



## **MIGRANTS, UNFREE LABOUR, AND THE LEGAL CONSTRUCTION OF DOMESTIC SERVITUDE: MIGRANT DOMESTIC WORKERS IN THE UK**

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## **Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK**

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We recognise that the [Overseas Domestic Workers] ODW routes can at times result in the import of abusive employer/employee relationships to the UK. It is important that those who use these routes to bring their staff here understand what is and is not acceptable. So we will be strengthening pre-entry measures to ensure that domestic workers and their employers understand their respective rights and responsibilities. Key to this will be written terms and conditions of employment that are agreed by both employee and employer. But the biggest protection for these workers will be delivered by limiting access to the UK through these routes. We are restoring them to their original purpose—to allow visitors and diplomats to be accompanied by their domestic staff—not to provide permanent access to the UK for unskilled workers.<sup>1</sup>

### **I. INTRODUCTION**

In 2009 the United Kingdom (UK) government passed a 'slavery law' that created, for the first time, an offence of holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour.<sup>2</sup> Hailed as a victory by campaigning non-governmental organisations (NGOs) including Anti-Slavery International and Liberty, the arguments in favour of a criminal offence were illustrated by stories like one about Zari, a domestic worker exploited in the UK by her 'foreign' employers.<sup>3</sup> Brought to Britain by her employers, she had her passport confiscated, was forced to work very long hours for little pay, given no breaks or time off, confined to the house, and physically and sexually assaulted.

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<sup>1</sup> Theresa May, HC Deb 29 Feb 2012 col 35WS

<sup>2</sup> Coroners and Justice Act, s. 71.

<sup>3</sup>Anti-Slavery International, 'Forced Labour in the UK: UK Government Backs New Slavery

Law' <[http://www.antislavery.org/english/campaigns/previous\\_actions/forced\\_labour\\_in\\_the\\_uk\\_2.aspx](http://www.antislavery.org/english/campaigns/previous_actions/forced_labour_in_the_uk_2.aspx)> accessed 28 April 2013.

Zari's story is one that has become increasingly familiar in the media coverage of 'modern slavery'.<sup>4</sup>

Zari came to the UK as a temporary migrant in the category of 'domestic workers in private households' (ODW visa scheme), a status that facilitates the entry of non-EU citizens to work in UK households. This category relates to a temporary domestic worker program that has unique characteristics when compared with other programs like the Live-In Caregiver program in Canada.<sup>5</sup> A migrant domestic worker may *only* enter the UK with a non-British employer who has been granted the right to reside in the UK through a separate category, or with a returning UK expatriate. In other words, the program is intended to make the UK attractive to wealthy transnational migrants (including diplomats, staff of foreign firms, and high net-worth individuals) by offering them scope to relocate not only themselves but also their households, which may include their paid domestic staff.

It is precisely the exploitation suffered by Zari that has made this category of precarious migrant status an object of concern. Kalayaan, an NGO that has long campaigned on behalf of (and provided services to) migrant domestic workers, states: 'The isolated, dependant and unregulated nature of working in private household, combined with gender-based and racial discrimination means that domestic workers are vulnerable to exploitative practices'.<sup>6</sup> The nature of the conditions of work is such that migrant domestic workers are not just vulnerable to *exploitative practices* but to *super-exploitation*, which is what has been characterised as modern slavery and/or servitude. The hard fought for ability to

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<sup>4</sup> Newspapers including *The Independent* and *the Guardian* have provided sustained reporting on stories of domestic servitude and trafficking since at least 2009, as well as highlighting the issues and related work of NGOs in online blogs. See for example <http://blogs.independent.co.uk/2012/04/10/slavery-is-far-from-over/> accessed 28 April 2013 and the Guardian Modern-day slavery hub <<http://www.guardian.co.uk/global-development-professionals-network/2013/apr/03/modern-day-slavery-project-global-development>> accessed 28 April 2013.

<sup>5</sup> Geraldine Pratt, *Working Feminism* (Temple University Press 2004); Daiva Stasiulis and Abigail Bakan, *Negotiating Citizenship: Migrant Women in Canada and the Global System* (University of Toronto Press 2005); Judy Fudge, 'Global Care Chains, Employment Agencies and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada' (2011) 12 *Canadian Journal of Women and The Law* 235.

<sup>6</sup> Kalayaan, Justice for Migrant Domestic Workers <<http://www.kalayaan.org.uk/>> accessed 28 April 2013

change employers, until recently a feature of this category of migration status, is seen by Kalayaan as an essential counterweight to this risk.

The removal of the right to change employers, one of a number of recent changes to the migrant domestic worker visa, has therefore been framed by Kalayaan as a 'return to slavery for migrant workers'.<sup>7</sup> Yet, as we illustrate below, the changes to the immigration controls for migrant domestic workers have been legally and discursively shaped by the broader criminalisation of slavery, trafficking, forced labour, and servitude in ways that allowed the UK Coalition Government's Home Secretary Theresa May (quoted in the opening passage) to justify them with two interrelated claims. On one hand, the government claims that trafficking legislation provides sufficiently robust protections for migrant domestic workers against super-exploitation such that labour rights (like the right to change employers) are unnecessary. On the other hand, and in keeping with the broader aim of drastically reducing non-EU net migration, May's comments illustrate the government's position that stemming the flow of migrant domestic workers into the UK best prevents abuse.

How, we ask in this chapter, did the political discourses of slavery, trafficking, and forced labour become the justification for stripping the migrant domestic worker visa of its key protective rights *and* the route to citizenship? We argue that analysing the political discourses of modern slavery, forced labour, and trafficking alongside the processes of legal characterisation that have accompanied them shows that the legal process has produced overlapping jurisdictions – criminal, immigration, human rights, and labour law – with differing associated techniques of governance. This process of legal characterisation does not only have 'vertical' effects relating to levels or scales of jurisdiction; it also has 'horizontal' effects that relate to the ways in which different jurisdictions – criminal law and human rights law in the case of trafficking for example - have elective affinities. We describe these effects in relation to forces that attract or repel; the regulatory approaches associated with trafficking discourse, for example, tend to repel and marginalise other forms of regulation designed to promote labour rights and managed migration.

The paper is in four parts. Section two explores the unfree nature of migrant domestic work, focusing on three dimensions: its political economy, its interrelation with the gender division of labour and the status of the household, and the importance of understanding its particular modalities over time and in place. The third section examines the legal construction of domestic servitude. We conclude by outlining the implications of our analysis of the importance of legal characterization for debates over the best methods of preventing the super-exploitation of migrant domestic workers.

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<sup>7</sup> *ibid*

## II. MIGRANT DOMESTIC WORKERS AND UNFREE LABOUR

Nandita Sharma has pointed out, in relation to the Canadian state, how in the latest period of capitalist globalization (which is often defined in relation to the loss of national state sovereignty) it is the *foreignness* of both certain forms of capital and certain workers that becomes framed as the key problem of neoliberalism.<sup>8</sup> 'Within this framework, not only is the relationship between national states and capitalists obfuscated but the fortification of national state boundaries come to be seen as necessary for the protection of "society" ...[with] profound effects in relation to the organization of national labour markets'.<sup>9</sup> National labour markets are socially constructed in and through the relations between capital, labour, and the state, which crystallise into durable institutional structures that are simultaneously sites of struggle.<sup>10</sup> In capitalist societies these institutions are also sites in which the capacity to rule is organised and technologies of governance legitimised. Sharma states that this process occurs in such a way that power is abstracted and categories come to stand for the people whose lives are ordered by them; the citizen-Self and the foreign-Other are constructed in legal-judicial space as well as the ideological space of the nation state in ways that are vital to the ability of 'rulers to rule'.<sup>11</sup>

One of Sharma's key insights is that these processes do not, as orthodox and Marxist political economists have claimed, solely function through the process of commodification that produces the 'free' wage labourers who are the engines of the production of value. Sharma points to the ways in which particular national economies are constituted in and through the simultaneous inclusion of foreign migrant workers in labour markets, and their exclusion from the nation as citizens. In this way her work extends, through its engagements with race and gender, scholarship of the last several decades that has sought to highlight the centrality of unfree labour to contemporary capitalism and conceptualise freedom/unfreedom as a spectrum rather than a binary.<sup>12</sup>

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<sup>8</sup> Nandita Sharma, *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada* (University of Toronto Press 2006).

