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Viewing domestic workers problems through a human rights lens

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Abstract

Purpose – The purpose of this paper is to examine the pattern and attitude of the UK government towards international frameworks that promotes humane treatment of domestic workers and the respect of their human rights. This paper also examines the UK government continued refusal to adopt ILO Convention 189 that consolidates the framework for regulating domestic work.

Design/methodology/approach – Using the concept of human rights, this paper conducts an extensive literature review on domestic workers; migrants in particular.

Findings – This paper concludes that the best way to deal with the problems faced by domestic workers in the UK is the inclusion of them in all aspects of employment and health and safety protection, the regulation of domestic work, and a review of the domestic workers visas.

Research limitations/implications – The Home Office has commissioned a panel to look into the effect of the current domestic workers visa on the vulnerability of the workers. The panel's report is yet to be released as at the time of drafting this viewpoint.

Practical implications – This paper contains useful informational for policy makers, NGOs, and academics.

Social implications – This papers is a useful tool for a symposium, seminar, or conference.

Originality/value – This paper contains original work of the author; except where copyright is acknowledged.

Keywords Employment, Gender, Discrimination, Equal opportunities, Immigration, Government policy

Paper type Viewpoint

Foreword

Cross-border migration has changed the dynamic of private households' workforce in the UK. Domestic work that is historically performed by the poor, destitute natives, and slaves (Delap, 2012) has become a target job for migrants, especially women from the developing countries (International Labour Organisation (ILO), 2010a, b, c; Lutz, 2008). The need for non-family members to take on paid job in European households partly arises from the care deficit (Ehrenreich and Hochschild, 2003) that has resulted from a decline in traditional European housewives (Bennhold, 2010). The market for overseas domestic workers (ODWs) creates challenges to policy makers who have to find a better way of managing their flow, protect their human rights, and maximise migration's contributions to growth and development (International Labour Organisation (ILO), 2004a, b). Amongst the challenges that confronts the UK government is the task of balancing migration control with the admission of low skilled migrants such as ODWs (Home Office, 2012a, b, c).

Modern day domestic workers in the UK are no better than their counterparts in the early nineteenth century England who were hardly protected by law, stereotyped, and treated with prejudice (Davidoff, 1974; Delap, 2012). Despite a continued overall improvement in the UK Labour laws and related laws, amongst the aspects of domestic workers that have remained unchanged include the lack of job recognition, their

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invisibility to the public, limited employment rights, and a lack of legal protection (Salih, 2013a, b). These deficits contribute to or precipitate employers' disregard for their domestic workers' rights, the discrimination against the workers, and the exposure of them to servitude, exploitation, and abuses (Human Rights Watch (HRW), 2014; International Labour Organisation (ILO), 2013a, b). As a highly feminised and informal sector (International Labour Organisation (ILO), 2010a, b, c), the households predispose domestic workers to a sub-standard working conditions and a high degree of vulnerability to the risk of hazards and work-related diseases (Fevre *et al.*, 2010). The unusual nature of the household as a workplace creates friction between public and private law, and has resulted in the lack of job regulation (Lutz, 2008).

Due to a combination of factors such as poor social-economic background (Ehrenreich and Hochschild, 2003), immigration status (Anderson, 2010), type of employer, and government policy, the workers' vulnerability in the labour market has increased. The plight of domestic workers in the UK is complicated by a change in the government policy towards them as reflected by the changes to their visas on 6th April 2012. Before these changes, ODWs were allowed to stay more than 12 months provided their services are required by their employers. However, since 6th April 2012, newly admitted domestic workers are only allowed a maximum of six months, after which they must depart from the UK. Although those admitted to work in the diplomatic households could still stay beyond 12 months if required, they are unable to change from diplomatic employers to private employers. Even though they may stay up to five years if required, they are not entitled to apply for permanent residence permit. This is despite the policy that allows those on work visas (Tier 2 visa) to apply for permanent residence after a continuous period of five years in the UK.

Although Kalayaan (2014), a charity founded in 1987 to provide advice, advocacy, and support to ODWs in the UK reported in 2014 that the numbers of ODWs that have been abused and exploited since the new visa was introduced has increased, the statistic that was presented appears insignificantly persuasive. However, the lack of substantial statistical data does not make the report less credible. Besides, lived experience is not something that can be measured statistically. The lack of substantial data on the number of ODWs escaping their employers could be due to factors such as the lack of incentive. ODWs on the new visa who escape their employers are unable to take on a new job because their visa become invalid immediately they escape the employers. They must also leave the UK voluntarily except they have a genuine case for humanitarian protection.

