

## Workers without rights as citizens at the margins

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This article presents a normative account of citizenship which requires respect for labour rights, as much as it requires respect for other human rights. The exclusion of certain categories of workers, such as domestic workers, from these rights is wrong. This article presents domestic workers as marginal citizens who are unfairly deprived of certain labour rights in national legal orders. It also shows that international human rights law counteracts the marginal legal status of this group of workers. By being attached to everyone simply by virtue of being human, irrespective of nationality, human rights can complement citizenship rights when both are viewed as normative standards. The example of domestic work as it has been approached in international human rights law in recent years, shows that certain rights of workers are universal. Their enjoyment cannot depend on citizenship as legal status or on regular residency. The enjoyment of labour rights as human rights depends, and should only depend, on the status of someone as a human being who is also a worker.

**Keywords:** marginal citizenship; human rights; labour rights; domestic workers

### Introduction

In a recent essay on citizenship and migrant domestic work, Linda Bosniak argued that ‘in the context of transnational domestic labor [...], characterizing the equality aspirations of employer women as matters of citizenship can work to obscure the status citizenship deprivations experienced by many of the female employees’ (Bosniak 2009, p. 147). The statement illustrates the following tension: participation in the labour market outside home empowers women to achieve equal citizenship to men. But this development is coupled by the expansion of the domestic work sector, which is under-regulated. Domestic workers, who are most of the time female, are disadvantaged because national law in many jurisdictions unfairly excludes them from much labour protective legislation. Domestic workers are also very often migrant, and immigration legislation in many

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national legal orders also disadvantages them. The lack of citizenship status (as legal status) leads to their exclusion from additional labour rights.

The situation and treatment of domestic workers is incompatible with a normative conception of citizenship, which requires respect for labour rights, together with civil, political and other social rights. The neglect of domestic workers' labour rights is problematic for citizenship theory with its emphasis on the protection of rights for community membership. Domestic workers remain excluded, marginal citizens.

International human rights law, on the other hand, counteracts the marginal status of groups of workers who lack certain legal rights in several national jurisdictions. Human rights are universal normative standards. Human rights law insists on the universal enjoyment of basic rights, including labour rights. To exemplify this, this paper presents recent developments in European human rights and international labour law which have brought the plight of migrant domestic workers to the forefront of discussions, having recognized that their exclusion from protective laws is incompatible with universal human rights principles.

If human rights inform the discussions of citizenship by untying rights from the status of nationality and bringing them closer to the ideal of universality, they help to bring domestic workers to the light, rather than keeping them in the margins of citizenship and the shadows of the labour market. They can complement the understanding of citizenship rights at a normative level, and ultimately enhance the protection of marginal citizens. Human rights can help advance an inclusive account of citizenship, which is suitable in today's world of increased labour migration.

### **Citizenship and rights**

The notion of citizenship has seen an explosion of interest in recent years in literature that approaches it from several angles: active citizenship or citizenship as political participation (Kymlicka and Norman 1994, p. 361), passive citizenship or citizenship as rights (Ignatieff 1989, p. 63), and formal citizenship or citizenship as legal status (Young 1989, p. 250). Even though these are separate lines of enquiry, there are links between them, in the sense that political participation, for instance, and the recognition of rights, create a feeling of community membership (Bellamy 2010).

Hannah Arendt described citizenship as the 'right to have rights', discussing the problem of statelessness (Arendt 1968, p. 177). The *locus classicus* on citizenship and rights, which is the focus of this piece, is the essay of the British sociologist T. H. Marshall. Marshall explored the notion as it developed in Britain in his influential essay 'Citizenship and Social Class' (Marshall 1997, p. 291). He defined citizenship as 'a status bestowed on those who are full members of a community. All who possess

the status are equal with respect to the rights and duties with which the status is endowed' (p. 300). Citizenship has three elements: the civil, the political and the social.

The civil element is composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. [...] By the political element, I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. [...] By the social element, I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society. (p. 294)

The inclusion of a social element as an essential component of citizenship has been particularly influential. This aspect of Marshall's theory is regularly referred to in human rights literature, for instance, that argues against the separation of civil, political and social rights in distinct categories in legal documents.<sup>1</sup> Social rights, such as the right to housing and the right to work, are essential elements of citizenship on Marshall's analysis, as much as civil and political rights are, like freedom of expression and privacy. Full citizenship entails civil, political and social rights.