<sup>9</sup> *ibid* 5.

<sup>10</sup> Jamie Peck, *Work-place: The Social Regulation of Labor Markets* (Guilford Press 1996).

<sup>11</sup> Sharma (n 8) 54-55.

<sup>12</sup> Klara Shrivankova, 'Between decent work and forced labour: examining the continuum of exploitation' *JRF programme paper* (Joseph Rowntree Foundation, 2010); Genevieve LeBaron, 'Unfree Labor Beyond Binaries: Insecurity, Social Hierarchy, and Labor Market Restructuring' (in press) *International Journal of*

Unfree labour, then, describes when a worker is unable to enter the labour market (of the receiving country) through a process of 'free' contract, but her labour power is nevertheless commodified. This process does not preclude the payment of a wage; many forms of unfree labour are in fact done in exchange for some form of payment. Slavery in all its forms, bonded labour, and other forms of forced labour are subsets of unfree labour that involve coercion of various kinds at, or prior to, the initiation of the work relation. This moment of initiation is part of a spectrum of unfreedom that not only encompasses a range of forms and relations of commodification and exploitation, but a variety of individual work relations that are not static across time or in place.

Migrant domestic workers are a special group within the broad typology of unfreedom.<sup>13</sup> In relation to initiation, they are *a priori* unfree in the sense that unfreedom is endogenous to the migrant domestic worker status in most cases. Migrant domestic workers are rendered unfree at the moment of contract by virtue of the restrictive conditions imposed by their precarious migrant status, which constructed by the state. The state thus creates the conditions under which such unfreedom becomes super-exploitation by employers.

For example, most migrant worker visa programs encompass restrictions on how a worker is employed, where she may reside (often within the employer's home), if and by what means she may obtain citizenship, and under what conditions (if any) she can be joined by dependents. In some cases her passport is confiscated on arrival.<sup>14</sup> Many programs also set out conditions of termination of the contract of employment that are different for domestic migrant workers than for other types of workers and which result in her deportation: if she leaves her employer, for instance, or if she becomes pregnant.

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Feminist Politics xx; Kendra Strauss, 'Unfree Labour and the Regulation of Temporary Agency Work in the UK' in Judy Fudge and Kendra Strauss (eds) *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, in press) xx;

<sup>13</sup>Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press, 2013); Abigail B. Bakan and Daiva Stasiulis, 'The Political Economy of Migrant Live-in Caregivers: A Case of Unfree Labour', in Patti Tamara Lenard and Christine Straehle (eds) *Legislated Inequality: Temporary Labour Migration in Canada* (McGill-Queens University Press, 2012); Judy Fudge and Daniel Parrott, 'Placing Filipino Caregivers in Canadian Homes: Regulating Transnational Employment Agencies in British Columbia' in Judy Fudge and Kendra Strauss (eds) *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, in press) xx.

<sup>14</sup> The ILO defines the confiscation and withholding of travel documents as an indicator of forced labour.

As Abigail Bakan and Daiva Stasiulis highlight, the reasons for the particular constitution of the unfreedom of this group of migrant workers relate, at least in part, to the political economy of waged domestic labour in a globalised market.<sup>15</sup> The increase in women's labour force participation, falling fertility rates, increasing life expectancy, changes in family structure, shortage of public care, and the increasing marketisation of care in the North creates a demand for migrant domestic workers. On the supply side, economic trends such as growing inequalities between high- and low-income countries, and insecurity, vulnerability, and instability due to economic crises combine with gender-related factors such as abuse, family conflict, and discrimination to increase the numbers of women who migrate in order to obtain paid work.<sup>16</sup> Remittances are crucial for the survival of household, community, and country in a number of developing countries as exporting workers is one means by which governments cope with unemployment and foreign debt.<sup>17</sup> Through the intersection of categories of social difference such as race, class, gender, citizenship, and sexuality precarious migrant status is assigned to foreign domestic workers in ways that structure their unfreedom and privilege the social reproduction of some groups over others.<sup>18</sup> These relations do not, however, mark a migrant domestic worker as a slave, nor do they cement unfreedom as an attribute or identity of the *worker* (it is not her ontological state). Rather it is an attribute of the work relation and of related multi-level structures that arise from, and shape, the operation of social and economic power, the institutionalisation of labour markets, and thus the desire and ability of *employers* to exploit workers and appropriate surplus across the labour market.

The second dimension of the unfreedom of domestic migrant workers is *where* they work and live: in the household. The household is understood in 'advanced' capitalist economies as a separate domain from workplace, as the private sphere. A defining characteristic of this work is that it takes place within the home, the private domain of the family, where women's unpaid work is invisible and not economically valued. The boundaries between home/market and public/private are deeply inscribed in contemporary legal doctrines, discourses, and institutions.<sup>19</sup> For migrant domestic workers their employers'

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<sup>15</sup> Bakan and Stasiulis (n 13) 215-216

<sup>16</sup> Lourdes Benéria, 'The Crisis of Care, International Migration, and Public Policy', (2008) 14 *Feminist Economics* 1.

<sup>17</sup> Sasia Sassen, 'Global Cities and Survival Circuits', in Barbara Ehrenreich and Arlie Russell Hochschild (eds), *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (Henry Holt 2002) 39.

<sup>18</sup> Bakan and Stasiulis (n 13)

<sup>19</sup> Fudge (n 5).

Comentari [JU1]: I don't buy this argument

household *is* their workplace, and it is also usually their home – both the UK and Canadian programs require that workers live-in (which is unique to this group; domestic workers from within the EU at least nominally have the choice to live out). This requirement provides an extraordinary set of constraints even where to the legal right to change employers exists, as well as limiting employment-related legal protections since many are not extended to the private domain or, if they apply, difficult to enforce.<sup>20</sup>

Comentari [JU2]: This statement is problematic

The final, important aspect of the unfreedom of migrant domestic workers is that it is temporally and spatially varied and specific. In the UK domestic labour has historical roots in the concept of menial service and fell somewhere between contractual freedom and paternalism.<sup>21</sup> Contemporary discourses of servitude and slavery have roots in both this tradition and in abolitionist movements that sought to outlaw the *trade* in African slaves whilst simultaneously embedding relations of unfree labour that were of a different type and order than chattel slavery. Bakan and Stasiulis use of *modalities* is useful in this context. It signifies structural and systemic processes that operate at multiple scales and thus produce different time-and-place specific relations and institutions.<sup>22</sup> The fact that the UK domestic migrant worker visa only allows non-UK migrants to bring household staff with them for a limited period relates to the pool of available EU and accession country labour; the contemporary modality of unfree domestic migrant labour in the UK is therefore different than in, for example, Canada.

Migrants are thus highly vulnerable to super-exploitation in ways that are directly related to the context-specific social and political construction of the category of migrant worker. Here unfreedom is legally constructed by the state in combination with the legal and economic power of capital. Yet it is also critical to understand the ways in which the state both constructs unfreedom for some workers *and* in some cases seeks to ameliorate it. In this sense the state is liable to capture by, but not reducible to, factions of capital and normative characterization is a legal process with social and cultural, as well as economic, dimensions.

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<sup>20</sup> Deirdre McCann, 'New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms, (2013) 34 Comparative Labor Law and Policy Journal 167; Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2013) 34 Comparative Labor Law and Policy Journal 133.