Domestic workers labour rights as human rights

Human rights are an umbrella of rights that include cultural, social, political, and economic rights which impact on all aspects of human lives (UNHCR, 2005). Thus, from a liberal perspective, "all human beings should be accorded certain fundamental rights by virtue of their humanity" (Collins, 2011, p. 140). There have been extensive discussions and ongoing debates amongst academics, legal practitioners, NGOs, and policy makers about whether labour rights could count as human rights (Adams, 2001a; Collins, 2011; Ewing, 1998; Fudge, 2007; International Labour Organisation (ILO), 1998a, b; Mantouvalou, 2012; Palmer, 2000). Although the International Labour Organisation (ILO) that sets international labour standards predates human rights treaties (Mantouvalou, 2012), given that labour rights are intrinsically part of economic rights, and economic rights falls within the ambit of human rights, it makes sense to

interpret labour rights in the light of human rights. Both migrants and non-migrant workers would benefit from having their labour rights interpreted as human rights. However, migrant workers would benefit more because the stigma of migration makes them more vulnerable than the non-migrant workers (Rechel *et al.*, 2011). Also, restrictive immigration policies adopted by the UK government aggravate public hostility towards the migrant workers (Blinder, 2012).

According to OSCE (2009, p. 14) "more women are migrating and the demand for workers in female-dominated sectors are ever-increasing, such as in domestic work". However, these workers continue to experience less favourable treatment (International Labour Organisation (ILO), 2009). Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women defines discrimination as an unfair distinction, exclusion, or restriction on the basis of gender. Hence, any policy under which domestic workers are treated less favourably could be tantamount to gender discrimination. Discrimination of any kind offends against the basic principle of human rights which provides that all human beings deserve to be treated equally and with respect (Rawls, 1971).

It is clear from Article 1(3) of the UN Charter that the UN is committed to encouraging respect for human rights for all without distinction. Against this backdrop, the Committee on the Elimination of Racial Discrimination (2004) has asserted that the convention on the elimination of all forms of racial discrimination must be construed to avoid undermining the basic prohibition of discrimination and in a way that allows citizens and non-citizens to enjoy equal protection and recognition before the law.

Amongst the problems of domestic workers discussed at the 87th Session of the International Labour Congress (ILC) in 1999 include the lack of contract of employment, inadequate remuneration, and maternity leave. These problems persist in the twenty-first century. Under Regulation 2(2) of the National Minimum Wage Regulations 1999, domestic workers in the UK are not entitled to the minimum wage if they have been treated as a family member of the employers. What constitutes treatment as a family member remains controversial. In *Nambalat v Taher & Anor: Udin v Pasha & Ors* (2012) EWCA Civ 1249, the court of appeal held, in deciding whether a worker has been treated as a family member, the issue is whether the employer provided the worker with accommodation, meal, and share tasks and leisure activities with the worker. Literally, it suffices if the employer has provided any form of accommodation and feeding. The court is not interested in the type of accommodation, the quality or quantity of meal that was provided. This law allows unscrupulous employers to exploit their domestic workers and puts the workers in a socially and economically disadvantaged position.

Domestic workers often work very long, unsocial hours without pay and/or protection (ILO, 2013a, b). The European Working Time Directive 2003/88/EC obliges Member States to ensure all workers in their territories are protected against work-related adverse effects and health and safety hazards that are secondary to excessively long working hours, inadequate rest, or disruptive working patterns.

While Member States have taken actions to improve the lives of most workers, domestic workers are excluded from protection. The UK Working Time Regulation 1998 that implements Directive 2003/88/EC explicitly excludes domestic workers from:

(1) the maximum weekly working time at 48 hours, including overtime – Regulation 4;

(2) a provision that night work shall not exceed an average of eight hours for each 24 hours – Regulation 6;

(3) prohibition of employer from assigning the worker to work at night – Regulation 7; and

(4) the obligation on the employer not to do anything that would put the health and safety of the worker at risk – Regulation 8.

