁹ Although *Rantsev* did not involve domestic work, it is important for present purposes because it examined another example of grave abuse that is often presented as modern slavery in the context of article 4 of the convention: human trafficking for sexual exploitation. The European Court of Human Rights examined whether such trafficking could fall under article 4, even though it is not explicitly included therein. The court referred not only to the 1926 Slavery Convention, but also to materials of the International Criminal Tribunal for the Former Yugoslavia, which ruled that elements that can constitute slavery include the

control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.¹⁰

It concluded that it is impossible to have a comprehensive list of all elements of modern slavery.

Contrary to *Siliadin*, in *Rantsev* the court was not as concerned to classify the behaviour in question as falling in one of the categories that we find in article 4, namely “slavery”, “servitude”, “forced and compulsory labour”. It said:

trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere ... It implies close surveillance of the activities of victims, whose movements are often circumscribed ... It involves the use of violence and threats against victims, who live and work under poor conditions.¹¹

Without distinguishing between the four concepts of article 4, the court was prepared to rule that human trafficking fell within its ambit. The commodification of individuals, the restriction of their ability to move freely, the restrictive artiste visa regime, the threats by the employer and bad working conditions, were all factors afforded weight in the decision.

Interpreting the European Convention on Human Rights in an “anti-originalist”¹² manner, the court was satisfied that the ban on labour exploitation, which constitutes the principle underlying article 4, covers human trafficking, too, even though such behaviour could not have been envisaged by the drafters of the provision in the late 1940s. Crucially, *Rantsev* also emphasised that it is not sufficient to have legislation in place to regulate abusive labour conditions: a state is also obliged to take steps to enforce the legislation when the authorities know or ought to have known that such a situation exists. This principle is clearly important for cases of domestic workers, particularly when they are “live-in” and hence “invisible” to the authorities; it might legitimise a certain intrusion in the employers’ privacy, in their homes, for the purposes of enforcement.

Slavery: A Multi-Faceted Concept

In both *Siliadin* and *Rantsev* it was evident that the applicants had suffered abuse. The claim that this constituted a violation of article 4 of the European Convention on Human Rights made the court engage in the difficult task of defining slavery, servitude, forced and compulsory labour, and of attempting to classify the abuse under one or more of these concepts. To a non-lawyer this might appear formalistic: it is clear that the applicants were victims of exploitation, and this should be enough. State authorities should protect individuals from such abuse. If they do not, they should be held to account. Yet carefully defining a concept may be crucial in law, and particularly in criminal law. If slavery is criminalised in a jurisdiction, but servitude, forced and compulsory labour are not explicitly banned, it will be essential to define it for the purposes of criminal prosecutions. Definition may also be important for other reasons, for it can enable us to understand human behaviour more accurately.

Criminalisation, which the *Siliadin* judgement required, may lead to the harshest consequences, such as deprivation of liberty, with its associated ills of social exclusion, isolation and stigmatisation. A clear definition of what constitutes an offence is therefore essential. The problems in the definition of contemporary forms of slavery, which emerged in *Rantsev* and *Siliadin*, can be highlighted by looking at a recent criminal law case in the United Kingdom.¹³ *Regina v. SK* involved the trafficking of a domestic worker from Africa. The complainant had been convicted of the offence of trafficking for exploitation, contrary to sections 4(1) and 5 of the

Asylum and Immigration (Treatment of Claimants) Act 2004. The Court of Appeal quashed the conviction and ordered a retrial. The reason given was that the judge in the original trial had not adequately elaborated on what form of exploitation was at stake, having said only that “exploitation” for present purposes means treating someone “more like property than a person”, “more like an object”. The limited analysis of the key concepts meant that the conviction could not stand.

Even though a definition of modern slavery for the purposes of its criminalisation may be important, the judgements *Rantsev* and *Siliadin* do not develop such a definition fully. *Rantsev* did not elaborate sufficiently on the definition of slavery and how the latter differs from servitude, forced and compulsory labour. In *Siliadin*, on the other hand, the European Court of Human Rights analysed what differentiates slavery from servitude and forced labour, but said that the applicant was not a slave, because no right of legal ownership existed. Is legal ownership necessarily constitutive of slavery, as the 1926 Slavery Convention suggests and the court accepted in *Siliadin*? Was the ownership criterion in fact satisfied in *Siliadin* or was the court correct to say that this situation was not slavery?

Leading work in sociology has suggested that it is a mistake to define slavery (even in its traditional form) by reference to legal ownership. Orlando Patterson claimed that other characteristics are key, such as the victim’s natal alienation and dishonour.¹⁴ On this analysis, legal ownership is not a sufficient condition for slavery, because it does not go to the heart of what is bad about it. This becomes evident when considering an instance in which people are owned today, in the sense that they can be bought and sold as objects. This is the example of professional athletes, such as footballers.¹⁵ Patterson explained that it is absurd to call them “slaves” because there are other key features of slavery, more fundamental than ownership rights, which are missing in their case.¹⁶ Key features of slavery, which do not characterise the position of athletes, are the power of the parties in the relationship, the origins of the power, and the alienation that slaves suffer.