<sup>21</sup> Einat Albin, 'From "Domestic Servant" to "Domestic Workers"' in Judy Fudge, Shae McCrystal and Kamala Sankaran (ed), *Challenging the Legal Boundaries of Work Regulation* (Hart 2012) 213.

<sup>22</sup> Bakan and Stasiulis (n 13).

### III. THE LEGAL CONSTRUCTION OF DOMESTIC SERVITUDE

#### 1. Modern Slavery

Beginning in the mid-1990s, advocacy groups in the UK invoked 'domestic servitude' and 'modern slavery' to bring attention to the exploitative conditions of migrant domestic workers from countries outside the European Union who entered the UK with business people, diplomats, tourists, and UK returning residents who employed them. These workers did not have an independent route of entry in order to fill labour market shortages in the UK. Nor were they assessed in order to determine their contribution to the UK; their entry was completely dependent upon that of their employer. Under the UK immigration regime, these workers suffered a double form of unfreedom: in order to maintain their status as lawful migrants they not only had to work for the employer who sponsored them, they were required to reside in the homes of their employers, which was also their place of work.<sup>23</sup>

The modern slavery slogan embedded the campaign to end migrant domestic workers' unfreedom in broader social and legal scripts, which simultaneously advanced and limited the campaign to obtain a more secure migrant status and better labour standards for migrant domestic workers. Bridget Anderson explains how gendered and racialised stereotypes of victims – the poor women from the Third World – permeated the anti-slavery discourse, as did the tropes of 'evil foreigners importing slavery' and a heroic state upholding 'British values of freedom and democracy'.<sup>24</sup> Although advocates invoked slavery to emphasize these migrants' exploitation as workers, it became difficult, if not impossible, for them to escape the frame of abuse.<sup>25</sup> By invoking slavery, advocates sought to engage a powerful legal obligation; in international treaty and customary law, slavery is both *erga omnes* and part of *jus cogens*; however, its scope is quite narrow.<sup>26</sup> Thus, human and labour rights advocates

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<sup>23</sup> Bridget Anderson, *Doing the Dirty Work* (Pluto 2000) ch 6 for the history of the campaign in the UK to obtain a visa program for domestic workers. Au pairs, who are young people, predominantly women, from specified European states, have were to be subject to a different migration regime, that we are not discussing in this paper. See Bridget Anderson, (n 13) 168-72.

<sup>24</sup> Bridget Anderson, 'Mobilizing Migrants, Making citizens: Migrant Domestic Workers as Political Agents' (2010) 33 *Ethnic and Racial Studies* 60.

<sup>25</sup> Anderson, (n 13) 173.

<sup>26</sup> Anne T. Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 50 *Virginia Journal of International Law* 789, 798.

endeavoured to stretch the legal meaning of slavery to include forms of work-related exploitation endured by migrant domestic workers. They also sought to use international and European human rights instruments to chisel away at the immigration controls that made migrant workers vulnerable to exploitation.

The characterization of migrant domestic workers' unfreedom as a form of modern slavery elicited a 'humanitarian' response from the newly elected Labour government, which granted migrant domestic workers from third countries the right to change employers if they suffered abuse at the hands of their sponsoring employer, allowed family members to accompany them, and provided them with a route to settlement. In 2002, this scheme was formally incorporated into the Immigration Rules as the Overseas Domestic Workers Visa Scheme (ODW). Despite these changes, migrant domestic workers were still vulnerable to exploitation; only domestic workers who had been employed for a year or more in the house of their employer or a connected household were eligible to apply for a visa, they were required to work as domestic workers, and they were not entitled to recourse to public funds while in the UK.<sup>27</sup> Moreover, under UK employment laws, domestic workers were (and continue to be) excluded from a number of labour standards, including maximum weekly working time, restrictions on the duration of night work, occupational health and safety legislation, and, if they reside in their employer's home and are 'treated as a member of the family', the minimum wage.<sup>28</sup> If they are not 'legal' migrants, they are not able to enforce their contractual or statutory rights on the ground that their employment relationship is illegal.<sup>29</sup>

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<sup>27</sup> Anderson (n 20) 67. Domestic workers in diplomatic households are described by Siobhán Mullally and Clíodhna Murphy, 'Migrant Domestic Workers, Exclusions, Exemptions and Rights' (2014) 36(2) *Human Rights Quarterly* (2014) forthcoming, as experiencing a 'double jeopardy'. Unlike domestic worker admitted under the ODW visa for private households, migrant domestic workers employed in diplomatic households did not enjoy the right to change employers. Moreover, as a diplomat, the employer can claim diplomatic immunity under the 1961 Vienna Convention on Diplomatic Relations.

<sup>28</sup> National Minimum Wage Regulations 1999 (No. 584 of 1999), Regulation 2(2); Regulation 19, Working Time Regulations 1998 (No. 1833 of 1998); Health and Safety Act 1974, s 51.

<sup>29</sup> *Zarkasi v Anindita*, Appeal No. UKEAT/0400/11/JOJ, Decision of EAT of 18 January 2012; *Hounga v Allen* [2012] EWCA Civ 609. An appeal from the latter decision is before the UK Supreme Court, see Alan Bogg and Tonia A Novitz 'Race discrimination and the doctrine of illegality' (2013) 129 *The Law Quarterly Review* 12.

## 2. Trafficking

In 2006, the Labour government announced that it was abolishing the ODW scheme as part of its overhaul the immigration system, which was designed to promote the immigration of desirable and high-skilled migrant workers through the introduction of a 'points system'.<sup>30</sup> Instead of invoking modern slavery, this time domestic workers advocacy groups such as Kalayaan and human rights organizations opposed the change by raising the fear that the restrictions on domestic workers entry into the UK would result in them being trafficked.<sup>31</sup>

Since the visa scheme for overseas domestic workers was introduced, trafficking had both eclipsed and incorporated modern slavery as the focus of political attention and the preferred legal characterization of the exploitation of migrants. In the late 1990s, destination countries in Europe, North America, and Australia identified migrant smuggling as a security threat and the issue quickly moved 'from the margins to the mainstream of international political concern'.<sup>32</sup> In the process, 'human trafficking, an obscure but jealously guarded mandate of the UN's human rights system, had been similarly elevated and ... unceremoniously snatched away from its traditional home' and placed in the context of migration, public order, and organized crime.<sup>33</sup> The key international instrument adopted was the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (known as the Trafficking Protocol), which supplements the UN Convention against Transnational Organized Crime (2000).<sup>34</sup> While prostitution was the cynosure of the anti-trafficking campaign, the Protocol adopted a broad definition of trafficking, which included the exploitation

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<sup>30</sup> This announcement came two years after the enlargement of the European Union to include eight new Member states (known as the A8), many of which had lower wages and living standards than the older Member states. The UK was one of only three Member states that allowed A8 national immediate access to its labour market.

<sup>31</sup> Anderson (n 24) 70.

<sup>32</sup> Gallagher (n 26) 790.

<sup>33</sup> *ibid.*

<sup>34</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, S. Treaty Doc. No. 108-16 (2004) 2237 U.N.T.S. 419 (the Trafficking Protocol). Convention Against Organised Crime, Nov. 15, 2000, S. Treaty Doc. No. 08-16(2004), 2225 U.N.T.S. 209. Another protocol dealt with smuggling, see Protocol against Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, S. Treat Doc. 108-16(2004) 2241 U.N.T.S. 2241.

of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. It also drew inspiration from the anti-slavery conventions and the ILO's instruments against forced labour.<sup>35</sup>

The Trafficking Protocol was widely ratified and it had a cascading effect, which resulted in the adoption of a very uniform anti-trafficking framework across the world.<sup>36</sup> Although the framework is composed of three elements – prevention, prosecution, and protection – most countries emphasized the criminal and immigration law elements, which put human rights on the back step.<sup>37</sup> The UK was no exception. Moreover, until 2012, when the UK government adopted the EU Directive of Trafficking, 2011, it focused exclusively on the cross-border aspect of trafficking.<sup>38</sup> The Sexual Offences Act 2003, which came into force on 1 May 2004, established wide-ranging offences of trafficking of people into, within or from the UK for sexual purposes. Prohibitions specifically relating to trafficking for labour and organ exploitation were provided in the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The UK also targeted employers who employed undocumented migrants, which led to a conflation of trafficking with 'illegal' migration.<sup>39</sup> Under the Immigration, Asylum and Nationality Act 2006, employers who employ illegal migrants are subject to a civil penalty, or, if they knowingly employ illegal migrants, a maximum penalty of two years' imprisonment and unlimited fine.