The declaration of the principles and rights at work adopted by the ILO in June 1998, linked labour rights to human rights and reiterated the four ILO fundamental principles, namely: the prohibition of unfair discrimination, right of free association and collective bargaining, freedom from forced and compulsory labour, and the eradication of child labour. According to United Nations General Assembly (UNGA) (2010a, b) report, amongst the earlier international labour frameworks that protect migrants, but which, the UK government had refused to adopt include the ILO Migrant Workers (Supplementary Provisions) Convention 143 and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The UK government has so far not argued ODWs are not required in the UK, but preferred to curtail their rights. In addition to the documented ODWs who are vaguely protected by law, the position of the undocumented ODWs is in a legal limbo. Under the "doctrine of illegality", a legal maxim of *ex turpi causa non actio oritur,* UK courts would refuse to hear employment claims where the work has been arranged or performed illegally. In *Hounga v Allen* (2014) UKSC 47, a domestic worker who has been trafficked for domestic servitude could not claim in contract against the employer/trafficker because she did not have visa to work in the UK.

The Universal Declaration of Human Rights (UDHR) 1948 which the UK is a signatory, sets the framework for international human rights and obliges signatory States to respect and protect the human rights of everyone within their territory; irrespective of nationality or status (see Office of the United Nations High Commissioner for Human Rights, 1986). Recognising labour rights as human rights, Article 24 UDHR provides that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. The right to a standard of living adequate for the health and well-being is enshrined within Article 25 UDHR. The European Convention on Human Rights (ECHR) replicates all the rights contained within the UDHR 1948. By enacting the Human Rights Act 1998, the UK parliament has obliged the government to act according to the principles of the UDHR 1948. Article 3 ECHR prohibits torture and inhuman or degrading treatment, while Article 4 ECHR prohibits holding anyone in slavery or servitude condition. Similarly the ILO Forced Labour Convention 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105) oblige Member States to take positive steps in combating forced labour. Yet, domestic workers in the UK are continuously exposed to servitude and degrading treatment by their employers who continued to evade justice (HRW, 2014).

In *Siliadin v. France* (application no. 73316/01), Siliadin, a Togolese national who was under the age of 18 when she accompanied a French National of Togolese origin to France averred that she was enslaved by the employer and have experienced degrading treatment. She complained that her employer failed to regularised her immigration status and send her to school as promised. She also complained that the employer confiscated her passport and made her work long hours without adequate rest and without pay. Although the European Court of Human Rights (ECtHR) ruled

she was not slaved contrary to Article 3 ECHR because the employer had no genuine right of legal ownership over her, the court held, her overall treatment amounted to servitude contrary to Article 4 ECHR.

The difficulty of proving "slavery" is further evident in *C.N.* and *V. v. France* (application no. 67724/09) where two orphaned sisters aged 16 and ten complained that they were kept by the same employer as slaves. Unable to find that they were enslaved, the court held, they were subjected to servitude and forced labour. It became obvious that the chance of any victim, proving that he/she was enslaved is very high as he/she must show that a physical barrier prevented him/her from escaping the captor.

Before 2009, victims of domestic servitude in the UK had no means of seeking redress. In *C.N. v.* the UK (no. 4239/08), a Ugandan woman complained to the ECtHR that she had been forced into working as a live-in carer and subjected to domestic servitude by her employer in violation of Article 4 ECHR. Upon the ECtHR ruling that the UK has failed to enact measures that could be used to hold human traffickers criminally liable, the UK implemented s. 71 of the Coroner and Justice Act 2009 that enables the prosecution of anyone who has trafficked people in the UK for domestic servitude.

The new Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29) and the accompanying Recommendation 203 adopted at the 103rd ILC session (11 June 2014) now lay greater emphasis on the protection of the victims and access to justice. The preamble of the Protocol clearly links forced labour to a breach of human rights. Within Article 4 of the protocol, signatory States are obliged to treat legal and illegal workers equally. It follows that immigration status should not be a barrier to protecting and supporting the victims, and in assisting them to access justice and claim compensation against the abuser. This provision, if implemented by the UK government, could assist ODWs to argue against negative effects of the doctrine of illegality. Further, Article 2(f) obliges signatory States to take positive steps in addressing the root causes and factors that heighten the risks of forced labour. The competent authorities must consider factors which render victims vulnerable to trafficking when making a decision to return victims who are foreign nationals to their countries.

Trafficking for domestic servitude

The UN Protocol to prevent, suppress, and punish trafficking also known as the "Palermo Protocol" is the first international instrument to define and address trafficking. But, it mainly concerned itself with penalising and deterring traffickers. Also, the provision under Article 6 that obliges signatory States to provide assistance and protect the victims of trafficking in persons is mainly ignored (OSCE, 2006). Further, the annex to the United Nations Global Plan of Action to Combat Trafficking in Persons (UNGA, 2010b) obliges Member States to take positive steps to promote the human rights of the victims of trafficking. The scale of trafficking for domestic servitude is unknown and extremely difficult to assess because domestic servitude is mostly undocumented (OSCE, 2010). However, the OSCE has observed that trafficking for domestic servitude covers a range of situations, all of which share features such as: forced labour, obligation to provide work for a private individual, low or no salary, no days off, psychological and/or physical violence, limited or restricted freedom of movement, and the impossibility of a private life.

