

ANETA TYC

Migrant Domestic Workers in Europe: the Need for Better Protection*

Introduction

According to ILO, migrant domestic workers are estimated at approximately 11.5 million persons worldwide, and “women comprise the majority of domestic workers, accounting for 80 per cent of all workers in the sector globally.”¹ Moreover, gender is fundamental in relation to migration. European women are being replaced in their cleaning, caring and cooking tasks by immigrant women from Africa, Asia and Eastern Europe.²

Migrant domestic workers are vulnerable not only to different kinds of abuse, but also harassment and violence. Sexual, psychological and physical abuse, including food deprivation and confinement, are the most serious violations. The physical proximity of domestic workers to household members, and the intimacy and isolation of the workplace cause the risk to rise. Live-in domestic workers are in a worse situation, because they are present in the household all the time.³ The home is a place that typically escapes any control on the part of labour inspections and is not treated like a formal workplace.⁴

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1 ILO, *Social protection for domestic workers: Key policy trends and statistics*, paper no. 16, Geneva 2016, pp. IX–X.

2 A. Triandafyllidou, *Irregular Migration and Domestic Work in Europe: Who Cares?*, in *Irregular Migrant Domestic Workers in Europe: Who Cares?*, ed. A. Triandafyllidou, Farnham 2013, p. 6.

3 ILO, *Effective protection for domestic workers: a guide to designing labour laws*, Geneva 2012, pp. 3, 41.

4 A. Triandafyllidou, *op. cit.*, p. 2.

It is a place where women's unpaid work is invisible and not economically valued.⁵ Domestic work is extremely susceptible to illegal work, because state strategies to control compliance would require interference in private homes, and that is likely to meet with the resistance of citizens.⁶ For that reason, migrant domestic workers, whose legal status of residence is very often unregulated, are the most disadvantaged. Female migrant domestic workers, characterised by the lack of support, the lack of awareness of their rights and gender discrimination, may be even more vulnerable.⁷

Firstly, my intention in this article is to list the most important international legal instruments relating to the protection of migrants. This will make it easier to answer the question whether human labour rights are available to all migrants – both legal and illegal – and will provide a starting point for examining whether the international legal guarantees are not an illusion in the face of reality. Secondly, in this article I will look at the effectiveness of the human labour rights of the migrant domestic workers residing in Europe, taking as a starting point the typology presented by K. Drzewicki. As this author points out, international standards concerning labour as a matter of human rights are divided into four groups: rights relating to employment (e.g. the prohibition of slavery and forced labour); rights deriving from employment (e.g. the right to social security, the right to just and favourable conditions of work); rights concerning equal treatment and non-discrimination; and instrumental rights (e.g. the right to organise, the right to strike).⁸ Instrumental rights are beyond the scope of this study.

Legal basis

Within the United Nations' instruments, we should firstly mention the Universal Declaration of Human Rights, according to which: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Everyone also has the

5 J. Fudge, K. Strauss, *Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK*, in *Migrants at Work. Immigration and Vulnerability in Labour Law*, ed. C. Costello, M. Freedland, Oxford 2014, p. 164.

6 D. Vogel, *The challenge of irregular migration*, in *Routledge Handbook of Immigration and Refugee Studies*, ed. A. Triandafyllidou, London – New York 2016, p. 338.

7 ILO, *Effective...*, *op. cit.*, pp. 3, 41.

8 K. Drzewicki, *Pravo do pracy jako normatywny agregat międzynarodowej ochrony praw człowieka*, in *Wolność i sprawiedliwość w zatrudnieniu. Księga pamiątkowa poświęcona Prezydentowi Rzeczypospolitej Polskiej Profesorowi Lechowi Kaczyńskiemu*, ed. M. Seweryński, J. Stelina, Gdańsk 2012, pp. 75–77.

right to social security, the right to freedom of peaceful assembly and association, the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment. The Universal Declaration of Human Rights sets forth the principle of equality and equal protection against any discrimination. The document ensures these and other rights to “everyone,” without restrictions in the case of migrant status. However, the Universal Declaration of Human Rights is not legally binding. Similarly, the 1985 UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live has no binding force. Moreover, the document limits the application of labour and social rights to “aliens lawfully residing in the territory of a State.”⁹

The International Covenant on Economic, Social and Cultural Rights adopted in 1966 guarantees everyone the right to work, the right of everyone to the enjoyment of just and favourable conditions of work and the right of everyone to form trade unions and join the trade union of his or her choice. The International Covenant on Civil and Political Rights states that no one shall be required to perform forced or compulsory labour, and that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It also points out that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests.