Even though Marshall was a sociologist, and his analysis appeared historical and descriptive at first, theoretical scholarship examined its normative implications. In the essay 'Social Citizenship and the Defence of Welfare Provision', for instance, Jeremy Waldron asked what a modern notion of citizenship entails and what it signifies (Waldron 1993, p. 271). Waldron argued convincingly that Marshall analysed the way in which welfare provision ought to be viewed.

The suggestion is that we *ought* to associate welfare with citizenship because our concept of citizenship will be radically impoverished if we do not. Citizenship, on this account *demands* welfare provision; we cannot have an adequate notion of citizenship without it. (pp. 279–280)

Against this background, contemporary citizenship theory is a normative theory.<sup>2</sup> It explores what it means to be a full citizen in terms of rights and duties that individuals must have. It requires the protection of all categories of rights, and is not tied to citizenship as formal legal status.

Marshall's analysis is pertinent to the discussion of marginal citizenship because it places rights at the forefront of the discussion. Against this background, workers' rights, usually classified as social rights, cannot but constitute an essential component of citizenship too. Discussing American citizenship, Judith Shklar argued that the right to work is one of its central elements (Shklar 1995, p.1).<sup>3</sup> 'The dignity of work and of personal

achievement', said Shklar, 'and the contempt for aristocratic idleness, have since colonial times been an important part of American civic self-identification.' This is true for many countries, particularly in the Western world. The inclusion of a right to work as a fundamental citizenship right is particularly important in jurisdictions, like the United States, where it is not always protected in bills of rights or other human rights documents. It highlights the importance of earning in countries where '[a]ristocrats and slaves are anomalies' (p. 64). Paid work creates a sense of membership to community, and the value of citizenship as a normative concept emphasizes that.

Full citizenship requires the protection of all groups of rights. The notion of marginal citizenship (as opposed to full citizenship) captures those who are excluded from some of the rights of citizenship; those that live in a particular community, participate in that community through their work or otherwise, have certain rights, but are unfairly excluded from some other rights. More precisely, this article argues that the right to have a job is a necessary but not sufficient element for citizenship. Labour rights are also essential for citizenship.

Marginal citizens, then, for the purposes of this contribution, are those who are workers, but are excluded from protection of their labour rights through legislation. The marginalization of workers becomes particularly dramatic when they are migrant, and immigration legislation gives the employer a special power to exercise arbitrary control over them: a power to dominate them (Pettit 1999, p. 52). In these instances, we are faced with a most dramatic form of marginalization, because the worker does not have a power to change this condition without a very considerable cost (that of deportation).

In relation to immigration status, it should be noted before moving on that for citizenship theory, the idea of belonging is central. In the heart of the role of rights for citizenship lies the belief that only when a person enjoys the full range of rights can she or he be full member of a community. A community is not a synonym to the state, though, and the importance of belonging is not limited to state nationals. There is important literature on cosmopolitan citizenship that is based on the view that in a globalized world there is increased integration between states, so the boundaries of the communities are not clear (Bosniak 2000, Weinstock 2001, Benhabib 2004). Citizenship theorists are aware of the potential for exclusion of immigrants that lack citizenship as formal legal status.<sup>4</sup> Citizenship theory addresses the problem of the exclusion of foreign nationals by showing that even citizenship as formal legal status is not nowadays necessarily tied to nationality (e.g. Lehning 2001). Looking at the example of the European Union and the rights of migrant workers, for instance, Soysal developed the idea of post-national citizenship, in the context of which 'what were previously defined as national rights become entitlements legitimized on the basis of personhood' (Soysal 1995, p. 3).

This article focuses on domestic workers as marginal citizens. Even though the focus is on domestic workers, though, the argument applies equally to other marginalized workers, such as the self-employed and casual workers. A definition of domestic work and further analysis of its role today is necessary before moving on.

### **Domestic work**

Domestic workers typically work in private homes, performing various household tasks, such as cleaning, cooking, gardening and caring for children or elderly people (the latter are also known as ‘care workers’).<sup>5</sup> This type of work is gendered, and most of the times done by women (Anderson 2000). Domestic workers may be live-in or live-out (full-time or part-time), employees or independent contractors. Domestic work was delineated as a separate area of work when productive and reproductive work got separated. During Victorian times this type of work was performed by ‘menial or domestic servants’ for middle- and high-class families, and with the decline in domestic servant employment the weekly cash-in-hand cleaner has become important for professional couples. During the post-war period a shift occurred from the model of the ideal family with a single wage-earning male head of household to the ideal family being comprised of dual-wage earners. This new model of family life required accommodations of new patterns of work and family-life, which resulted, among other things, in an increasing need for domestic labour.