The Palermo protocol has been incorporated into the Council of Europe Convention on Action against Trafficking in Human Beings. Articles 11-13 oblige Member States to

protect, assist, and allow the victims of trafficking a period of reflection. Under Article 14, renewable residence permit should be issued to victims of trafficking on an individual basis. Article 15 obliges Member States provide the victims with an access to compensation and legal redress. Significantly, Article 26 obliges Member States not to impose penalties on the victims for their involvement in unlawful activities, to the extent that they have been compelled to do so. The provisions of the Convention that were formerly incorporated within the Council Framework Decision 2002/629/JHA, has been replaced by Directive 2011/36/EU. This directive sets out minimum standards to be applied throughout the EU in preventing and combating human trafficking, and protecting the victims.

The UK signed the Council of Europe Convention on Action against Trafficking in Human Beings on 23 March 2007 and implemented it on 1st April 2009. The UK Human Trafficking Centre that act as the competent body of the NRM intended to provide a way for all agencies such as the police, the UK Border Agency, local authorities and NGOs to cooperate, share information about potential victims, identify those victims and facilitate their access to advice, accommodation and support. However, the government has conceded that the hidden nature of trafficking makes it difficult to gain an accurate picture of its true scale and nature (Home Office, 2014). The government has also conceded that more still needs to be done on the identification and the treatment of the victims, as well as bringing the traffickers to justice (Home Office, 2012a, b, c).

Some of the victims of trafficking experience harshness in the law through the prosecution of them for a crime that they may have committed under duress or in an attempt to flee those responsible for trafficking and/or exploiting them. In *L, HVN, THN* and *T.v.R* (Children's Commissioner for England and the Equality and Human Rights Commission intervening) (2013) EWCA Crim 991, the court of appeal quashed the convictions of the four young Vietnamese who have been trafficked and forced to work in cannabis factories. One of the key problems with prosecuting victims of trafficking is the inability of the crown prosecution services, the Police, and or the Home office to find them credible as genuine victims of trafficking (Home Office, 2012a, b, c, p. 37). In *R.v. Ajayi* (2010) EWCA Crim 471, the court of appeal stated "we accept that a person who has been trafficked may give different accounts, or be understood to have given different accounts, for various reasons; there may be problems of translation; there may be problems occasioned by trauma; or one may have a situation in which somebody who is a genuine victim glosses the story in order to make it more believable". Perhaps the reason why finding a victim of trafficking credible is problematic for the Home Office is that such finding would trigger the eligibility of the victim to humanitarian protection; hence a form of residence permit.

In addition to those who have been trafficked and have entered the UK without any or the proper immigration document, whereby making them undocumented and prone to domestic servitude, those on valid ODWs visa may also be victims of trafficking if the employer has lied to them about the nature of the job and their entitlement. Possibly, realizing the defects in the current law which, do not allow /encourage the domestic workers to free themselves from domestic servitude, the Government has enacted the Modern Slavery Act 2015 (MSA, 2015). However, the law which received royal assent on 26th March 2015 fails to adequately address the lack of an escape route for the victims and the need to enshrine the workers' human rights into law. The nature of the intense debates in both houses of parliament before the Bill received royal assent

is indicative of either the government lack of understanding of the problems of the ODWs or a blatant disregard for their plight. With the current ODWs visa restricting the rights of domestic workers, and with the continued exclusion of ODWs from vital aspects of employment and health and safety laws, more positive steps in the right direction are required.

Which way forward?

The UK government policy that prioritises business entrepreneurs and highly skilled workers over the low skill migrant workers such as domestic workers (Murray, 2011) may be essential in a democratic society, but it must be balanced with the government obligation to protect workers within its territory. The exclusion of domestic workers from labour and health and safety protections is not proportionate to a legitimate measure to achieve government's goal. The exclusion could therefore constitute an affront to the workers' basic rights. Domestic workers may be vulnerable workers and the household as an informal sector may expose them to a precarious working condition (Forastieri, 1999; ILO, 2011a, b; McKay *et al.*, 2012; Tilly *et al.*, 2013), the vulnerability and the precarity could be managed if their basic human rights are respected by the employers.