In 1990, the UN document – The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families – was adopted, and since then “has become a cornerstone of the human rights–based approach to regulating labor immigration”¹⁰. The Convention entered into force on 1 June 2003 and encompasses the human rights of all migrants, those illegal and members of their families as well¹¹. The difference is visible between the third (Articles 8–35) and the fourth part (Articles 36–56) of the Convention. The third part refers to all migrant workers, and the fourth only to legal migrants and their families. In the light of Article 25, migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other working conditions. The Convention

9 M. Olivier, O. Dupper, A. Govindjee, *Enhancing the Protection of Transnational Migrant Workers: a Critical Evaluation of Regulatory Techniques*, in *The Transnational Dimension of Labour Relations. A New Order in the Making?*, ed. E. Ales, I. Senatori, Turin 2013, p. 294.

10 M. Ruhs, *The Price of Rights: Regulating International Labor Migration*, Oxford 2013, p. 1.

11 J.N. Fish, *Rights across borders: policies, protections and practices for migrant domestic workers in South Africa*, in *Exploited, Undervalued – and Essential: Domestic Workers and the Realisation of their Rights*, ed. D. du Toit, Pretoria 2013, p. 231; D. Estrada-Tanck, *Human Security and Universal Human Rights of Undocumented Migrants: Transnational Vulnerabilities and Regional Traditions*, in *Select Proceedings of the European Society of International Law*, ed. M.J. Aznar, M.E. Footer, Oxford – Portland – Oregon 2015, p. 190.

is overseen by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹²

A General Recommendation from the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) – General Recommendation No. 26 on Women Migrant Workers, and a General Comment from the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families – General Comment No. 1 on Migrant Domestic Workers, have attempted to address the problems of workplace exploitation, the exclusion from the protections of employment law, social security, and precarious migration status.¹³

Turning now to the ILO's instruments, we should mention the Migration for Employment Convention (Revised), 1949, no. 97, and the Migration for Employment Recommendation (Revised), 1949, no. 86, which concentrate on the standards applicable to the recruitment of migrants for employment and their conditions of work. Two further documents, the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers no. 143, 1975 and the Migrant Workers Recommendation no. 151, 1975, were an attempt to cope with undocumented migrants and traffickers. According to Convention No. 143, each member for which the Convention is in force undertakes to respect the basic human rights of all migrant workers, and reaffirms its commitments to respect the equality of opportunity and treatment. However, it should be highlighted that Convention no. 97 states that each member for which this Convention is in force undertakes to apply, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the matters specified therein. A similar limitation in the use of the effective equality of opportunity and treatment is introduced in Recommendation no. 151.¹⁴ Moreover, the ILO's Convention concerning decent work for domestic workers (Domestic Workers Convention, no. 189, 2011, entry into force: 5 September 2013), and Recommendation no. 201, 2011, ensure that domestic workers, particularly migrant domestic workers, live-in domestic workers and young domestic workers, should enjoy labour and social protection in the indicated domains.¹⁵ For example, according to Article 8(1) of the Convention no. 189, "National laws and regulations shall require that

12 L. Swepston, *The Development in International Law of Articles 23 and 24 of the Universal Declaration of Human Rights: The Labor Rights Articles*, Leiden – Boston 2014, p. 18; L. F. Vosko, *Out of the Shadows? The Non-Binding Multilateral Framework on Migration (2006) and Prospects for Using International Labour Regulation to Forge Global Labour Market Membership*, in *The Idea of Labour Law*, ed. G. Davidov, B. Langille, Oxford 2011, p. 374.

