Domestic Workers – the forgotten group?

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Yota Kravaritou was on the side of the oppressed. She fought for the rights of women. Domestic work is, therefore, a subject which she would have approved. The following considerations are dedicated to her memory.

1. Introduction

Labour law focuses on industrial work which, historically speaking, gave rise to most of its rules. Increasingly, it is picking up and encompassing problems of the service sector. Yet in Germany or in France it would be difficult to find a study devoted to domestic work, despite the immense number of books and articles on labour law that are published each year. Employment within a household tends to be regarded, in certain respects, as a private matter, unlike the activities of a saleswoman, nurse or office cleaner which are observable by all in the course of daily life.

As a first step, we will describe the phenomenon of domestic work and give a provisional definition. What is the legal status of domestic workers? Are they located inside or outside labour law? The next section will deal with the specific problems arising for this group of workers. Finally, we will concentrate on the measures that could be taken to improve the situation of workers in this category.

2. What is domestic work?

Domestic work is carried out in a household. It is based not on family obligations but on a relationship of a different type which should entail remuneration for the worker. In this context, it is possible to distinguish three main groups of activities.[1]

- Traditional housekeeping which includes cleaning, cooking, laundering and care of pets. It has been normally a privilege of the rich to employ one or more persons to perform these tasks, which may additionally include driving and gardening.

- Childcare. This could be described as education within the home, insofar as it comprises both the supervision of children's daily life as well as the intellectual activity of teaching. If both parents have a full-time job and no grandparents are available, then this form of domestic work is indispensable, even for families who cannot be regarded as privileged.

- Personal care. Workers in this category assist elderly or disabled persons who require personal services. In an aging society, the need for this kind of work is on the increase. Since the demand for

[1] Most of the following informationsis based on Report IV (1) of the International Labour Office to the International Labour Conference 2010 "Decent work for domestic workers" (www.ilo.org – "Domestic workers")

such services is not dependent on the affluence or reasonably comfortable economic situation of the recipients, financial problems will inevitably arise and ways of solving them have to be found.

3. Forms of domestic work

Domestic work is, in most cases, informal work. Frequently it is performed by migrant workers. The relationship between householder and worker may, theoretically, be governed by labour law but, in practice, this aspect of the situation tends not to be mentioned. No taxes or social security contributions are paid; labour inspectorates or courts are not expected to intervene; the activity will not appear in any official statistics. Even in a country like Germany, particularly the first form of domestic work ("housekeeping") will be an informal one. Tax offices sometimes actually appear surprised when such an activity is disclosed to them.

In some cases, domestic work is concealed beneath a family or neighbourly relationship. "Helpers" must pretend to belong to the family or to the neighbourhood in which people support each other. In reality, this constitutes a special kind of informal work which is even more dangerous for the worker insofar as "friendship" excludes normally payment.

Finally, domestic work may, in other cases, constitute a normal form of labour relationship that can exist between the head of household and the worker. In other instances, it is the result of an employment relationship with an agency which recruits domestic workers and sends them to work in households.

Domestic work can be a full-time job where the worker actually lives with the family. This applies in the case of the traditional maid and may be a necessity in the cases of childcare and personal care. Other activities, like cleaning the home, can be carried out on a part-time basis without living with the family. Such part-timers may work for more than one household, an arrangement which may create some additional problems.

4. Specific problems

Domestic workers are normally in a weaker situation than other employees. The reasons for this seem to be obvious.

Domestic workers live in a situation of intensive personal subordination. The members of the household may issue concrete instructions at any moment. In factories or offices the worker has to follow pre-established rules but only exceptionally will he or she receive an instruction. This might be described as a form of virtual subordination, existing in the background but almost never applied. The different situation prevailing in households may create a lot of dissatisfaction; the worker may be ill-treated, even abused.