By implementing measures which take human rights protection into full consideration, policy makers would be sending a clear signal to employers that the human rights of their workers should be respected. For instance, following the public concern over the tragic death by drowning of 23 Chinese cockle pickers in Morecambe Bay in 2004, and the subsequent newspaper articles that depicted the outcry (Lawrence *et al.*, 2004), the government enacted and implemented the Gangmasters (Licensing) Act 2004 to protect the vulnerable workers whilst, supporting and encouraging economic growth. The implementation of this law brought improvement to the health and safety and well-being of the seasonal workers and related workers.

The international framework for the protection of domestic workers is now contained within the ILO Convention 189 and its accompanying Recommendation 201 adopted on 16th June 2011. This Convention, which sets the current international standards for domestic workers worldwide, has been hailed as a landmark treaty by Human Rights Watch (HRW) (2011). The main focus of the Convention is to close the gaps in the vulnerability of domestic workers and prevent the abuse of them by their employers by guaranteeing minimum labour protections and recognising their fundamental rights as workers (ILO, 2011a, b). Amongst the key rights enshrined in the Convention include:

(1) promotion and protection of the fundamental human rights of all domestic workers (Article 3);

(2) protection against all forms of abuse, harassment, and violence (Article 5);

(3) enjoyment of fair terms of employment as well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy (Articles 6-9);

(4) guarantee to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave, on call, and the regulations or collective agreement (Article 10);

(5) ensure that domestic workers enjoy minimum wage coverage without discrimination based on sex (Article 11);

(6) the right to a safe and healthy working environment (Article 13);

(7) respect for social security protection, including maternity benefits (Article 14); and

(8) access to courts, tribunals, or other dispute resolution mechanisms (Article 16).

The accompanying Recommendation 201 provides practical guidance concerning possible legal and other measures to implement the rights and principles stated in the Convention. Since the Convention came into force on 5th September 2013, it has been ratified by a few countries including Italy and Germany. The ILO (2012) guidance on designing labour law to implement the Convention obliges law and policy makers to bear the gendered aspect of domestic work in mind, promote laws that provide adequate protection from abuse, harassment, violence, pay discrimination, and maternity protection. Although the European Commission has issued communique COM (European Commission - COM, 2013) 152 final 2013/0085 (NLE) to authorised Member States to adopt the Convention, the UK government has refused to adopt it.

Although the Convention sets a blueprint for humane treatment of domestic workers, it has no legal force and ratifying States are allowed to opt out of some of its provisions. Notably, the German government implements the Convention by simply reiterating the existing German national law is capable of dealing with the convention provisions without any need to enact new laws (see Bundesregierung Deustchland, 2012a, b, Schwenken, 2013b). However, a review of German labour law shows a loophole in the protection of mainly live-in domestic workers (Schwenken, 2013a). Paradoxically, the UK is amongst the countries that have been singled out for not doing enough to protect domestic workers (ILO, 2010a, b, c).

Refusing to ratify Convention 189, the UK government cited amongst others, the irreconcilable differences between the Convention and the UK health and safety law (Department of Business, Innovation and Skills, 2013). Understandably, obliging households to implement health and safety measures and authorising the health and safety executives (HSE) to conduct inspections of the households sounds intruding into private affairs. However, any household that employs people has qualified as an employer. There is therefore no reason why health and safety measures should not apply to such household. Besides, the HSE does not appear to have the logistics to inspect all businesses or workplaces in the UK. Inspections would be carried out where the risks are likely to be highest and where it will have the greatest impact. Thus, the fear of the UK government about intrusion into private matters do not stand tall. By extending health and safety protections to the households, the government will be putting domestic workers' employers on notice that they need to perform an adequate risk assessment and ensure issues like stress, which could originate from long working hours without adequate breaks, and work-related hazards are properly dealt with. Nevertheless, since health and safety is just one of the matters contained within Convention 189, the concern appears to have been overemphasised.

Notably, like the German government, the UK government has asserted that existing laws adequately protect domestic workers in the country. Such an assertion is regrettably wrong because live-in domestic worker in the UK are still subject to exclusion from working time protection and the minimum wage (HRW, 2014; ILO, 2013a, b). Furthermore, the damaging changes to the ODWs visa introduced by the Conservatives led government in April 2012 puts the immigration status of the workers in a precarious state and increases their vulnerability to abuse and exploitation. Given the return of the majority Conservative government to parliament on 7th May 2015, it is highly unlikely that things are going to get better for the ODWs in the UK.

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