13 S. Mullally, *Migration, Gender, and the Limits of Rights*, in *Human Rights and Immigration*, ed. R. Rubio-Marín, Oxford 2014, p. 169.

14 M. Olivier, O. Dupper, A. Govindjee, *op. cit.*, pp. 300–302.

15 ILO, *Effective...*, *op. cit.*, p. 6.

migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to in Article 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies.”

In the framework of the Council of Europe system, the European Social Charter and its revised version, provide for the right of migrant workers and their families to protection and assistance. The document encompasses “foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.” The interpretation according to which migrants working, but residing unlawfully, are protected by the scope of the European Social Charter, cannot be excluded.¹⁶ Generally this protection does not cover migrants who are not nationals of the contracting parties. Refugees lawfully staying in the territory of the contracting parties, who should be given “treatment as favourable as possible,” are among the exceptions.

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provides that state parties have to secure for everyone within their jurisdiction the rights and freedoms defined in section I of the Convention. Theoretically, such a formulation includes illegal immigrants who can effectively enforce their rights before the European Court of Human Rights (e.g. *Siliadin v France*, App no 73316/01, ECHR 26 July 2005). It is nevertheless important to remember that there is no guarantee in the Convention which would protect the irregular immigrant from the consequences of irregularity.¹⁷ The Convention does not generally protect labour rights, but provides, *inter alia*, the prohibition of slavery and forced labour, freedom of thought, conscience and religion, freedom of assembly and association, including the right to form and to join trade unions, the right to an effective remedy and the right to equality. The prohibition of discrimination is regulated in Article 14, but it only secures the enjoyment of the rights and freedoms set forth in the Convention. However, Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 2000, entails further consequences. It introduces a general prohibition of discrimination. The practical significance of the autonomous nature of this Protocol is based on the full opening of the European Court of Human Rights forum for complaints of discrimination, e.g. on employment or issues related to social and living conditions. “It will be in the full sense the judicially conducted

16 V. Mantouvalou, *Organizing against Abuse and Exclusion: The Associational Rights of Undocumented Workers*, in *Migrants at Work...*, *op. cit.*, *passim*.

17 E. Dewhurst, *The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional, and National Legal Systems*, in *Migrants at Work...*, *op. cit.*, p. 226.

complaint procedure.”¹⁸ Protocol no. 12 has been signed so far by 19 countries and ratified by 19 more. Poland does not belong to either of these groups.

Within the system of the Council of Europe, we should also mention the European Convention on the Legal Status of Migrant Workers 1977, which entered into force on 1 May 1983, but has only been ratified by eleven states.¹⁹ The Convention sets forth, *inter alia*, that in the matter of conditions of work, migrant workers authorised to take up employment shall enjoy treatment not less favourable than that which applies to national workers. Equality of treatment should be also ensured in the matter of social security. Some rights are limited to migrant workers and the members of their families lawfully present in (or officially admitted to) the territory of a contracting party, e.g. social and medical assistance, general education, vocation training, retraining and access to higher education. Moreover, as stated by Cholewinski, the Convention constitutes a framework instrument, which does not regulate all the elements of the legal status of migrant workers, but refers instead to national legislation, and other multilateral and bilateral instruments. Besides, in spite of the Convention’s emphasis on migrant workers’ equal treatment with the nationals of contracting parties, a major part of its provisions are worded in terms of inter-state obligations rather than in terms of the rights of migrant workers.²⁰

Answering the question of whether all migrants are eligible for human labour rights, it should be stated that some differences in treatment are tolerable for illegal migrants.

Rights relating to employment

The existence of slavery in Europe, especially among migrant domestic workers has been reported in the literature. There is evidence (e.g. provided by recent high-profile UK court cases) of migrants being kept “like slaves” in their employers’ homes. This constitutes proof of the existence and “possible prevalence of forced labour experiences among migrants in the UK.”²¹ According to the report of the non-governmental organisation Kalayaan from London, which helps migrant domestic workers, in 2010, 60% of migrant domestic workers registered with Kalayaan were not allowed out unaccompanied, 65% had their passport withheld, 54% suffered from psychological abuse, 18% physical abuse/assault, 3% sexual abuse/harassment, 26% did not receive regular/sufficient food, 49% did

18 B. Gronowska, *Europejska Konwencja Praw Człowieka a prawa drugiej generacji – kilka refleksji o zacieraniu granic*, “Europejski Przegląd Sądowy” 2013, no. 9, p. 8.