The positive effect of paid domestic work for contemporary society cannot be underestimated. With changes happening in the labour market, including the growth of the service economy, higher participation of women in the market, the sharing of household tasks by men and globalization, it has become clear that having domestic workers is beneficial for family members, employers and the market as a whole. In today’s economic setting, domestic work is vital for the sustainability and function of the economy outside the household. Domestic labour can also be a desirable job for workers who are not highly skilled and might not easily be employable in other occupations. Domestic workers are not always low skilled, though; they are sometimes educated, and migrate to work in the domestic labour sector in order to send income back to their home countries (Lutz 2007, p. 189). Like other jobs, domestic work can be fulfilling: the worker develops a personal relationship of trust with the employer, sometimes to a degree higher than other jobs, and may feel highly valued for the services provided.

Yet the particularities of domestic work set challenges too. The intimacy that often characterizes the relationship between the employer and the domestic worker makes her seem like a family member – not a worker. This sense of intimacy can be false, though, because the relationship

between the domestic worker and the employer, who is a woman most of the times, is characterized by a difference of status that the latter is often keen to maintain (Anderson 2007).

Domestic workers are workers, not family members, and are more vulnerable to labour exploitation than most other groups of workers. Much of the domestic labour workforce is composed of migrants who are often preferred by the employers to the country's nationals, particularly if they are live-in domestic workers. Immigration status, as will be explained below, makes the domestic worker vulnerable to abuse. Live-in domestic workers, who are most of the times migrants, are even more susceptible to ill-treatment. Domestic work is hard to regulate. It is invisible because it is performed away from the public eye, in the privacy of the employer's household. The location of domestic labour is an additional factor of vulnerability, as it makes the workers more prone to abuse by the employers as they are hidden from the authorities and the public.

Domestic labour also has a stigma attached to it, because it is the poorest and neediest who are occupied in it, and due to the tasks required from the workers, which are gendered and undervalued (Nussbaum 1999, p. 282). Domestic work is precarious for social (gender, race, migration and social class), psychological (intimacy and stigma), and also economic reasons (low pay).

Sadly, examples of abuse of domestic workers are widespread, as has been shown in research conducted under the auspices of the International Labour Organisation (ILO) and other international organizations that linked the working conditions of domestic workers to situations of slavery, and called for regulation of the sector.<sup>6</sup> There is also important academic literature that documents and analyses the problems associated with the working and living conditions of domestic workers (Anderson 2000, Bales 2000, ch. 1). Some numbers can illustrate the problem. A recent report by Kalayaan, a non-governmental organization (NGO) working on migrant domestic workers in the UK, said that in 2010, 60% of those who registered with it were not allowed out unaccompanied, 65% had their passport withheld, 54% suffered psychological abuse, 18% suffered physical abuse or assault, 3% were sexually abused, 26% did not receive adequate meals, and 49% did not have their own room. Their working conditions were exploitative: 67% worked seven days a week without time off, 58% had to be available 'on call' 24 hours a day, 48% worked at least 16 hours a day, and 56% received a weekly salary of £50 or less (Lalani 2011, p. 10).

Domestic workers are more vulnerable to abuse than other categories of workers for the reasons described above. Particularly when they are live-in, they are more susceptible to harm because they are hidden from the authorities. They are also less likely to report the harm suffered because they are almost always migrant and live in fear of deportation. Yet domestic work is

vital in today's world, when female family members participate in the labour market outside home. There is, therefore, a pressing need for regulation.

Is the regulation of the domestic labour sector satisfactory? As the following section shows, the answer to this question is negative. Domestic workers are excluded from many labour rights in national law, and are therefore treated as marginal citizens. Their exclusion is not justified and is often due to practicalities. This situation is coupled by very restrictive immigration rules. When they are immigrants, and hence do not have citizenship as formal legal status, domestic workers are faced with immigration legislation that facilitates their exploitation even further. The law pushes citizens to the margins, depriving them of the power to change their position.

How does the law treat domestic workers as marginal citizens?