Domestic workers are normally isolated from each other. Contacts can be established only during their spare time. To join a union would be considered strange behaviour by the employer and often penalised by dismissal. In most countries, laws protecting against dismissal do not apply to small units with only one or two workers. Resistance to inadequate working conditions is therefore possible only in an informal manner: work may be performed less conscientiously but the limits of such behaviour are very soon reached.

In many cases, domestic workers have no vocational qualifications; one worker can, therefore, easily be replaced by another. Even where this is not the case, especially in the case of personal care workers, their position on the labour market remains weak. Their activity resembles unpaid family work, this being an additional reason for their low wages which may also be considered acceptable insofar as the employer frequently lacks economic strength.

Working time may be regulated by law but in reality it is difficult to imagine that a childcare worker would fail to look after the child or solve problems arising during the night. Personal care workers, similarly, cannot refuse their services in the event of urgent need; the argument "I have already done my ten hours" would be considered grave misconduct.

If the worker lives in the household, a problem of privacy arises. Will s/he have her/his own room which can be locked? Are there certain periods of rest time during which contacts with other people are possible? Can phone calls be made unsupervised? Is health protection possible? Can a doctor be reached without difficulty? In most countries it would be extremely optimistic to imagine that all these questions could be answered positively.

5. Traditional legal remedies

The first thing that occurs to lawyers when they are faced with major problems is that the law should be improved. This may be a reasonable step in any legislative corpus in which domestic workers benefit from even less legal protection than other workers. It may be that they are excluded – as in China – from all protection afforded by labour law because the householder, their "employer", is not regarded as an employer in the legal sense. A further consequence of this may be that they are excluded also from the social security system. Under other legislative systems they are not entitled to join a union or participate in collective action. Even if they are included in the labour and social law system as a whole, they will normally suffer from the fact that entitlement to protection against dismissal requires a certain number of employees (for example, five or ten) virtually never reached in a household.

Abolition of the general or partial exclusion would be a useful step towards creation of equality with other categories of workers. Achievement of a better level of protection against dismissal would, however, require an important legal reform difficult to envisage in the near future.

What happens when domestic workers enjoy the same legal protection as other workers? In the large majority of cases the answer is quite simple Nothing. This is obvious in all circumstances in which domestic work is informal work. In reality, law does not exist in these cases and it makes absolutely no difference whether the theoretically applicable legislative provisions are favourable or otherwise.

If the relationship is – as happens exceptionally, and is more likely in the case of personal care workers – subject to legal regulation, the problem of implementation arises. Can a legal rule be so concrete as to regulate matters like unobserved phone calls or the requirement that the worker be given a separate room with a door that can be locked? What happens if there is no phone or lockable room in the house? A law-maker can forbid "inappropriate" instructions, but what will be considered "inappropriate" in practice? Sexual harassment can be strictly forbidden, but what will happen if the boss declares that the initiative was actually taken by the maid?

Nor are these the only obstacles. Even if the facts are clear, will a domestic worker send a letter to the labour inspectorate stating that her working time exceeds 12 hours a day? Will a domestic worker sue his employer in the labour court for incorrect payment of wages? Will he or she go to the data protection authority with a complaint that phone calls are impossible or allowed only in the presence of the "master"? Any person acting in this manner would lose his or her job on grounds of disloyalty or failure in the performance of duty. A well-informed employer would, of course, not mention such a motive because it could make the dismissal illegal. But he would probably give no reason at all or refer to circumstances that could reasonably prompt dismissal – disappearance of an object which the worker might be suspected of having taken; excessively slow work on the part of the maid or inappropriate remarks made to her employer, etc. In Germany, more than 600 000 complaints are made to the labour courts every year but among the considerable number of published judgments no court decision concerning domestic work is to be found.

6. New and better legal rules?

It is possible, of course, to seek to put in place very concrete legal provisions dealing with the situation of domestic workers. South Africa offers an example of this kind.[2] (Former) common law countries will have less difficulty in entering into details than continental countries with their civil code traditions that almost inevitably produce quite abstract rules. Even so, it is not impossible to cross traditional borders. The quality and appropriateness of rules does not seem to be the main obstacle.