In legal scholarship, on the other hand, James Penner has argued that the inclusion of “ownership” in the 1926 Slavery Convention need not be problematic for the definition of slavery today. Building on Patterson’s idea of social death as a key element of slavery, Penner claims that in examples of modern slavery, like the situation in *Siliadin*, we have in fact a relationship that falls within the scope of the convention’s definition to which the European Court of Human Rights made reference. This is because in situations like these we are faced with immediate, exclusive, corporeal possession, and *de facto* slavery: the transfer of the domestic worker from one person to another and the acceptance of her as a gift constitute the exercise of powers attaching to ownership. This reality, coupled with the person’s social isolation, lead to the conclusion that modern forms of slavery can satisfy the criterion of ownership—not *de jure* but *de facto*. In this way, Penner suggests that the definition found in the 1926 Convention, accepted by the European Court of Human Rights in *Siliadin*, can capture instances of modern slavery.¹⁷

To the above analysis, it can fairly be added that legislation *does* play a role in the exploitation faced by migrant domestic workers, so we might be able to talk about *de jure* slavery, too. This is not because of the exercise of a right of legal ownership, which the 1926 Convention requires, but because of legislation that gravely limits the

freedom of domestic workers, such as very restrictive immigration laws. We therefore have a strong element of legal coercion, too. Discussing similar issues in the context of the United States, Justice Sandra Day O'Connor said

it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude.¹⁸

Justice William Joseph Brennan, though, suggested that the focus should not be on the threats themselves but on the working conditions as such. He explained that in looking at these,

[w]hile no one factor is dispositive, complete domination over all aspects of the victim's life, oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of that slavlike condition of servitude.¹⁹

These two views combined suggest that legislation, on the one hand, and actual oppression, on the other, are crucial elements in slavery.

To conclude, slavery is a multifaceted concept. The law, through the “living instrument” approach of the European Court of Human Rights, for example, can address its various aspects, and adapt to contemporary circumstances. Past accounts of slavery focused on the exercise of rights of legal ownership. Today, no such rights exist in law, but some workers are treated in ways that suggest they are objectified. Legislation—particularly immigration law—plays a major role here, granting significant powers to employers over workers. However, it is important to add that at least for the purposes of article 4 of the European Convention on Human Rights, and other legislation, too, as we will see in the section below, human rights and criminal law do not outlaw slavery only, but also servitude and forced and compulsory labour. The classification of all these concepts as criminal may make the problem of the definition of slavery alone less important, if the conduct in question falls under one of the other categories.

Responses

Leaving the question of the definition of slavery aside, the role of *Siliadin* in raising awareness of the appalling living and working conditions that affect domestic workers worldwide should be emphasised. Even so, the case should be put in context: not all domestic workers are treated in such a way.

The *Siliadin* judgement has been discussed in various national and supranational forums on the phenomenon of modern slavery. Significantly, it was heavily relied upon in NGO submissions and parliamentary debates, leading to legislation in the United Kingdom criminalising slavery, servitude, and forced and compulsory labour.²⁰ The legislation makes explicit reference to article 4 of the European Convention on Human Rights, declaring that the above offences ought to be interpreted according to it. Here, too, the most significant difficulty in establishing these new offences lies in demonstrating the existence of some kind of coercion. Modern slaves are not held in chains—not literally. Are they actually free to work in

extremely poor conditions if their only alternative is severe socio-economic deprivation or deportation? Because of the lack of explicit physical force it might be argued that there is nothing coerced in the situations faced by migrant workers or others kept in abusive conditions, if they are not locked up in the employer's home or business premises. The above discussion of the definition of modern slavery is again relevant, though as the legislation criminalises conduct that can also be classified as servitude and forced and compulsory labour, it may not be crucial to distinguish between these forms of oppression and slavery. Behaviour that can be classified under any of these headings is unlawful.

The *Siliadin* judgement was also discussed by the International Labour Organisation (ILO) during the drafting of two legislative instruments, Convention No. 189 and Recommendation No. 201 on Domestic Workers, which were adopted in 2011. The new instruments of the ILO, which is the agency of the United Nations that specialises in drawing up and monitoring labour standards, provide a welcome response to the challenges faced by migrant domestic workers. These legal documents take a human rights approach that entails universal and stringent entitlements for this group of workers, while at the same time incorporating certain more detailed labour standards that address the particularities of this disadvantaged sector.²¹ The convention itself does not mention the term “modern slavery”, but refers to the importance of the ILO's Fundamental Principles and Rights at Work for domestic workers, one of which is the prohibition of forced and compulsory labour.²² It therefore recognises that migrant domestic workers are vulnerable to grave abuse.