While the UK simply adopted the trafficking paradigm that prevailed in international legal instruments, its approach to the wide range of European legal instruments that could be used to mitigate migrant domestic workers' unfreedom was uneven. In 2005, the Council of Europe adopted a Convention on Action against Trafficking in Human Beings, which emphasized the protective dimension of a comprehensive approach to trafficking.<sup>40</sup> The Convention built upon the Parliamentary Assembly's earlier condemnations of domestic slavery and domestic servitude, which had called for a charter of rights for domestic

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<sup>35</sup> Gallagher (n 24 ); Hila Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 6 UCLA Rev 76, 85

<sup>36</sup> Shamir (n 35) 78.

<sup>37</sup> Gallagher (n 24) 812.

<sup>38</sup> The government enacted provisions in the Protection of Freedoms Act, 2012, which are designed to address trafficking that occurs entirely within the UK.

<sup>39</sup> Anderson (n 13) 141.

<sup>40</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005 < <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm> > accessed 16 April 2013. (09/01/13)]. The Convention came into effect in 2008.

workers.<sup>41</sup> It obliged member States to take steps to protect the human rights of victims of trafficking and to set up a specific monitoring mechanism. However, it did not address the specific problems of migrant domestic workers.

In 2007, the UK announced that it would ratify the Council of Europe Convention and it published an Action Plan on Trafficking, which specifically linked its fight against trafficking to the bicentenary of the legislation abolishing the slave trade in the British Empire.<sup>42</sup> Thus, the Plan reinforced the tropes of foreign victims, foreign villains, and the British state as saviour in the fight against trafficking. However, it also endorsed a human rights framework for dealing with the victims of trafficking and broadened the focus of anti-trafficking initiatives beyond sex exploitation to forced labour. After ratifying the Convention in 2009, the government established the National Referral Mechanism (NRM), a framework enabling statutory agents like the police, local authorities, and the UK Border Agency together with third-sector organizations such as Kalayaan and the Salvation Army to identify victims of trafficking and provide them with appropriate support.<sup>43</sup> A key mandate of the NRM was to forge closer links between the immigration service and law enforcement.

But, at the same time as the UK government ratified the Council of Europe Convention Against Trafficking, it opted out of two European Union directives, one that would enable victims of trafficking to become permanent residents and another that would provide undocumented migrant workers with the right to recoup unpaid wages.<sup>44</sup> Significantly, the Labour government was able to adopt

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<sup>41</sup> Council of Europe, Parliamentary Assembly Report 9102, 17 May 2001, 149 entitled 'Domestic Slavery', and Council of Europe, Parliamentary Assembly, Recommendation 1663 (2004) 22 June 2004, entitled 'Domestic Slavery: Servitude, Au Pairs and 'Mail-Order Brides'', <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/erec1663.htm>> accessed 16 April 2013.

<sup>42</sup> Home Office, UK Action Plan on Tackling Human Trafficking, March 2008, 4, referring to the 1807 Slave Trade Act.

<sup>43</sup> Serious Organised Crime Agency, National Referral Mechanism <<http://www.soca.gov.uk/about-soca/about-the-ukhct/national-referral-mechanism>> accessed 15 April 2013.

<sup>44</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ L 261; Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals OJ L 168/24.

an approach to human rights that positioned trafficking as an integral part of border controls and reinforced a criminal law jurisdiction, while it avoided labour law and immigration initiatives that could be seen as 'rewarding' breaches of immigration legislation. Moreover, the emphasis on trafficking meant that the police were unlikely to investigate claims of abuse in situations in which the domestic worker's status was lawful or she had 'colluded' with her employer in entering the UK.<sup>45</sup>

Kalayaan's use of trafficking to describe what might happen if the ODW visa scheme was revoked shaped the Labour government's response to the campaign to preserve the Overseas Domestic Visa scheme.<sup>46</sup> When the government implemented the new immigration regime in 2008, it agreed to postpone the abolition of the ODW for two years until it completed its review of the national anti-trafficking strategy.<sup>47</sup> However, the problem was that trafficking not only framed domestic workers' unfreedom in a particular way, it also reinforced the use of the criminal law and border controls as the solution. While Kalayaan and other groups endeavoured to extend the meaning of unfreedom to include migration controls, trafficking was generally, albeit mistakenly, equated with illegality and irregularity. The use of stereotypes to portray domestic workers as victims and their employers as villains was inexorable since the frame of trafficking pushed even advocates to use them.<sup>48</sup> Although resort to European human rights norms and instruments helped to dismantle some of the restrictions in the trafficking approach to labour exploitation, in the UK the human rights norms were unable to uproot the legal construction of migrant domestic workers' unfreedom from a trafficking paradigm, which remained firmly planted in the criminal law, making it difficult to graft to a labour regulation approach.

### 3. Forced Labour

One of the key limitations in using the laws against trafficking to assist migrant domestic workers is that trafficking requires a specific action – recruitment,

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<sup>45</sup> The Anti-Trafficking Monitoring Group, *The Wrong Kind of Victim? One year On: An analysis of UK Measures to protect Trafficked Persons* (2010) 35, [http://www.antislavery.org/includes/documents/cm\\_docs/2010/a/1\\_atmg\\_report\\_for\\_web.pdf](http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf) accessed 27 April 2013

<sup>46</sup> Anderson (n 13) 175.

<sup>47</sup> Anderson (n 24) 72.

<sup>48</sup> Jacqueline Bhabba, 'Border Rights and Rites: Generalisations, Stereotypes, and Gendered Migration' in Sarah Van Walsum and Thomas Spijkerboer (eds), *Women and Immigration Law: New Variations on Classical Feminist Themes* (Routledge Cavendish 2007) 22.

transfer, harbouring, or receipt of persons; the offence is not designed to outlaw forced labour per se, but to criminalise it when movement is involved. Article 4 of the European Conventions on Human Rights (ECHR), which provides that (1) no one shall be held in slavery or servitude and (2) no one shall be required to perform forced or compulsory labour, was invoked to characterise the exploitation of domestic workers as forced labour and domestic servitude. The European Court of Human Rights' 2005 decision *Siliadin. France* broke new ground; the Court ruled that Article 4 gave rise to positive obligations on states, it relied on international legal instruments, specifically the ILO's convention on forced labour, to interpret the meaning of compulsory and forced labour in the ECHR to include domestic servitude, and it implicated immigration controls in the construction of unfreedom.<sup>49</sup> *Siliadin* illustrates how legal construction at the micro-level in multi-scalar regulatory context can have broader meso and macro level effects. But, while *Siliadin* has been celebrated as an object lesson of the capacity of human rights law to address, both symbolically and practically, labour abuse,<sup>50</sup> it also reveals the limitations and biases in this approach.