The real problems are connected with the control of implementation. Labour inspectorates and courts as the main instruments cannot rely on an initiative coming from the individual concerned. The labour inspectorate has to rely on its own powers of control. As it normally does not have even enough inspectors to visit all workplaces at least once a year, where would the human resources be found if inpectorates were to control units as small as households? The public budget is not big enough to hire a sizeable number of additional inspectors – at least in the view of the majorities in the parliaments

[2] See Shireen Ally, From Servants to Workers. South African Domestic Workers and the Democratic State, University of KwaZulu-Natal Press 2009

and of influential pressure groups. In former times Marx criticized the lack of inspectors in Britain which made all legal restrictions of weekly working time quite useless, and his evaluation is valid still today. In some countries, what is more, there would be no legal right to enter a private house or apartment in order to inspect working conditions. Whereas factories and offices are, in significant respects, open to professional and commercial communication, including the intervention of a labour inspectorate, households belong to the private sphere which may be disturbed only in highly specific types of instance explicitly enumerated by law.

Can the labour court intervene without any activity on the part of the worker? The liberal tradition considers a lawsuit to be a procedure between two equal parties with comparable rights and duties. It is astonishing that the generally accepted rule that the worker is the weaker partner in the labour relationship is completely forgotten as soon as employer and worker are in a court building. In reality, there is a major need to modify the rules of civil procedure in labour matters. The first and most important change required relates to the principle that the court will deal with a case only on the basis of a complaint introduced by one of the parties: consumer protection law has produced in the EU the possibility of consumers' associations initiating a lawsuit against an entrepreneur without any individual being directly involved. Until now, labour law has had major difficulties in following the example of consumer protection law. This may initially seem astonishing as a consumer will not be threatened by sanctions: to bring a lawsuit against *Carrefour* or *El Corte ingles* will not lead to a prohibition on entering its subsidiaries or a refusal to sell goods or conclude other contracts. Of course, a consumer will find it difficult to go to court, insofar as the legal situation appears to her confusing, to consult a lawyer costs money and a lawsuit may be quite time-consuming. The reasons for placing matters in the hands of consumer associations are well-founded, but there are even more convincing reasons to establish a comparable right for workers and their organisations. If the national legislator hesitates to take such a step, the reason does not lie in the weaker situation of the worker but, more likely, in the fear that giving more rights to workers' organisations could considerably strengthen the situation of unions, an undesirable outcome in the eyes of the majority of decision-makers.

There is, however, one special field in which, in many countries, the position of the legislator is much less "cautious", namely, antidiscrimination law. There are "Equal employment opportunity" commissions that have the task of supervising, for example, the conclusion of labour contracts, and of acting on their own behalf in taking measures against discriminatory practices. Might not this represent an important instrument in favour of domestic workers?

Domestic work is undervalued and characterized by various other disadvantages that have been described above. This state of affairs may be regarded as discrimination against a whole branch of activities compared to other branches involving similar kinds of work, performed by a majority of men and not of women. But the problem is that antidiscrimination law has a more restricted field of application. It deals with discrimination occurring in the same enterprise and with discrimination deriving from a specific legal instrument like a state law or a collective agreement. While the European Court of Justice once emphasized that the principle of ex-Art. 119 of the EEC Treaty aims at wage

equality in society as a whole[3], there is not a single case in which this rule has found concrete application. Even in the legal literature it has been seldom mentioned. The reason for this may be that to take this point of departure seriously would be to create major changes on the labour market which are not desired by the large majority of influential organisations. Efforts to improve the situation of domestic workers must, therefore, move along other paths.