It should be added here that domestic workers who accompany foreign diplomats often suffer the worst forms of exploitation, which is frequently covered in the media. However, Article 31 of the Vienna Convention on Diplomatic Relations (1961) grants diplomats wide immunity from civil and criminal jurisdiction in the receiving state. Immunity often leads to complete impunity for grave crimes. This explains why the Parliamentary Assembly of the Council of Europe in its Recommendation 1523 (2001) requested the amendment of the Vienna Convention so as to exclude all offences committed in private life. A resolution of the European Parliament of the European Union, in turn, invited member states to connect the issuing of visas for domestic workers employed by diplomats to a minimum level of working conditions.²³ The question of diplomatic immunity was only mentioned in the ILO's Recommendation No. 201, which is not legally binding. The silence on diplomatic immunity of the ILO's new legislative instrument raises concerns about the lack of protection for the most vulnerable domestic workers.

Conclusion

The living and working conditions of migrant domestic workers in contemporary Europe and globally have rightly become central in the work of civil society organisations and international bodies. Recent developments in European and international human rights law, together with the surrounding literature, recognise that this group of workers is prone to grave abuse and attempt to address it. Whether their situation can be categorised as slavery, or whether it is servitude and forced labour instead, requires further analysis.

It is important, however, to emphasise that modern slavery is a multifaceted concept, and can include both *de jure* and *de facto* elements. Legislation can address its different aspects. Defining it may be important for the purposes of criminalising the conduct of errant employers, but not crucial if servitude and forced and compulsory labour are also criminalised and prohibited in human rights legislation.

Yet, as a general matter, classifying the grave abuse of domestic workers as modern slavery is important. Migrant domestic work, traditionally undervalued, is no longer invisible. Human rights law has played a leading role in recognising and raising awareness of the problem. It remains to be seen if the appropriate steps will be taken by the authorities to tackle modern slavery in practice.

ENDNOTES

1. See Bridget Anderson, “A Very Private Business: Exploring the Demand for Migrant Domestic Workers”, *European Journal of Women’s Studies* 14, no. 3 (August 2007), and Bridget Anderson, “Just Another Job? The Commodification of Domestic Labor”, in *Global Woman: Nannies, Maids and Sex Workers in the New Economy*, ed. Barbara Ehrenreich and Arlie Russell Hochschild (London: Granta, 2003).
2. See Martha Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999), p. 282.
3. Mumtaz Lalani, *Ending the Abuse: Policies That Work to Protect Migrant Domestic Workers* (London: Kalayaan, 2011), p. 10.
4. See Council of Europe, Parliamentary Assembly Report 9102 of 17 May 2001, “Domestic Slavery”, and Recommendation 1663(2004) of 22 June 2004, “Domestic Slavery: Servitude, Au Pairs and ‘Mail-Order Brides’ ”.
5. *Siliadin v. France*, App. No. 73316/01, Judgement of 26 July 2005. For analysis, see Virginia Mantouvalou, “Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers”, *Industrial Law Journal* 35, no. 4 (December 2006).
6. *Siliadin*, para. 123.
7. *Siliadin*, para. 126.
8. *Rantsev v. Cyprus and Russia*, App. No. 25965/04, Judgement of 10 January 2010.
9. See, for instance, *Demir and Baykara v. Turkey*, App. No. 34503/97, Judgement of 12 November 2008, para. 146.
10. *Prosecutor v. Kunarac, Vukovic and Kovac*, Judgement of 12 June 2002, para. 119.
11. *Rantsev*, para. 281.
12. George Letsas, “Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer”, *European Journal of International Law* 21, no. 3 (2010), p. 523.
13. *Regina v. SK*, England and Wales Court of Appeal (Criminal Division) [2011], 1691.
14. Orlando Patterson, *Slavery and Social Death* (Cambridge: Harvard University Press, 1982), pp. 1–14.
15. I am grateful to Hugh Collins for raising this point.
16. Patterson, *Slavery and Social Death*, pp. 24–5.
17. James Penner, “The Concept of Property and the Concept of Slavery”, in *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. Jean Allain (Oxford: Oxford University Press, forthcoming).
18. *United States v. Kozminski*, 487 U.S. 931 (1987), 948.
19. *Ibid.*, 962–3.
20. Section 71 of the Coroners and Justice Act 2009, noted in Virginia Mantouvalou, “Modern Slavery: The UK Response”, *Industrial Law Journal* 39, no. 4 (2010), p. 67.
21. For analysis, see Einat Albin and Virginia Mantouvalou, “The ILO Convention on Domestic Workers: From the Shadows to the Light”, *Industrial Law Journal* 41, no. 1 (2012).
22. ILO Convention on Domestic Workers, article 3, para. 2(b).
23. European Parliament, resolution, “Regulating Domestic Work”, 30 November 2000.