19 V. Mantouvalou, *Organizing...*, *op. cit.*, p. 389.

20 R. Cholewinski, *The Legal Status of Migrants Admitted for Employment. Committee of Experts on the Legal Status and Rights of Immigrants: A Comparative Study of Law and Practice in Selected European States*, Strasburg 2004, p. 14.

21 H. Lewis, P. Dwyer, S. Hodkinson, L. Waite, *Hyper-precarious lives: Migrants, work and forced labour in the Global North*, “Progress in Human Geography” 2015, vol. 39, no. 5, p. 589.

not have their own room, 67% worked seven days a week with no time off, 48% worked at least 16 hours a day, 58% had to be available “on call” 24 hours, 56% received a salary of 50 GBP or less per week.²² Such abusive working conditions have been qualified as “modern slavery,” not only in the literature and the documents of governmental and non-governmental organisations, but also in case law.²³

In the literature, much attention has been paid to the sexual servitude of women. Other forms of forced labour, such as domestic service, should nevertheless be given equal attention. The ILO Forced Labour Convention no. 29, 1930 defines forced or compulsory labour 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.”²⁴ In the UN Trafficking Protocol, 2000, domestic work was also considered as one of the occupations that are vulnerable not only to domestic slavery and forced labour, but also to trafficking. As we know from the International Organisation for Migration (IOM) data, there are up to 800,000 people trafficked annually. According to an estimate made by the ILO in 2005, up to 12.3 million people were victims of forced labour. 20 per cent of them were also victims of trafficking (2.45 million people).²⁵ Migrant domestic workers, especially those in an irregular situation, are particularly vulnerable to such risks.²⁶

In 2001, the Council of Europe adopted Recommendation 1523 on “domestic slavery” and, in 2004, the Parliamentary Assembly in the Council of Europe adopted Recommendation 1663, “Domestic slavery: servitude, au pairs and mail-order brides.” Domestic work is perceived in these documents as forced labour and trafficking in human beings, and female migrants working in the houses of diplomats is seen “as the prototype of the enslaved migrant domestic worker.”²⁷ In fact, many studies deliver information about migrants who have been compelled, coerced and confined into exploitative work.²⁸ For example, according to the Centre for Equal Opportunities and the Fight against Racism on Human Trafficking’s report (2011), in Brussels the number of cases of economic exploitation of domestic “live-in” workers is rising. There are two principal profiles within

22 M. Lalani, *Ending the Abuse. Policies that work to protect migrant domestic workers*, Kalayaan. Justice for migrant domestic workers, London 2011, pp. 12, 35.

23 V. Mantouvalou, *Are Labour Rights Human Rights?*, “European Labour Law Journal” 2012, vol. 3, no. 2, p. 165.

24 L. Lean Lim, K. Landuyt, M. Ebisui, M. Kawar, S. Ameratunga, *An Information Guide: Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers*, Geneva 2003, p. 10.

25 A. Ricard-Guay, *Trafficking in human beings. 15 years after the Palermo Protocol*, in *Routledge Handbook...*, *op. cit.*, p. 354.

26 S. Mullally, *op. cit.*, p. 168.

27 M. Kontos, G. Tibe Bonifacio, *Introduction: Domestic and Care Work of Migrant Women and the Right to Family Life*, in *Migrant Domestic Workers and Family Life: International Perspectives*, ed. M. Kontos, G. Tibe Bonifacio, London 2015, pp. 1–2.