7. Usefulness of an ILO Convention?

The ILO is currently examining whether its member states and the social partners wish to have a special instrument – a convention or a recommendation – in the field of domestic work. Domestic work is on the agenda of the International Labour Conference in 2010 and, if standard-setting as such is approved, a decision on a convention or a recommendation (or both) will be taken in 2011. Would not this be an important contribution to the decent work "campaign"? Answers to a questionnaire sent to member states and social partners in March 2009 show that a clear majority is in favour of an instrument: 72 States, 10 employers' organisations (with 7 votes against) and 124 trade unions. Will that be sufficient to convince at least a proportion of those employers who failed to respond? Will the Labour Conference take a majority decision in this field? Any answer at this moment is quite impossible for anyone not in possession of insider knowledge of the ILO's diplomatic rules.

But let us be optimistic for one moment and imagine the International Labour Conference inspired by a spirit of courage to fight for a better future for domestic workers. Is it conceivable that it will enact rules that go beyond "minimum wages" and "fair treatment" of domestic workers? Will it be able to lay down rules that will lead to implementation in all those member states that decide to ratify the convention? Better rights and more human resources for labour inspectorates, access to courts not only by individuals but also by unions acting on their behalf? This naturally sounds very much like utopia! Even a rule such as "the national minimum wage applies to domestic workers" is not easy to implement. For what about states that have no minimum wage, such as Sweden and Germany? If such a rule were amended to state that "the national minimum wage, where it exists, applies also to domestic workers", would this not then constitute an incentive for member states to choose not to introduce a minimum wage or to abolish the existing rules if the political situation were to allow it? And even if you prefer to set aside these issues, how then do you calculate the minimum wage in cases where the worker is provided with food and board by the employer? Should there not be a specific minimum wage taking these particular circumstances into account? A positive answer to this question would require us to deal with the problem that, in many countries, the regular minimum wage is far below what is required for a person to live modestly but decently. Are we to make an exception for domestic workers and give them a real right to a decent life? I can imagine the protests based on economic restrictions and – input from the legal advisor will be useful here – on the principle of equality. Why should there be special rights for domestic workers and no comparable rights for miners, steel workers and nurses?

[3] European Court of Justice, 8.4.1976 – C-43/75, ECR 1976 p. 455 = Neue Juristische Wochenschrift 1976, p. 2068, 2069 – Defrenne II

Labour law is a highly complicated network even on the national level. Changing a single element is liable to provoke unwanted effects in other respects. To evaluate these possible repercussions requires a comprehensive knowledge not only of written law but of case law too and an understanding of how courts are likely to react to an amended legal framework. The complexity increases to an extreme degree if a rule is drawn up that then has to be incorporated into 50 or 100 different national legislative corpuses. It is inevitable that whatever wording is selected will be open to numerous interpretations? Will that be helpful for domestic workers?

One way round this problem, theoretically, might be to concentrate on implementation procedures without any change of substantial rules. This is, in some measure, the method chosen by the NAFTA side agreement where the supervisory boards merely control the implementation of the national law. A procedure that was deemed viable between three American States cannot be transferred to the international level at which the ILO is operating. Taking rights seriously would be the biggest change the ILO has ever produced. Were we living in an age where completion of the welfare state was a generally accepted principle, such an idea would probably be extremely helpful. But as we still live in an era from which, despite major crisis, neoliberalism has not disappeared, there is no chance of realising such a concept.

Should we, therefore, put away and forget all ILO activities in this field? The answer is a – hesitant – "no". The ILO activities will at least concentrate the attention of governments and people dealing with social policy on the problems of domestic work. It will appear on the scene of publicly debated issues and this represents a considerable step forward for those whose working conditions interested nobody, who, it might be said, were living in the shadow.

8. New solutions

For all the reasons described above labour law is not operational in the relationship between the domestic worker and the employer. What can be done in such cases? Are there other kinds of labour relationship with comparable problems? Can we find elsewhere a best – or at least a better – practice?

A comparable situation is that of agricultural workers living with small farmers. As far as I am aware, there has been no development of regulatory examples that might serve as a point of reference. Workers in small shops living with the owner are a second group with similar conditions but "good examples" are absent in this field too.