### **Working conditions and union representation**

A few examples from national legislation that deprives domestic workers of labour rights that other workers possess help illustrate the problem of marginal citizenship. In many jurisdictions labour laws on working conditions and union representation differentiate the treatment of domestic workers from other workers (e.g. European Trade Union Confederation 2005, Ramirez-Machado 2003). In the UK, for instance, they are exempted from legislation on working time, minimum wage, and health and safety. Regulation 19 of the Working Time Regulations excludes domestic workers in private homes from the majority of Regulations 4–8 on maximum weekly working time, maximum working time for young workers, length of night work, night work by young workers, and restrictions on the patterns of work that can be set by employers when there is risk to the health and safety of a worker. These examples are by no means exceptional. Working-time exclusions are found in almost half of the countries surveyed in a report of the ILO (2010, p. 49), while at the same time the majority of the countries examined (83%) do not impose a limit on night work of domestic workers (p. 50).

On minimum wage, the UK Minimum Wage Regulations 1999 exempt family members and those living within the family household who are not family, but work in the household or for the family business, from the scope of protection. Canada, Finland, Japan and Switzerland offer further examples of such exclusion from minimum wage legislation (ILO 2010, p. 40). Further exclusions from the scope of legislation can be observed when it comes to trade union representation. Even though collective organization can have crucial effects for workers who are migrant and work in a household, such as a feeling of membership and inclusion in society,<sup>7</sup> various countries like Ethiopia and Jordan exclude them from protection (D'Souza 2010, p. 49).

Another area of law that treats domestic workers differently to other workers is the exemption from, or special regulation of, monitoring of working conditions through labour inspections. Section 51 of the UK Health and Safety at Work Act 1974, which regulates working conditions, inspection and sanctions, excludes domestic workers from its scope altogether. In France, inspectors can monitor the working conditions of domestic workers, but only after a court order. In other jurisdictions, the law sets special conditions for inspectors to be able to visit the household, such as a request by one of the parties (Ramirez-Machado 2003, p. 63).

Domestic workers, as it emerges, irrespective of their status as nationals or foreigners, are excluded from labour rights – both individual and collective – and pushed to the margins of the labour market. Having a right to work, which is a central element of citizenship, but no labour rights that other workers enjoy, domestic workers are not treated equally to them'.<sup>8</sup> This unequal treatment is not justified on grounds of principle, but is mainly due to the practical difficulties that the regulation of this sector raises. Yet immigration legislation is the key reason why domestic workers are described in this article as marginal citizens.

### **Immigration status**

Immigration legislation on domestic worker visas leads to the worst forms of marginalization, for it deprives domestic workers of the ability to change their position without a very considerable cost: that of deportation. In the UK, immigration rules (sections 159A-159H) allowed until recently domestic workers to change employers (but not their work sector). Following reforms, today when migrant domestic workers arrive lawfully in the country accompanying a particular employer, their visa status ties them to this employer. Their residency status is lawful for as long as the employer with whom they entered employs them. Immigration law gives the employer unprecedented power to control the domestic workers, who know that they will be deported if they lose their job (Anderson 2010b, p. 310). Similar programmes exist in other jurisdictions, like Canada (Carens 2008a, p. 433).

Migrant domestic workers are in a vulnerable position. Irregular migrants, namely workers who entered a country unlawfully or overstayed their visa or work permit, are the most precarious of all. Immigration law permits their deportation, since their status in the country is unlawful. Due to the fear of deportation, domestic workers often wish to remain invisible to the authorities, and their desire to remain invisible makes them vulnerable to abuse. But the anxiety of deportation is not the only implication of the irregular status of a migrant worker.

What is particularly troubling for the purposes of this article is that the irregular status of workers has implications for employment rights too, with



rules of employment law leading to further marginalization. In the UK, for example, the employment contract of an unlawful resident is considered to be illegal. Workers whose contract is illegal have very limited rights. The problem was illustrated in a case of the Employment Appeal Tribunal (EAT), where a migrant domestic worker, Ms Houna, who overstayed her tourist visa and kept on working as a domestic worker, was seriously ill-treated and eventually dismissed by her employer (*Allen (Nee Aboyade-Cole) v Houna*, [2011] UKEAT 0326\_10\_3103). Because of her irregular status in the UK, the tribunal ruled that the employment contract was illegal, so her claims for unfair dismissal, breach of contract, unpaid wages and holiday pay could not be enforced. The EAT said that ‘the courts exist to enforce the law, not to enforce illegality’ (para. 37). On its view, Ms Houna never had the right to work, so she could not claim loss of earnings because of her discriminatory dismissal. Only her discrimination claim was allowed, as it did not depend on a valid contract of employment. Yet the Court of Appeal was not willing to accept that the discrimination claim should be allowed for the reason that she was fully aware of the illegality (*Houna v Allen* [2012] EWCA Civ 609). The approach of courts in decisions such as *Houna*, which uphold an unlimited power of the employer for exploitation of irregular migrant workers, is problematic (Carens 2008b, p. 172) and reinforces the employer’s power of domination.