28 H. Lewis, P. Dwyer, S. Hodgkinson, L. Waite, *op. cit.*, p. 589.

the victims: namely, females working as domestic workers for a diplomat, and females working in a private home, often looking after the children.²⁹

The above-mentioned landmark case of *Siliadin v. France* sparked hopes for an improvement to the situation of migrant domestic workers. The case involved a migrant domestic worker from Togo who was forced to endure horrific living conditions in France. Taking into consideration Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Court described the situation as “servitude, forced and compulsory labour.” However, the Court did not qualify the situation as “slavery” because the employers did not exercise the right of legal ownership over the victim. With respect to France, the Court ruled that the lack of legislation criminalising such extremely difficult working conditions constitutes a breach of Article 4.³⁰

Rights deriving from employment

A lack of effectiveness of the rights deriving from employment, in the case of migrant workers, has been very well documented in the literature. For this group of people, the term “precarity” has been used. It has been described as a phenomenon related to workers “hirable on demand, available on call, exploitable at will, and frable at whim.”³¹ However, the situation of many migrant workers (especially domestic migrant workers) could be described by the term “hyper-precarity,” which “refers to the multidimensional insecurities in migrants’ work relations and other aspects of their migration journey or project. Migrants’ precarious statuses can restrict and impede their access to, in law and in practice, a range of employment and social protections in the host state that citizens and permanent residents generally enjoy.”³² Hyper-precarious undocumented immigrants are in a situation of extreme deprivation of any rights, and of the greatest exploitation.³³ For instance, in France illegal migrant domestic workers who work undeclared are in principle not covered by the usual employment-related social security, e.g.

29 M. Godin, *Domestic Work in Belgium: Crossing Boundaries between Informality and Formality*, in *Irregular...*, *op. cit.*, p. 34.

30 B. Ryan, V. Mantouvalou, *The Labour and Social Rights of Migrants in International Law*, in *Human Rights and Immigration*, *op. cit.*, p. 206.

31 A. Foti, *Mayday Mayday: Euro flex workers time to get a move on*, 2005, <http://eipcp.net/transversal/0704/foti/en> [access: 28.01.2017].

32 M. Zou, *Hyper-Dependence and Hyper-Precarity in Migrant Work Relations*, in *Labour And Social Rights. An Evolving Scenario. Proceedings of the Twelfth International Conference in Commemoration of Marco Biagi*, ed. T. Addabbo, W. Bromwich, T.M. Fabbri, I. Senatori, Turin 2015, p. 256.

33 B. Likić-Brborić, C.-U. Schierup, *Labour Rights as Human Rights? Trajectories in the Global Governance of Migration*, in *Migration, Precarity and Global Governance: Challenges and Opportunities for Labour*, ed. C.-U. Schierup, R. Munck, B. Likić-Brborić, A. Neergaard, Oxford 2015, p. 231.

paid sick leave, maternity leave, unemployment benefits or pensions for occupational disabilities or retirement. Since 1999, a specific scheme for irregular migrants entitled the “State Medical Aid” has existed for health care coverage. However, it provides access only to basic health care treatment and services for irregular migrants who have stayed for at least three months in France and have few resources.³⁴

Entering the foreign labour market, migrant workers accept “by definition” to undertake “3D” jobs: “dirty,” “dangerous” and “demeaning” (or “degrading”). These are jobs that native workers are no longer interested in.³⁵

In the literature, migrant domestic work has been described by the term “decent work deficit”. It implies not only low wages and unpredictable working hours, but also limited access to social security, and an ambiguous employment status.³⁶ Moreover, there are many situations in which an agreement made verbally between parties is changed by the employer during the fulfilment of work. Employers increase employees’ tasks without simultaneously increasing their remuneration. They usually do this “naturally” “as live-in domestic workers develop pseudo-family relations with their clients.”³⁷

The acceptance of abusive working conditions and the renunciation from claiming entitlements by migrant domestic workers are symptomatic of their situation. It is caused by the necessity to keep their job, maintain their income of subsistence, and to keep sending remittances to their children and families.³⁸ Besides, by losing her job, a live-in migrant domestic worker at the same time loses her home.³⁹

The negative influence of abusive working and living conditions on migrant workers’ health is another important determinant that affects their situation. Chronic illness or work incapacity may occur when working for longer time-frames under appalling working conditions and psychological pressure.⁴⁰ Women migrant workers are exposed to many specific health risks, e.g. physical, they are prone to sexual and verbal abuse. The ILO reported that Indonesian or Filipino women domestic migrant workers are particularly vulnerable to gender predicated violence and to HIV that is a constant threat throughout the employment period.⁴¹ Another important issue is the obligation to work

34 K. Sohler, F. Lévy, *Migration Careers and Professional Trajectories of Irregular Domestic Workers in France*, in *Irregular...*, *op. cit.*, p. 60.