If an employment relationship is by nature obviously unable to provide the necessary protection for the worker, another way out should be tried: why not replace the employer by a third (and larger) unit, with which the legal links are established? Instead of relating exclusively to the relationship between worker and employer, the need for protection of the worker should be placed at the centre of the reform and a legal framework constructed in pursuit of this aim. There are two experiences which could perhaps justify such a way of thinking.

The first relates to dockers in sea harbours. The various undertakings present in the harbour have, at certain times, to perform a volume of work that is followed by periods of no activity. If labour contracts were to reflect the discontinuous nature of the work, employees would have only fixed-term contracts lasting two or three weeks, entailing deprivation of annual leave and other social advantages provided for those working for a longer period. In order to prevent such a precarious form of labour, there has been established, in many countries, what may be described as an artificial employer: a unit is created by law or by collective agreement in order to conclude open-ended labour contracts with the workers. The unit sends the workers to those enterprises currently needing additional labour. This arrangement might be seen as a predecessor of what is currently described as temporary agency work, entailing socially acceptable conditions and a high level of stability. Whereas bilateral contracts between workers and employers would not guarantee a sufficient degree of protection, the contract with the artificial employer is able to do just this.

The second experience follows a comparable pattern. In Los Angeles/California about 74,000 home-care aides became unionized during the 1990s. The union's activities lasted a decade but cannot be described here.[4] The problem was whether or not these workers could be considered self-employed and whether, in the absence of a recognizable employer, they would be governed by federal or by state law. Much of the home-care work was provided to "subsidized consumers, whose expenses are defrayed by a complex multilevel funding scheme financed by federal, state and local governments." The report given by Karl Klare continues:[5]

> "After some false starts, the union concluded that it would have to create an employer, an objective that could be accomplished only through the political process. After years of lobbying, California enacted legislation authorizing its county governments to establish 'home-care authorities' which would receive and dispense the funding and act as employers. To achieve this, the union had to sustain the energy and enthusiasm of its ever-changing grassroots base…"

The creation of an artificial employer is a necessary but not a sufficient condition for solving at least some of our problems. There is a need for social standards to be imposed on the new employer, such as minimum wage, maximum working time, health protection, etc. According to national traditions, it is possible to imagine a common administration of the new employer by the financing units and the unions. Moreover, a grievance procedure should be available for the domestic worker, one able to be used, in the event of workplace conflict, without risking future employment: if the worker had been ill-treated or abused, a complaint would lead to a transfer to another place. The ugly alternative between acceptance of poor conditions or facing unemployment would cease to exist. A step along these lines is currently being discussed in Shanghai.[6]

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[4] For all details s. Klare, Horizons of Transformative Labour and Employment Law, in:Conaghan/Fischl/Klare (ed.), *Labour Law in an Era of Globalization*, Oxford 2005, p. 20 ff.

[5] Klare, op. cit., p. 22.

[6] See International Conference about "„ocial Security for Domestic Workers"" organized by the Friedrich -bert -oundation and the Shanghai Women'´ Federation, 16-17 March 2010, Shanghai

Such a model cannot be enforced by creating a monopoly of the artificial employer to send workers. Such an arrangement may exist in some harbours, but it would not be realistic to deprive private individuals of the right to hire directly a person to carry out activities in their household. The approach that is possible would be to make workers coming from the “agency” more attractive: if such workers were in possession of specific skills, vouched for by the agency, before being sent out to households, then many “customers” would prefer to call on the services of the new unit rather than going to the general labour market and placing an advertisement in the local newspaper.

Without any doubt, any solution along these lines will entail numerous problems which we have failed to see or omitted to discuss. But uncertainty must not block our activities. To take some first steps without paying too much attention to “scientific” scepticism is to act in a spirit of faithfulness to the ideas of Yota Kravaritou.