Citizenship requires recognition and protection of civil and political, and social and labour rights. Domestic workers, though, both when they have formal citizenship or a work permit, and – even more so – when they are unlawfully employed, suffer from exclusions or special treatment in legislation, which in this way treats them not as full members of society or the labour market, but as workers and citizens at the margins.

The employment relationship is commonly described as one of submission and subordination (Davies and Freedland 1983, p. 18), and one of the justifications of labour law is exactly to address this situation. In the case of domestic workers, the problem is that legislation reinforces (rather than addressing) the relation of submission and subordination. In the examples presented above, the states’ ability to deport and the employers’ ability to control workers who fear deportation highlight the unique power of the employer to dominate the worker, for it is the law itself, through immigration and other rules, that reinforces the workers’ existing precariousness (Anderson et al. 2011).

### **Human rights for marginal citizens**

Even though labour rights are essential for citizenship, labour and immigration law in many legal orders have severe shortcomings, treating certain categories of workers as marginal citizens. International human rights law, though, counteracts the marginal legal status of groups of workers that lack

certain legal rights. Exploring the justification of workers' rights, Guy Mundlak noted that:

the fundamental difference is that citizenship rights are aimed at establishing the relationship between individuals and groups and the community, most notably the nation-state. Human rights are rooted in a perception of humanity that extends beyond the nation-state. They do not describe obligations and rights of members in the community, but identify the rights and obligations of all humankind. (Mundlak 2007, p. 540)

Universality is indeed a central feature of human rights, which are attached to everyone simply by virtue of being human, regardless of whether they are citizens or not (Tasioulas 2012, p. 17). If we view social and labour rights as human rights (Mantouvalou 2012b), it is hard to recognize different entitlements to different human beings (Jones 1994, p. 167).

International human rights law recognizes that certain labour rights are fundamental human rights. In Europe, for instance, the European Convention on Human Rights (1950) protects civil and political rights, while the European Social Charter (1961) incorporates economic and social rights. Most labour rights are classified as social rights, but some of them are classified as civil and political rights in these treaties. The supervisory mechanisms of human rights treaties in Europe and elsewhere have frequently ruled that everyone must enjoy human rights, which cannot be made conditional on citizenship.<sup>9</sup> The exclusion of undocumented migrants from labour rights protection was addressed at length in a landmark advisory opinion of the Inter-American Court of Human Rights (2003) that emphasized that human rights, including labour rights, are based on human dignity and not on the status of citizenship or lawful residence.

Developments in international human rights law in recent years have helped to address the marginalization of domestic workers more particularly. Two examples will be used to support this: first, a decision of the European Court of Human Rights, and second, a treaty of the ILO.<sup>10</sup>

### **Siliadin**

In 2005 the European Court of Human Rights (ECtHR), the judicial organ of the Council of Europe that monitors compliance with the European Convention on Human Rights (ECHR) for its 47 member states, decided the case *Siliadin v France* (App. No. 73,316/01, Judgment of 26 July 2005).<sup>11</sup> The facts of the case illustrate the cruelty of the social problem. The applicant was a Togolese national who was brought to France to work and be educated, but was instead kept at home as a domestic worker. She had to clean the house and the employer's office; look after three children; she slept on the floor in their room; rarely had a day off; and was almost

never paid. When she escaped from her employers, she was faced with the fact that French law did not criminalize this behaviour. She was only awarded some compensation in respect of arrears of salary, holiday leave and notice period. Having exhausted domestic remedies, she took her case to the ECtHR in Strasbourg. She claimed that lack of criminal legislation dealing with the abuse that she suffered constituted a violation of article 4 of the ECHR, which states, insofar as relevant: '1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour.' In dealing with this situation, the court took two steps. First, it stated that this situation is not 'slavery'. It considered that a right of legal ownership is a constitutive element of slavery, and made reference to the 1926 Slavery Convention of the United Nations for support, which states that 'slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. The employers of Siliadin did not have a legal right of ownership over her, so this aspect of article 4 was not at stake in the present case.