35 M. Maroufof, “*With All the Cares in the World*”: *Irregular Migrant Domestic Workers in Greece*, in *Irregular...*, *op. cit.*, p. 96; F.A. Latif Alnasir, *Health of Migrant Workers; A Matter Of Concern*, “Middle East Journal of Family Medicine” 2015, vol. 13, no. 2, p. 43; L. Lean Lim, K. Landuyt, M. Ebisui, M. Kawar, S. Ameratunga, *op. cit.*, p. 25.

36 S. Mullally, *op. cit.*, p. 168.

37 M. Maroufof, *op. cit.*, pp. 101–102.

38 K. Sohler, F. Lévy, *op. cit.*, p. 54.

39 M. Maroufof, *op. cit.*, p. 104.

40 K. Sohler, F. Lévy, *op. cit.*, p. 61.

41 F.A. Latif Alnasir, *op. cit.*, pp. 43–44. See the cited literature.

when they are ill,⁴² and psychological stress that causes depression, for example.⁴³ As pointed out by Bonizzoni, many live-in workers reported that they were not fed enough by their employers; some of them were always controlled in regards to what and how much they ate.⁴⁴

Rights concerning equal treatment and non-discrimination

Female migrant domestic workers very often suffer discrimination and exploitation.⁴⁵ According to J. Wrench,⁴⁶ there are four main variants of discrimination against immigrants that are important from the perspective of the field of employment: racist, statistical, societal and structural discrimination.

Racist discrimination is direct and intentional. It takes place when the hallmarks of racial or ethnic identity are used as grounds for differentiation, and no other justification exists. Racist discrimination includes actions by racist or prejudiced people who hold and act on negative stereotypes about people, e.g. denying them jobs. Moreover, this type of discrimination covers not only verbal, psychological and physical abuse, but also harassment at the workplace.

Statistical discrimination includes actions based on perceptions of a minority group as having certain features that will generate negative consequences for the employer. This type of discrimination does not cover actions based on personal racism or prejudices.

Societal discrimination means that people who may not be motivated by prejudice or ethnic hostility themselves take into consideration other people's negative approaches to members of a social group. For instance, if employment agency employees know that an employer is reluctant to employ immigrants, they can refrain from sending immigrants for a job interview.

Structural discrimination, which is also called systemic discrimination, "concerns group-based patterns of disadvantage and inequality that are not the consequences of a particular individual's bias against the group or a wilful act of social exclusion, but are the result of more subtle, structural and institutional forces." The disadvantage appears

42 H. Lewis, P. Dwyer, S. Hodgkinson, L. Waite, *op. cit.*, p. 589.

43 P. Bonizzoni, *Undocumented Domestic Workers in Italy: Surviving and Regularizing Strategies*, in *Irregular...*, *op. cit.*, p. 153.

44 *Ibidem*, p. 151.

45 N. Cyrus, *Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers*, in *Migration and Domestic Work: A European Perspective on a Global Theme*, ed. H. Lutz, London – New York 2008, p. 177.

46 J. Wrench, *Discrimination against immigrants in the labour market. An overview and a typology*, in *Routledge Handbook...*, *op. cit.*, pp. 121–123; idem, *Diversity Management and Discrimination: Immigrants and Ethnic Minorities in the EU*, London – New York 2016, pp. 116–119. V. the cited literature.

here because the existing system of opportunities and constraints favours the success of one group and disadvantages another group, through the operation of policies and practices contributing to such a situation.

Legal discrimination is a sub-type of structural discrimination. It is connected with the restrictions in some countries that impede the access of migrant workers e.g. to major sections of labour market opportunities.

