

MIGRANT DOMESTIC WORKERS IN THE EUROPEAN UNION:
POTENTIAL HUMAN RIGHTS AVENUES FOR
EMPOWERMENT

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ABSTRACT

Migrant domestic workers are increasingly needed in the EU to manage ‘reproductive’ crisis and to ensure sustainable growth of economy. Nevertheless EU migration and labour policies ignore these migrant women and leave them almost without any rights.

The concept of domestic work and women participation in migration is discussed in the first section. Second chapter analyses EU level labour migration policies and provides examples from Germany, France and the UK. In third chapter, research is focused on potential avenues for migrant domestic workers rights advancement within European Human Rights system. Here it is shown how certain framing of rights can either empower or further victimise the target group. Subsequently, analysis show how these claims can be enforced within three main actors within the European Court of Justice, the European Court of Human Rights and the European Committee for Social Rights.

Thesis is concluded with an argument that whereas current situation is not just for the migrant domestic workers within the EU, European Human rights system has certain potential to ensure and empower their rights. The main solution proposed is a paradigm shift from migrant workers as ‘victims’, to migrant workers as ‘workers’.

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LIST OF ABBREVIATIONS

CEE – Central and Eastern European countries
CoE – Council of Europe
EEA – European Economic Area (EU + EFTA)
ECOSOC - UN Economic and Social Committee
ECHR – European Convention of Human Rights
ECtHR - European Court of Human Rights
ECJ – European Court of Justice
EESC - European Economic and Social Committee (EU)
EFTA - European Free Trade Association (Iceland, Liechtenstein, Norway, Switzerland)
ESC – European Committee for Social Rights (CoE)
ESCh – European Social Charter
EU – European Union
FRCh – EU Fundamental Rights and Freedoms Charter
GMG - UN Global Migration Group
IDWN - International Domestic Workers’ Network
ILO - International Labour Organization
UK – United Kingdom
UN – United Nations
US – United States
TCN – Third Country Nationals (non-EU citizens)
UNDESA - UN Department on Economic and Social Affairs
UNFPA - United Nations Population Fund
UNIFEM – UN Development Fund for Women

ACKNOWLEDGMENTS

Writing this thesis was a challenging but enriching experience. I have decided to use feminist critique within this thesis, as Human Rights are about taking sides. At least this is what I have learnt during studies in the CEU. Human Right course made me to look differently towards human rights – to search for the actual way how they can change the reality, how they can empower people. The language of empowerment has become so special for me. I became empowered as, there were a lot of people supporting me and helping to handle with the stress and with difficulties in writing.

First of all I would like to express my gratitude for Professor Csilla Kollonay – Lehoczky for consultations and valuable advices. Furthermore, I would like to thank for those friends of mine who have agreed to read and discuss the parts of thesis – John Axiak, Dovilė Rimkutė, Dora Dezso and Maike Sassman. What is more, I would like to thank for Noel Oettle and Bettina Koelle, who have provided me with perfect conditions to write this thesis during my internship in South Africa. Finally, I would like to thank for my family for all their love and support.

INTRODUCTION

Thesis Problem

Demand for women migrant domestic workers is increasing in the EU.¹ Migrant domestic worker's role is crucial for the reproduction of the society and economic growth of the EU.² Despite this, the EU does not provide any legal provisions for migrant domestic workers to enter the countries covered by Schengen Agreement. On the contrary, the EU continues the 'securitization' policies, which have an adverse impact on the rights of migrant domestic workers.³ This is also true for the national policies in the three countries compared: Germany, France and the UK.

In the EU, there is a wide gap between the rights of legal migrants and irregular ones. Migrant domestic workers fall under both of these categories - their legal status may vary from regular to undocumented on case by case basis. Regarding irregular migrants, some basic and mostly procedural rights are declared for them. On the other hand, even legal migrants working in the domestic sector not many prospects to protect their labour rights.⁴ Subsequently there is a lack of access to justice for migrant domestic workers both at national and EU level.

It is widely acknowledged that due to the intersectional grounds of discrimination on gender, race, class, ethnicity and nationality migrant domestic workers form a vulnerable

¹ As indicated in EU policy papers and further reports: Anja K. Frank and Andrea Spehar, *Women's labour migration in the context of globalisation*, report to WIDE (Globalising Gender Equality and Social Justice) (Brussels: WIDE, 2010); Helen Schwenken, "Domestic Slavery" versus "Workers Rights": *Political Mobilizations of Migrant Domestic Workers in the European Union*, Working paper 116 for The Center for Comparative Immigration Studies, (San Diego: University of California, 2005).

² Frank and Spehar, *Women's labour migration in the context of globalisation*, p.10

³ Supported by Helma Lutz, ed., *Migration and Domestic Work: A European Perspective on a Global Theme* (Hampshire: Ashgate, 2008) and especially Norbert Cyrus, "Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers," in *Migration and Domestic Work: A European Perspective on a Global Theme*, Lutz, ed., p. 177-196; Virginie Guiraudon and Christian Joppke, eds., *Controlling a New Migration World*, (London: Routledge, 2001).