Even though the court ruled that Siliadin was not a slave, it classified her situation as 'servitude', which is still in the scope of article 4. On servitude, it said that:

what is prohibited is a 'particularly serious form of denial of freedom'. [...] It includes, 'in addition to the obligation to perform certain services for others [...] the obligation for the serf' to live on another person's property and the impossibility of altering his condition. (para. 123)

Being a minor at the time, the applicant migrant domestic worker had to work almost 15 hours a day, seven days per week. She had not chosen to work for her employers, had no resources, was isolated, had no money to move elsewhere, and 'was entirely at [the employers'] mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred' (para. 126). She was almost never free to leave the house, nor did she have any free time. Even though she had been promised that she would be sent to school, this never happened, so she had no hope that her life would improve. Second, the court found that article 4 imposes positive obligations on state authorities. It not only requires that the state refrains from keeping individuals in exploitative labour conditions, but also imposes a state duty to criminalize private conduct that is classified as falling in the scope of article 4. Lack of criminal legislation penalizing grave labour exploitation by private employers, in other words, is incompatible with the ECHR.

Despite the fact that the *Siliadin* judgment did not rule that the applicant was a slave, it found that her condition had elements akin to slavery. Shklar (1995, p. 16) said with reference to American citizenship that its value 'was derived primarily from its denial to slaves, to some white men,

and to all women'. European human rights law endorsed this approach. The situation of a migrant domestic worker was ruled to be akin to slavery – a total denial of citizenship, which the court ruled to be incompatible with international human rights law. It is important to emphasize that the *Siliadin* judgment attracted the attention of national and international organizations, and raised awareness on the situation of domestic workers who are employed in unacceptable conditions, and are isolated. *Siliadin* triggered debates and legislative reform in the UK, which enacted section 71 of the Coroners and Justice Act that criminalizes slavery, servitude, forced and compulsory labour in a development that was celebrated in academic literature and NGO campaigns for demonstrating the transformative power of human rights law (Mantouvalou 2010).

### **ILO Convention on Domestic Workers**

More recently, the ILO adopted a landmark Convention and Recommendation, which emphasized the importance of the protection of the human rights of domestic workers. On the 100th session of the International Labour Conference, in June 2011, the ILO adopted Convention No. 189 and supplementing Recommendation No. 201 regulating the terms and conditions of work for domestic workers.<sup>12</sup> In regulating the work of domestic workers, the Convention adopts a human rights approach. Already from its Preamble it makes reference to numerous international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 3(1) states that member states 'shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in this Convention', and Article 3(2) highlights the importance of freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination. It also places emphasis on private life rights of domestic workers (article 6) and the potential for abuse in the privacy of the employers' household (article 5). These provisions reflect the special challenges of the public–private divide that characterize the domestic labour relation. The Convention expresses desirability for state intervention in a location that is at the time the domestic worker's workplace, but also the employers' and the workers' home (when they are live-in domestic workers).

The Domestic Workers' Convention includes both civil rights, such as access to justice and privacy, and social and labour rights, such as working time and minimum wage, taking an integrated approach towards human rights law, which is in line with the ideal of citizenship that Marshall developed where all groups of rights are essential for membership. This integrated approach breaks down traditional divisions between civil and social rights, and this is important because international human rights law

created in the past an artificial dichotomy between the two categories of entitlements (Mantouvalou 2013). This integrated approach characterizes the work of the ILO more generally and has also been described as a ‘holistic approach’ (Leary 1996, p. 40). It is one of its important contributions, for it rests on the recognition that human rights are not easily separable, either practically or as a matter of principle. There is no hierarchy between them. The right to privacy is no more important than the right to decent working conditions, and there may in fact be an overlap between the two: there can be no decent working conditions for a worker who does not enjoy a certain degree of privacy in the workplace. There is also no privacy for a live-in domestic worker whose working conditions are appalling and who is not allowed to have private time or private space. The links between all rights are complex, and the approach of the ILO recognizes that.