The facts of *Siliadin* instantiated all of the stereotypes about domestic servitude – vulnerable women from 'backward' countries who lack agency and who are exploited by foreigners uneducated in the ways of their enlightened host country until the deserving victims are rescued by good Samaritans. The applicant, a Togolese national, was 15 years old when she was brought to France on a tourist visa, where she was 'lent' to her 'employers' to perform domestic work in their home. *Siliadin* worked without respite for approximately fifteen hours per day over several years without receiving wages or being sent to school, without identity papers, and without her immigration status being regularized, and she slept in the children's bedroom.<sup>51</sup> After she escaped, with the help of the Committee Against Modern Slavery she initiated civil actions claiming compensation for unpaid wages, other employment-related entitlements, and psychological harm, and a criminal action against the couple for whom she worked for subjecting her to 'working or living conditions which were incompatible with human dignity by taking advantage of that individual's vulnerability or state of independence'.<sup>52</sup> Although *Siliadin* received compensation through the civil process and her immigration status was regularised, her employers were acquitted of the criminal charges. Consequently, she complained to the Strasbourg Court that French criminal law 'did not afford

**Comentari [JU3]:** How much of the next two paragraphs should I cut? Some labour lawyers know the facts and holding of this case, most don't.

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<sup>49</sup> (2005) ECHR 545 (*Siliadin*).

<sup>50</sup> Virginia Mantouvalou, 'Modern Slavery: The UK Response' (2010) 39 *Industrial Law Journal* 425, 430.

<sup>51</sup> *Siliadin* [11].

<sup>52</sup> French Criminal Code, Article 224-14.

her sufficient and effective protection against the “servitude” in which she had been held, or at the very least against the “forced and compulsory” labour which she had been required to perform.<sup>53</sup>

The European Court of Human Rights interpreted the reference to compulsory and forced labour in Article 4 in light of the definition provided in Article 2 of the ILO’s Convention against Force Labour (No. 29): ‘forced or compulsory labour’ shall mean ‘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’.<sup>54</sup> According to the Court, the question was whether in *Siliadin*’s case there had been forced or compulsory labour. Although the Court acknowledged that she ‘was not threatened by a “penalty”, ‘the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat’, noting that ‘she was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police’.<sup>55</sup> Having found that she was subjected to forced labour, the Court went on to consider the second condition, viz, whether she was also held in servitude or slavery.<sup>56</sup> Interpreting ‘servitude’ as ‘an obligation to provide one’s services that is imposed by the use of coercion’ and linking it to a lack of personal autonomy, the Court, emphasizing, once again, *Siliadin*’s status as a minor and referring to her working conditions, isolation, living conditions, and her precarious migration status, concluded that she was held in servitude.<sup>57</sup> The final matter before the Court was whether France had met its positive obligation under Article 4. The Court found that the criminal law provisions did not deal specifically with slavery, servitude, and forced or compulsory labour, observing that ‘in the instant case, the applicant, who was subjected to treatment contrary to Article 4 and held in servitude, was not able to see those responsible for the wrong doing convicted through criminal law.’<sup>58</sup> Thus, the Court placed a positive obligation on the state to create bespoke legislation to outlaw forced labour and servitude.

In the UK, *Siliadin* fuelled efforts by the human rights groups Liberty and Anti-Slavery International to press for the creation and enactment of a new criminal law offence that specifically targeted forced labour without the need for any elements of trafficking. Although the Labour government initially demurred, claiming that there already existed criminal law provisions outlawing such activities, when new clauses aimed at criminalising servitude and forced labour

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<sup>53</sup> *Siliadin* [3].

<sup>54</sup> *ibid* [30].

<sup>55</sup> *ibid* [118].

<sup>56</sup> *ibid* [120], [121].

<sup>57</sup> *ibid* [122], [124].

<sup>58</sup> *ibid* [145].

were introduced during the House of Lord's consideration of the Coroners and Justice Bill, it recanted. However, it substituted its own provisions for those drafted by the human rights groups, arguing 'that a slightly different approach is preferable', one which drew on Article on 'the offence of trafficking for such purposes without the requirement that the person has been trafficked'.<sup>59</sup> Section 71 of the Coroners and Justice Act 2009, which came into effect in 2010, creates an offence of holding another person in slavery or servitude or requiring them to perform forced or compulsory labour.<sup>60</sup> Significantly, section 71 does not specifically define slavery, servitude, or forced or compulsory labour, referring instead to Article 4 of the European Convention on Human Rights and, thereby, delegating the responsibility for defining the scope of the offence to the European Court of Human Rights.

The European Court of Human Rights has used *Siliadin* to expand its conception of forced labour to include a broad range of labour exploitation and to take account of the specific features of domestic servitude. In *CN v the United Kingdom*, which arose before the UK enacted the specific offence of forced labour, the applicant was a woman from Uganda fleeing sexual violence, who, with the assistance of a relative, travelled to the UK on a false passport.<sup>61</sup> Once in the UK, C.N.'s relative confiscated her passport and referred her to an agent who ran a business supplying carers. The agent, who received C.N.'s wages and shared them with her relative, sent C.N. to work as a live-in caregiver, where she worked very long hours with little time off. After she escaped, C.N. applied for asylum, which was refused. Her complaints to the police were dismissed on the ground that she was not trafficked and that there was no legislation pertaining to domestic servitude when trafficking is not a factor.<sup>62</sup> She brought a

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<sup>59</sup> HC Deb 28 October 2009, col 182.

<sup>60</sup> Coroners and Justice Act 2009 (Commencement No 4, Transitional and Saving Provisions) Order 2010, SI 2010/816 which came into force on 6 April 2010. The maximum penalty (on conviction on indictment) is 14 years' imprisonment and/or a fine.

<sup>61</sup> *C.N. v. U.K.* App no 13 November 2012. See also *Kawogo v. UK*, Communicated Case 56921/09, where the applicant, a Tanzanian national who came to the UK in 2006 with her employer on a domestic worker visa, claimed that the failure to penalise forced labour and servitude breached the State's positive obligations under Article 4 and Article 8. In *O.G.O. v UK*, App no 13950/12, 8 March 2012, a Nigerian woman who was subjected to domestic servitude in her home country and then subsequently trafficked to the UK, claims that, among other things, the UK's failure to identify her as a victim of trafficking and its refusal to grant her asylum breached Article 4.

<sup>62</sup> *C.N. v. U.K.* *ibid* [29].

claim to the European Court of Human Rights arguing that the lack of a specific offence of forced labour or domestic servitude made the police investigation inadequate and, thus, the UK had failed to meet its positive obligation under Article 4. Remarking on the similarity of C.N.'s circumstances to Siliadin's, 'the only notable differences being that the applicant was older than Siliadin and that it was an agent and not her employers who she claimed was responsible for her treatment contrary to Article 4', the Court held that the UK had failed to meet its procedural duty to investigate to investigate forced labour.<sup>63</sup> It went on to elaborate that 'domestic servitude is a specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance'.<sup>64</sup> The Court concluded that, because there was no specific offence of domestic servitude, the domestic authorities were unable to give due weight to factors, such as C.N.'s allegation that her passport had been taken, that her wages were not kept for her, and that she was explicitly and implicitly threatened with denunciation to the immigration authorities, that the ILO had identified as indicators of forced labour.<sup>65</sup>

There are two clear benefits of characterising migrant domestic workers' unfreedom as domestic servitude. First, although the crime of forced labour has not resulted in many prosecutions, it should stop the police from fixating on a domestic worker's migration status when investigating whether or not she has been a victim of labour exploitation.<sup>66</sup> Second, it allows for explicit reference to the ILO's forced labour indicators, which can be used to advance a sophisticated appreciation of factors that undermine workers' choice.

However, there are a number of detriments. Since forced labour is embedded in a criminal law approach, there are jurisdictional constraints, such as principles of culpability and requirements of proof, that impose limits on the type of abuse that will attract sanction. The criminal law jurisdiction also limits the remedies available to migrant domestic workers. For example, while C.N. was

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<sup>63</sup> *ibid* [72], [76].

<sup>64</sup> *ibid* [80].

<sup>65</sup> *ibid*.