For example, in the UK the majority of migrant worker visa programmes limit the possibilities to decide on how workers should be employed, where they can live (it is often the employer's household), if and how they can obtain permanent residence or citizenship, and if they can be joined by their families. Sometimes they have their passports confiscated on arrival. Moreover, many programmes establish conditions concerning the termination of the employment of domestic migrant workers which differ from those created for other types of workers and which result in deportation, e.g. if they leave their employer, or if they become pregnant.⁴⁷ In fact, if a migrant domestic worker gets pregnant or has to support underage children it is common for her to lose her job. As we can see, it is gender that plays a crucial role in the course of the life of migrant domestic workers.⁴⁸

It is worth looking at other examples in order to highlight how the state disadvantages one group and favours others. In Spain, legally resident domestic workers start to receive sick pay only after 29 days of illness. In comparison, other workers receive sick pay on the fourth day of illness.⁴⁹ Moreover, if irregular immigrants seek legal redress in this country, they have to reckon with the fact that they can be deported.⁵⁰ In Ireland, the discrimination experienced by women working without documentation in an unregulated area of work is intensified by immigration policies which limit the organising opportunities among workers.⁵¹ In the UK, au pairs (often female migrants) are excluded from benefiting from the national minimum wage. In Eastern Europe, 45% of domestic employees are not protected under labour laws. Discrimination risk differs significantly depending on such contextual variables. "The risks for a highly skilled male migrant executive are unlikely to be the same as a low skilled female migrant au pair. Female migrants are therefore sometimes at risk of double or triple discrimination (age, gender and/or ethnicity)."⁵²

47 J. Fudge, K. Strauss, *op. cit.*, pp. 163–164.

48 A. Triandafyllidou, T. Maroukis, *Irregular Migrant Domestic Workers in Europe: Major Socioeconomic Challenges*, in *Irregular...*, *op. cit.*, p. 220.

49 *Ibidem*, p. 215.

50 *Ibidem*, p. 213.

51 S. Daly, *The Home as a Site of Work*, in *Irregular...*, *op. cit.*, p. 132.

52 J. Mallender, M. Gutheil, A. Heetman, D. Griffiths, M. Carlberg, R. Marangozov, *Discrimination of migrant workers at the workplace*, European Parliament, May 2014, p. 43.

With regard to remuneration, migrant women working as domestic and care workers earn, as a rule, less than the native care workers.⁵³ For example, according to 2004 estimates, in Western Europe the wages of migrant domestic workers were 24% lower than those of national domestic workers.⁵⁴ Besides, salary levels are differentiated according to the nationality of the worker. Longer established ethnic niches of care workers, e.g. Filipinos, earn more than the more recently arrived Ukrainians, Albanians or Russians. An evident connection between the stereotypes connected with the workers' ethnicity and their wages is also observable. For instance, comparing domestic workers from Albania and the Philippines during the 1990s, it was concluded that the inequality of their earnings resulted from the stereotypes attached to them: "the good Catholic girls," i.e. Filipinos, earned more than "the enemy at the doorstep", i.e. Albanians.⁵⁵ As regards race discrimination, e.g. in the Netherlands, there is a stronger demand for domestic workers from the Philippines (who get paid better) than for those from Ghana (who get paid worse). As has been mentioned above, it is also gender which keeps determining a migrant domestic worker's position on the Dutch market. Employers in the Netherlands generally see domestic work as women's work and tend to prefer women.⁵⁶

Conclusions

International instruments provide broad protection of the human labour rights of migrants. However, reflecting on their effectiveness, we come to the conclusion that some of them only exist in writing. Selected rights from the first three groups, according to the K. Drzewicki's typology, have been presented in this article. It turns out that the tools introducing safeguards for the protection of the rights relating to employment, rights deriving from employment and rights concerning equal treatment and non-discrimination lack effectiveness.