Most significantly, the Convention ‘applies to all domestic workers’ (article 2), irrespective of immigration status, reflecting the universalist nature of human rights standards. A person’s immigration status, sex or social status makes her no less of a right-holder. It should be explained that universality is a normative notion: it does not mean that everyone is, in fact, protected. Both governments and courts sometimes exclude categories of people from human rights protection. Universality means that everyone *should be* protected.

The ILO Convention itself leaves a gap, though, which is hard to reconcile with its human rights approach and its basic purpose, namely the inclusion of all domestic workers in its protective framework. It provides for certain exclusions (article 2(2)). These may apply to ‘limited categories of workers in respect of which special problems of a substantial nature arise’. It is not clear why the Convention contains this provision. It can fairly be assumed that one reason that led to the adoption of Convention 189 was the fact that many jurisdictions treat domestic workers as marginal citizens. That this Convention, which has been specifically drafted to protect domestic workers, allows the exclusion of some of them from its scope is therefore troubling. The provision appears to be contrary to the document’s purpose and incompatible with the universalist nature of human rights, including labour rights.

The adoption of a human rights approach by the ILO has not been uncontroversial because often in labour law circles there is scepticism as to the role of human rights in the protection of workers’ interests (Kolben 2010, Collins 2011). The human rights provisions of the ILO Domestic Workers Convention, however, can only be welcomed. This is because they recognize the universality, and the moral weight and urgency of domestic workers’ claims that become, thanks to the ILO, binding legal obligations. It is to be hoped that the universalist nature of human rights as normative standards will not permit the exclusion of domestic workers in the future interpretation and application of the Convention.

Domestic workers are left at the margins of citizenship very often, as shown above, because national law leaves them outside the scope of labour legislation, and makes them even more prone to abuse through very restrictive immigration legislation. International human rights, on the other hand, incorporate universal normative standards that counteract the problem of marginalization of certain categories of workers. International human rights and international labour law have in recent years endorsed the principle of universality and rejected citizenship as formal status as a condition for the enjoyment of rights. Human rights law shows that it is impermissible to deprive workers of their basic labour rights and to treat them as marginal citizens.

### **Conclusion**

There is much to be gained by the analysis of citizenship, when viewed as a normative concept, as to the rights that it entails. Its communitarian elements, and the weight that it places on membership to society, are an important addition to more traditional liberal human rights theories that mainly focus on the individual. Importantly, citizenship requires respect for labour rights, as much as it requires respect for other human rights. The exclusion of certain categories of workers, such as domestic workers, from these rights is wrong. This article presented domestic workers as marginal citizens because they work, but are excluded from, several labour rights in national legal orders. If they are migrants, and particularly if they have an irregular status, they are likely to be left outside the scope of rights of citizenship altogether. International human rights law counteracts the marginal legal status of these groups of workers. By being attached to everyone simply by virtue of being human, irrespective of nationality, human rights can complement citizenship rights when both are viewed as normative standards.<sup>13</sup> The example of domestic work as it has been approached in international human rights law in recent years shows that certain rights of workers are universal. Their enjoyment cannot depend on citizenship as legal status or on regular residency. The enjoyment of labour rights as human rights depends, and should only depend, on the status of someone as a human being who is also a worker.

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### **Notes**

1. For a theoretical account of social rights as human rights, see Nickel (2009, ch. 9). For a legal debate, see Gearty and Mantouvalou (2011); on citizenship as a possible justification of social rights, see particularly p. 105.

2. For an introductory account of citizenship theory, see Bellamy (2008). For an overview of key literature, see Bellamy and Palumbo (2010) (see also Bosniak 2002).
3. See also the discussion in Schultz (2000, p. 1928).
4. See the discussion in Bosniak (2006).
5. This section draws on Albin and Mantouvalou (2012).
6. For some early studies and responses by international organizations, see Blackett (1998), ILO Director General Report (2001, p. 29), ILO Director General Report (2005, p. 50), and Council of Europe, Parliamentary Assembly (2004). Further studies will be discussed below.
7. See the case study presented in Anderson (2010a).
8. For further examples of exclusions, see Mantouvalou (2012a).
9. See, for instance, *International Federation of Human Rights Leagues (FIDH) v France*, Complaint No. 14/2003, 8 September 2004.
10. For further examples, see Mantouvalou (2012a).
11. For analysis, see Mantouvalou (2006).
12. For further analysis, see Albin and Mantouvalou (2012).
13. For further discussion on the complementary role of social rights as human rights and citizenship rights, see Jones (1994, p. 165).

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