<sup>66</sup> There were only 12 prosecutions under s. 71 in 2011-12. Inter-Departmental Ministerial Group on Human Trafficking, *First annual report of the Inter-Departmental Ministerial Group on Human Trafficking*, Cm 8421, October 2012, 32. For examples of the problem with policing practice under the trafficking legislation see the discussion of C.N. above and the Anti-Trafficking Monitoring Group, *The Wrong Kind of Victim? One Year On: An Analysis of UK Measures to Protect Trafficked Persons* (2010) 35.

<[http://www.antislavery.org/includes/documents/cm\\_docs/2010/a/1\\_atmq\\_report\\_for\\_web.pdf](http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmq_report_for_web.pdf)> accessed 27 April 2013.

successful in obtaining damages (8000 euros) and costs (20,000 euros) from the Strasbourg Court, the Court did not order the UK to regularise her immigration status or to pay her back wages.<sup>67</sup> As long as the UK ensures that officials investigate allegations of trafficking and forced labour, which is now specifically prohibited, the government will have met its obligations under Article 4 of the ECHR.

An alluring avenue of redress for migrant domestic workers is to attempt to expand the factors that go to a finding of ‘menace of penalty’ to include immigration controls. The European Court of Human Rights’ 2010 decision in *Rantsev v Cyprus and Russia*, a case that dealt with trafficking for the purpose of sexual exploitation, has made this strategy more appealing because in it the Court clearly implicated the Cypriot visa regime as contributing to the breach of Article 4.<sup>68</sup> The Court went beyond a criminal investigation and prosecution approach to trafficking to consider the extent of a Member state’s obligations to provide commercial regulation and immigration rules that deter trafficking.<sup>69</sup> Noting the stinging criticisms of the cabaret artiste visa scheme by the Council of Europe Commissioner for Human Rights and the Cypriot government’s failure to act on these criticisms, the Court found ‘that the regime of artiste visas in Cyprus did not afford to Ms Rantseva practical and effective protection against trafficking and exploitation’ and that this scheme amounted to a violation of Article 4.<sup>70</sup> But, at the same time as this case opens the door to arguments that immigration controls contribute to forced labour,<sup>71</sup> it is also important to be attentive to the specificities of the case, which involved a young Russian woman who was recruited to work in a cabaret and whose visa required cabaret owners and managers ‘to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed’.<sup>72</sup> It was this aspect of the visa, not the

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<sup>67</sup> *C.N. v. U.K.* [94].

<sup>68</sup> App No 25965/04, Judgment of 7 January 2010 [293].

<sup>69</sup> *ibid* [para 200].

<sup>70</sup> *ibid* [101], [102], [292].

<sup>71</sup> Mantouvalou (n 50) 429-30 advocates an ‘integrated’ approach to the interpretation of Article 4 that would draw upon the findings and reports of other human rights agencies that the protections offered in the pre-2012 ODW visa system were important protections against trafficking and force labour to argue that the post-2012 visa system violated Article 4. Adopting such an approach, the Supreme Court of Israel struck down an immigration control that did not permit migrant domestic workers to change employers as violating the worker’s dignity and autonomy. Case No 4542/02, *Kav LaOved et al v The State of Israel* [2006] (Isr.)

<sup>72</sup> *Rantsev* [292].

requirement that the employer notify the immigration authorities when the migrant worker left her employment, that the Court found problematic. Ms Rantseva's death, fourteen days after arriving in Cyprus, combined with the clear understanding that the cabaret artiste visa and cabaret industry are part of sex tourism and the failure of Cypriot police to anything to assist her in escaping her employer – indeed, they assisted her employer in restraining her – contributed to the Court's findings that Cyprus was in violation of Article 4.<sup>73</sup>

The trafficking/forced labour paradigm tends to reinforce the view that migrant domestic workers' exploitation is the result of morally culpable individuals who should be publicly vilified rather than systemic and institutional features of state policies and practices relating to immigration and labour regulation. Thus, a human rights approach that hinges on the international instruments against forced labour and trafficking tends both to skew attention towards the worse cases of abuse and to transpose the stereotypes that dominate the public discourses around slavery and trafficking into the discussion of forced labour. Litigators and advocates will often select the most egregious cases of abuse and the most sympathetic victims in order either to win the case or to create a precedent. Thus, the legal system itself tends to reinforce the use of stereotypes even by advocates for migrant domestic workers. The cases of domestic servitude that have come before the European Court of Human Rights have generally involved African nationals as victims and non-European employers, reinforcing the idea that domestic servitude is a custom of certain countries or cultures.<sup>74</sup> Referring to data collected by the UK's National Referral Mechanism, the Inter-Departmental Ministerial Groups on Human Trafficking, which is the UK's national rapporteur under the EU Directive on Trafficking, reported that the largest number of potential victims of trafficking for the purpose of domestic servitude come from West Africa, although the majority of domestic workers admitted under the ODW come from India, Indonesia, and the Philippines.<sup>75</sup> However, it offered no discussion of why, given the nature of immigration controls and policing practices,

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<sup>73</sup> *ibid* [292-300] For a critique of the Court's legal reasoning, see Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 Human rights Law Review 546.

<sup>74</sup> Siliadin was Togolese, C.N was from Uganda, Kawogo from Tanzania, and O.W.O. from Nigeria.

<sup>75</sup> Inter-Departmental Ministerial Group on Human Trafficking, (n 66) *First annual report of the Inter-Departmental Ministerial Group on Human Trafficking*, Cm 8421, October 2012, 75; Home Office, UK Border Agency, Employment Related- Settlement, Tier 5 and Overseas Domestic Workers June 2011, 29 <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/employment-relate-settlement/>> accessed 16 April 2013.

that referrals to the NRM may reflect biases in detecting cases of domestic servitude. Worst yet, the NRM data was used to justify abolishing the Overseas Domestic Workers visa on the ground that it will reduce the risk of abusive relationships developing in this visa category, ignoring the fact that the majority of the cases involving domestic servitude before the ECtHR the workers had an irregular status.<sup>76</sup>

#### 4. Migration Controls: Victims, Foreigners, and the British State

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A crucial feature of Kalayaan's approach to trafficking was its linkage of employers' coercion and abuse of workers to the UK's proposed immigration legislation.<sup>77</sup> It argued that 'removal of any option to challenge or leave an abusive or exploitative employer is in direct contravention to the Home Office stated policy to protect victims of trafficking and to stop trafficking "at source".'<sup>78</sup> This broad approach to trafficking, which identifies restrictive immigration controls as contributing to the exploitation of migrant domestic, was adopted by the House of Commons Home Affairs Committee in its 2009 Report to Parliament on human trafficking in the UK, which recommended that the ODW visa scheme be extended beyond the two years the government had promised.<sup>79</sup>

A constellation of international and European human rights bodies have also identified the link between restrictive immigration controls and the exploitation of migrant workers.<sup>80</sup> However, none of these findings or reports is binding on the UK government, as the legal instruments upon which they are based are not justiciable. At best, they can have indirect legal effect by

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<sup>76</sup> Ibid. The exception is Kawogo, who entered the UK under an ODW visa.

<sup>77</sup> Anderson (n 24) 71.

<sup>78</sup> Ibid.

<sup>79</sup> House of Commons Home Affairs Comm., *The Trade in Human Beings: Human Trafficking in the UK*, 2008-09, H.C. 23-I, at 26.

<sup>80</sup> UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland*, 16 March 2010, A/HRC/14/30/Add.3, at 15 and 16, and recommendation at paragraph 60-61.; Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinia, UN Doc A/HRC/15/20 (18 January 2010) para 96; UN Committee on Migrant Workers, General Comment No. 1, CMW/C/GC1, 23 February 2011, para 21; Report of the European Union Agency for Fundamental Rights Agency, 'Migrants in an Irregular Situation Employed in Domestic Work: Fundamental Rights Challenges for the European Union and its Member States', Publications Office of the European Union, Luxembourg, 2011, 19.

influencing the interpretation of binding international and European legal instruments, such as Article 4 of the ECHR. At worse, they can be ignored.