In the face of such an unfavorable balance, action should be taken to encourage countries to take responsibility for modern slavery, hyper-precarity and discrimination. In particular, we should look at their approach to the ratification of international instruments. For example, the lack of ratification or even signing (by any of the EU countries) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, certainly does not provide the answer to the challenges of migration processes. In addition, the demands contained in the ILO's Fair Migration Agenda should be considered, e.g. with regard to increasing the effectiveness of laws on

53 H. Lutz, E. Palenga-Möllnbeck, *Global care chains*, in *Routledge Handbook...*, *op. cit.*, p. 141.

54 ILO, *Social...*, *op. cit.*, p. 16. V. the cited literature.

55 M. Maroufof, *op. cit.*, p. 104. V. the cited literature.

56 S. van Walsum, *Regulating Migrant Domestic Work in the Netherlands: Opportunities and Pitfalls*, in *Irregular...*, *op. cit.*, pp. 170–171.

equal treatment and non-discrimination.⁵⁷ It should also be emphasised that host countries should improve the domestic law and migration policies, ensuring decent working conditions and freedom from exploitation. Particular attention should be paid to helping migrants employed in households.

As highlighted by the ILO, the law should be drafted in an accessible way and should be accompanied by instruments and strategies for its communication and dissemination. Workers will benefit equally from such measures, as in many cases they will be unfamiliar with applicable laws and protective provisions. The tools and methodologies available to ensure compliance with the applicable law should be adapted to the specific circumstances of domestic work. The protection of victims, prevention of transgression, accessible assistance, and complaints procedures are important from the point of view of all domestic workers, especially live-in migrant domestic workers.⁵⁸ Legal protective provisions should perform the following tasks: define what constitutes abuse, harassment and violence; prohibit such transgressions; establish dissuasive sanctions; assign responsibility for prevention and protection; provide for preventative measures, and assign responsibility for monitoring and enforcement.⁵⁹

The situation of migrant domestic workers could be also improved by implementing programs analogous to the Irish pilot scheme of labour inspections of private homes.⁶⁰ The aim should be to establish monitoring and inspection systems to cover unregulated work in the informal economy, especially domestic work.⁶¹ Additionally, the requirement of a written contract for domestic workers may constitute an important step in transferring domestic work from the informal economy to the formal one.⁶² It is also important to reduce the number of illegal migrants, as most people from this group are exposed to violations of their rights.

As regards equal treatment and discrimination, further steps should also be taken. Countries should apply the principle of equal treatment, according to which migrant domestic workers are afforded the same labour rights as native workers, e.g. the right to social security. The ILO's study found that 86% of countries providing legal coverage for national domestic workers also do so for migrant domestic workers. However, challenges remain in terms of the vertical dimension of coverage with regard to the number of social security branches included in the coverage of migrant workers.⁶³

57 ILO, *Fair migration: Setting an ILO agenda. Report of the ILO Director General to the International Labour Conference*, Geneva 2014, p. 7.

58 ILO, *Effective...*, *op. cit.*, p. 4.

59 *Ibidem*, p. 42.

60 C. Murphy, *The Enduring Vulnerability of Migrant Domestic Workers in Europe*. "International & Comparative Law Quarterly" 2013, vol. 62, no. 3, pp. 611–613; S. Daly, *op. cit.*, pp. 119–120.

61 L. Lean Lim, K. Landuyt, M. Ebisui, M. Kawar, S. Ameratunga, *op. cit.*, p. 44.

62 ILO, *Effective...*, *op. cit.*, p. 16.

63 ILO, *Social...*, *op. cit.*, p. 38.

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SUMMARY

**Migrant Domestic Workers in Europe:
the Need for a Better Protection**

Migrant domestic workers are estimated at approximately 11.5 million persons worldwide. European women are being replaced in their household chores by immigrant women, e.g. from Africa, Asia and Eastern Europe. The paper focuses on human labour rights of domestic migrant workers, especially from the point of view of the typology which divides international standards concerning labour as a matter of human rights into four groups: rights relating to employment (eg. the prohibition of slavery and forced labour); rights deriving from employment (eg. the right to social security, the right to just and favourable conditions of work); rights concerning equal treatment and non-discrimination, and instrumental rights (eg. the right to organise, the right to strike). The aim of this paper is to reveal insufficient effectiveness of human labour rights according to the above-mentioned typology. Thus, the author will concentrate on the issues of modern slavery, hyper-precarity and discrimination.

Keywords: migrant domestic workers, modern slavery, hyper-precarity, discrimination

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