Intent on closing the UK's borders for work and settlement to all but the wealthiest and most highly skilled third-country nationals, and citing polling data indicating public support for its position, the Coalition government issued a consultation document in June 2011 on employment-related settlement.<sup>81</sup> The government proposed either to abolish the route for overseas domestic workers in private households or to restrict residence to a six month period as a visitor only, or 12 months where accompanying a Tier 1 (high value) or Tier 2 (skilled workers) migrant, with no possibility of extension, no right to change employers, no ability to sponsor dependants or, alternatively, no right for dependants to work in the UK, and no right to settlement.<sup>82</sup> These proposals mirrored the changes suggested, and postponed in the face of complaints that they would result in the trafficking of domestic workers, by the Labour government in 2006.<sup>83</sup>

Two types of rationales were offered for these proposals: closing the border to low-skilled workers who were considered to be of little economic value to the UK and ending the abuse of migrant domestic workers. Although the numbers of ODW visas issued ranged from between 12,500 in 2006 to 15,350 in 2010 and few ODW visa holders sought settlement in the UK, the government emphasized that there had been a 34 per cent increase in settlement in 2010 over 2009 for a total of 1060.<sup>84</sup> Describing the ODW visa scheme as 'more generous than EU countries', it suggested that in light of its restriction on skilled workers it would 'be counter intuitive to retain a route into the UK labour market for low skilled domestic workers via the private household route'.<sup>85</sup> Most remarkably, the government turned the argument that abolishing the ODW scheme would lead to more trafficking on it head, invoking the documented cases of employer abuse of domestic workers admitted under the visa as a reason for abolishing it.<sup>86</sup> It pointed to the National Referral Mechanism for identifying victims of trafficking as providing a means to respond to the exploitation of overseas domestic workers that did not exist when the right to change employer was introduced, noting that from April 2009 to Dec 2010 there were 219

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<sup>81</sup> Home Office, UK Border Agency, Employment Related- Settlement, Tier 5 and Overseas Domestic Workers June 2011, (n 75) 11, 12.

<sup>82</sup> *ibid*, 12-3.

<sup>83</sup> HC Deb 10 May 2006 col 101-107WH.

<sup>84</sup> Home Office, UK Border Agency, Employment Related- Settlement, Tier 5 and Overseas Domestic Workers (n 75) 29, 31.

<sup>85</sup> *ibid*

<sup>86</sup> *ibid*

referrals for domestic servitude.<sup>87</sup>

One of the government's key challenges was to find a way to align its goals of closing UK borders to unskilled third country nationals with keeping them open to wealthy migrants. While it dismissed concerns that the proposed changes would have a negative economic impact by deterring desirable immigrants who employed domestic workers from entering the UK as unsupported by evidence, it hedged its bet by allowing that 'there may be a case for arrangements which would allow a highly skilled or skilled migrant to be accompanied by their overseas-based domestic staff for up to a year to ease the transition to life in the UK and allow time for recruitment from the UK labour market.'<sup>88</sup> If the route for domestic workers remained, protections for genuine victims of trafficking would be combined with strengthened pre-entry requirements in order to minimise the possibility of abusive or exploitative employer/employee relationships being imported into the UK.

The release of the visa reform proposals at the same time as the government announced its decision to abstain from voting on the ILO's Domestic Worker's Convention, which provides a comprehensive set of labour standards for domestic workers, exemplifies the Coalition government's determination to separate trafficking from a labour regulation approach to the problem of the exploitation of migrant domestic workers.<sup>89</sup> It simply ignored the recommendations and reports of the international and European human rights bodies that identified immigration controls of the type it was proposing as part of the problem, holding fast to an anti-trafficking paradigm that strengthened border controls and deployed the criminal law, and, in the process, reinforced stereotypes that foreigners were undermining the British way of life.

A range of human rights groups and advocates for migrant workers defended the ODW visa. Kalayaan challenged many of the assumptions upon which the government's proposals were based. It countered the argument that the ODW visa resulted in large numbers of low-skilled workers crowding the British labour by highlighting the fact that less than five per cent of migrant domestic workers who were eligible to apply for settlement after five years in the UK went

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<sup>87</sup> *ibid* 31.

<sup>88</sup> *ibid* 30.

<sup>89</sup> [Rachel Williams](http://www.guardian.co.uk/world/2011/jun/15/coalition-refuses-protecting-domestic-workers), 'Coalition refuses to ratify UN measure protecting domestic workers' *The Guardian* (London, 15 June 2010) <<http://www.guardian.co.uk/world/2011/jun/15/coalition-refuses-protecting-domestic-workers>> 16 April 2012 accessed 16 April 2013; Convention Concerning Decent Work for Domestic Workers, International Labour Organisation, adopted at the 100th session of the International Labour Conference, Geneva, 2011.

on to do so.<sup>90</sup> Kalayaan consistently stressed the significance of the right to change employers as the most important prophylactic against abuse, referring to Home Office data that from January 2003 to August 2010, 969 out of 2,378 (or 41 per cent) of migrant domestic workers cited abuse and exploitation as the reason for changing their employer.<sup>91</sup> It also complained that the anti-trafficking mechanisms failed adequately to identify migrant domestic workers who are trafficked. Not only did the police fail to take domestic workers' complaints of trafficking seriously, about two-thirds of the workers Kalayaan identified as trafficked refused to be referred to the NRM, preferring instead to look for new employment, which they were able to do under the terms of the ODW visa.<sup>92</sup>

The government's preoccupation with 'Britishness' is illustrated by its classification of respondents to its proposals in terms of whether or not they were British.<sup>93</sup> Although over half (55%) of all respondents disagreed with the proposal to close the ODW entry route, over a third (37%) of the British respondents compared with over a quarter (26%) of non-British respondents supported the proposal.<sup>94</sup> While forty-three percent of all respondents disagreed with the proposal that the unrestricted right of ODWs in private households to change employer be removed given the existence of the National Referral Mechanism, 41% of British respondents were more supportive of the proposal compared with 34% of non-British respondents.<sup>95</sup>

In February 2012, the government announced that instead of abolishing the ODW visa, it would limit its duration to a maximum of six months, with no extensions, or until the employer leaves the UK, whichever was sooner. Domestic workers would be prohibited from bringing dependents with them (unless they

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<sup>90</sup> Mumtaz Lalani, *Ending the Abuse. Policies that Work to Protect Migrant Workers* (Kalayaan, 2011) 24.

<sup>91</sup> *ibid* 18 Kalayaan also suggested that the number of workers experiencing abuse was likely higher given their reluctance to complain to the Home Office.

<sup>92</sup> *ibid* 29.

<sup>93</sup> Home Office, UK Border Agency, Employment Related Settlement, Tier 5 and Overseas Domestic Workers, Consultation and Responses (September 2011) <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/employment-related-settlement/>> accessed 16 April 2013. According to the government, of the members of the public who responded, 'over half of these respondents were non-British (55%) and, of these, over two-thirds (69%) had a time limit on their stay. Forty-five percent were British citizens'. *ibid* 4. Since the document distinguishes between 'British' respondents and 'British citizens' it appears that 'British' refers to ethnic identity.

<sup>94</sup> *ibid* 19.

<sup>95</sup> *ibid* 20.

came as visitors), and, while in the UK, from changing employers, switching immigration categories, or applying for settlement.<sup>96</sup> Allowing even a narrow route for domestic workers was a concession to attract desirable immigrants, who after a six months grace period would then be required to recruit domestic help, possibly through an agency from amongst UK or EU workers in the UK labour market.<sup>97</sup> The government justified the prohibition against changing employers by referring both to data indicating that up to 60% of employer changes were not related to abusive employment conditions, and to the availability of other forms of protection, such as the NRM mechanism to identify and support victims of trafficking, the prohibition against slavery, forced labour, and domestic servitude, and 'the backstop of domestic workers being able to return to their country of origin'.<sup>98</sup> It estimated that immigration controls requiring the employer to provide written terms and condition of employment as well as a commitment to pay minimum wage would result in a 10% to 30% fall in volumes of eligible ODWs.<sup>99</sup>

The rules for migrant domestic workers changed on 6 April 2012.<sup>100</sup> The government has remained steadfast that 'the best way to address abuse of overseas domestic workers in the UK is to restrict access for such workers.'<sup>101</sup>

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<sup>96</sup> *ibid* 15.

<sup>97</sup> HC Deb, 29 February 2012, Column 35WS, 26WS; Home Office, UK Border Agency, Statement of Intent, Changes to Tier 1, Tier 2, and Tier 5 of the Points Based System; Overseas Domestic Workers; And Visitors, 29 February 2012, 15 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117953/tiers125-pbs-overseas-soi.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117953/tiers125-pbs-overseas-soi.pdf)> accessed 15 April 2013.

<sup>98</sup> Home Office, Impact Assessment, Changes to Tier 5 of the Points Based System and Overseas Domestic Worker routes of entry IA No HO0053, March 2012 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117958/impact-assessment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117958/impact-assessment.pdf)> accessed 16 April 2013, 17.

<sup>99</sup> See Immigration Rules, 159 A (v).

<sup>100</sup> Immigration Rules, 159 A to 159 H. The rules relating to domestic workers employed in a diplomatic household differed in two respects: the duration of the visa was tied to the length of the diplomatic posting and these domestic workers are able to sponsor dependents.

<sup>101</sup> This was the Minister of State for Immigration's response to a question raised in the House of Commons about the recommendations of the Organization for Security and Co-operation in Europe's Special Representative and Co-ordinator for Combating Trafficking in Human Beings for a visa regime for domestic workers that allows them to change employer and leads on to permanent settlement. (Organization for Security and Co-operation in Europe, Occasional Paper series no. 4, *Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude*, 2010). HC Deb 15 March 2012 col 372W.

When confronted with a report by the Salvation Army that it had witnessed an increase in domestic servitude after the visa changes came into effect, the Home Office replied that the most effective way to tackle the problem 'is to better identify and support victims and target the criminal gangs behind trafficking, not blaming immigration controls'.<sup>102</sup>

Meanwhile, as the Coalition government was restricting the route for third country national domestic workers to enter the UK to work in private households, it was both easing the requirements for nationals from Bulgaria and Romania (the A2 countries) to take on that work by no longer requiring them to have an employer obtain a work permit as a condition of obtaining an authorisation to work in the UK and extending by two years the requirement for them to have a work authorisation.<sup>103</sup> Although the aim behind this exemption for a work permit is to provide a supply of domestic workers to work in private households, it is unclear whether this supply will fill the demand that was previously met through the ODW visa scheme. Unlike third country domestic workers who enter under the ODW scheme, by the end of April 2013 it will not be possible either to tie A2 nationals to a single employer or to confine them to working in a private household. As EU citizens they will have the legal freedom to seek employment in sectors and types of employment that are less likely to result in domestic servitude.

## V. CONCLUSION

Through the analysis of the criminalization of slavery, human trafficking, and forced labour and changes to the UK ODW scheme, we have attempted to illustrate how an approach that focuses on migrant domestic workers' unfreedom by placing the obligation on the state to criminalise employer conduct is compatible both with a human rights approach and with erosion of labour and migration rights. This approach has drawn on epistemological and analytical traditions of both law and the social sciences. Through foregrounding legal interpretation to shed light on the legal characterisation of domestic servitude, we

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<sup>102</sup> Paul Peachey, 'More women forced into slavery after change to immigration law the' *The Independent* (London, 3 February 2013)

<<http://www.independent.co.uk/news/uk/crime/more-women-forced-into-slavery-after-change-to-immigration-law-8478998.html>> accessed 16 April 2013.

<sup>103</sup> Home Office, UK Border Services, Work Permits and Accession Worker Cards <<http://www.ukba.homeoffice.gov.uk/eucitizens/bulgaria-romania/work-permits/liveworkuk/>> accessed 16 April 2012.

have argued that the moral force of human rights<sup>104</sup> may reside in its articulation with a criminal law approach; it may not be possible therefore to invoke claims of modern slavery and trafficking to boost labour rights. By highlighting the political economy of migrant domestic labour and the related, unique (economic, political, and social, as well as legal) dimensions of unfreedom, we have sought to explore the ways in which processes of jurisdiction and related technologies of governance 'overspill' the legal domain in ways have resonance beyond the specific example of the UK's migrant domestic worker program.

In other words, as an example of a political strategy, the move to mobilise discourses of trafficking, slavery, and forced labour was initially successful insofar as it preserved (during the reign of the Labour government) both the ODW program and the right to change employers. As Bridget Anderson wrote:<sup>105</sup>

In order to make this claim for exceptional rights as migrants, that is, to be incorporated into the immigration rules, but not incorporated into mainstream immigration for employment regulation, the campaign highlighted the specificities of domestic work and of migrant domestic workers as being ... vulnerability to physical abuse and exploitation. This was tactically extremely successful. Had domestic workers initiated a joint campaign with fellow migrants calling for an end to visa sponsorship and the rights of all migrants to change employers, the likelihood is they would still be campaigning. Public images seized on images of abusive male employers, and this also generated considerable parliamentary support.

Yet the longer term the process of legal characterization associated with this political strategy resulted in a situation in which the Coalition government could claim that protections and sanctions offered by the criminal offences of trafficking, forced labour, and domestic servitude were sufficient to obviate the need for previously-existing employment rights or a path to citizenship.

As we have shown, the trafficking discourse has an elective affinity with traditional (civil and political) forms of human rights, and both are hegemonic and mutually reinforcing when it comes to combating modern slavery. However, the problem is that, rather than serving as the basis for an integrated approach to human rights that encompass economic and social rights, these regulatory approaches tend to repel and marginalize other forms of regulation designed to promote labour rights and managed migration. ILO indicators of forced labour, for example, have less legal 'force' than criminal offences because they are not directly justiciable. An approach to legal claims that understands different jurisdictions as simply additive does not account for how

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<sup>104</sup> Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2013) 34 *Comparative Labor Law and Policy Journal* 133, [164](#) .

<sup>105</sup> Anderson (n 12) 174.

differences in legal characterisation not only attract and repel particular jurisdictions and technologies of legal governance but how this process creates path dependence in approaches (legal and political). Thus an initial focus on trafficking makes the criminalization of slavery, domestic servitude, and forced labour a 'natural' political and legal outcome in contrast to an approach that endorses new or more robust labour and employment rights. Forces that attract and repel jurisdictions include social relations; when a moral script or political discourse acquires legal meaning it may, in the process of assigning legal jurisdiction, 'overspill' in ways social actors find difficult to control

Trafficking, slavery, and forced labour deploy the technology of the criminal law, and the goal is as much to punish villains, as it is to protect victims. It therefore also becomes easy to portray as the solution the exploitation of migrant domestic workers a strategy to close borders and keep out the foreign problem. It was the strategic focus on the exploitation of third country domestic workers admitted under ODW rather than all migrants, including those from the EU, which allowed domestic servitude to be seen as a foreign problem. Both the law and the state create borders, between jurisdictions, between nation states, and between categories of people within a territory. There is permeability (in the sense that migrants might gain citizenship rights, and approaches to trafficking might mobilise both criminal and human rights law), but in our present moment such permeability is constrained by the economic and immigration policies that privilege the mobility and social reproduction of the rich. While the ODW program is small in terms of the numbers of migrants admitted under it, it is symbolic of this politics and illustrative of how technologies of legal governance are mobilized in its cause.