⁴ Audrey Chapman and Sage Russell, eds., *Core obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002).

group.⁵ This group is subjected to serious human rights violations such as domestic servitude, forced labour, sexual abuse, racism, not to mention, severe abuse of their labour rights. In addition to this, there is stigma attached to domestic work, as occupation.

A ‘unique’ absence of regulations in the field of domestic work is rooted within women’s role in the society. Gender division of labour remains ‘invisible’ for policy makers and legislators as they associate women with private sphere. Therefore domestic work for a long was not perceived as a formal ‘work’, but rather as ‘help’, ‘family service’ or ‘love labour’.⁶

As a consequence some of migrant domestic workers found themselves in ‘double illegality’: not only they are working in the shadow economy, which is not regulated, but also they are staying in the country illegally.⁷ In the EU legal residence is connected with the work permit, family reunification or refugee status. As concerns work permits for migrant domestic workers – none of the existing EU directives provides them legal access to EU labour market.

The problem of migrant domestic workers has an ‘explosive’ nature in the EU. Migrant domestic workers are largely invisible for public authorities at national and EU level because of two reasons: statistics of their (usually) irregular presence and informal nature of the domestic sector.⁸ On the other hand, there is an ongoing demand for cheap domestic labour in EU, as more and more middle class European women work on an equal basis with men. Governments of the EU countries do not respond adequately to the need of care institutions for elders or children. European women are in a need for other women to replace ‘their’

⁵ Krystyna Slany, Maria Kontos and Maria Liapi, eds., *Women in New Migrations: Current Debates in European Societies*, (Cracow: Jagelonian University Press, 2010), p. 29.

⁶ International Labour Organization, “Decent Work for Domestic Workers”, report IV.1, Geneva: ILO, 2010, p. 15; Majda Hrzenjak, *Invisible Work* (Ljubljana: Mirovni Institute, 2007).

⁷ Maria Kontos, Kyoko Shinozaki, “Integration of New Female Migrants in the German Labour Market and Society,” p. 83- 120, in *Women in New Migrations: Current Debates in European Societies*, Slany, Kontos and Liapi, eds., p. 99.

⁸ Bridget Anderson, *Doing the dirty work? The global politics of domestic labour* (London: Zed Books, 2000).

‘reproductive’ role at home.⁹ This presents an opportunity for migrant women as they can pursue their life strategies with the capital earned.¹⁰

Nevertheless, the intersectional grounds of discrimination make these workers particularly vulnerable. Migrant domestic workers can be discriminated because of their gender, race and class, (usually) irregular migration status in the country and an informal nature of domestic work.¹¹ There is a widespread perception of employers’ impunity and employees’ powerlessness. It further contributes for rather easy deprivation of migrant domestic worker’s labour and human rights. In addition to this, in most cases migrant domestic workers do not have adequate access to justice to protect their human and labour rights in the domestic courts.

In a nutshell, current situation in the EU is not just for the migrant domestic workers. Whereas migrant domestic workers are needed for the EU economy to compensate the ‘reproductive’ crisis, they are not respected in the EU migration laws and national labour regulations. Therefore in this research I explore the potential avenues to invoke human rights and international labour standards’ provisions within European Human Rights system. These avenues are sought for protection and empowerment of migrant domestic workers.

Background and Thesis Actuality

Migrant domestic workers ‘invisibility’ recently has attracted much of attention from mass-media.¹² Regarding academic field, migrant domestic workers were in focus of

⁹ Pei-Chia Lan, “New Global Politics of Reproductive Labor: Gendered Labor and Marriage Migration,” *Sociology Compass* 2, no. 6, (November 2008):1801–1815. I use the term ‘reproductive labour’ according to Pei-Chia Lan, as she includes not only biological reproduction, but also “the work necessary for the reproduction of families, including subsistence reproduction<...> and social reproduction”.

¹⁰ For example, Laura Oso Casas and L. Mozere, as mentioned in: Slany, Kontos and Liapi, eds., *Women in New Migrations: Current Debates in European Societies*, p.67.

¹¹ The scope of the thesis covers both legal and undocumented migrant domestic workers. The scope is not limited only to the undeclared domestic work and includes migrant domestic workers who do have some of the labour rights. However migrant men engaging in the domestic work are out of the scope of this research.

¹² Only in 2011 there were launched following campaigns, such as MTV US Multiplatform Campaign Against ‘Modern-Day Slavery’ (<http://www.hollywoodreporter.com/news/mtv-launches-multiplatform-campaign-modern-239183>, accessed: November 20, 2011); Calle 13, UNICEF, MTV Latin America and Tr3s launched the ‘MTV Exit’ campaign (http://www.unicef.org/protection/57929_60686.html, accessed: November 20, 2011); The CNN Freedom Project: Ending Modern-Day Slavery (<http://thecnnfreedomproject.blogs.cnn.com/>, accessed:

sociologists (especially interested on gender issues), political scientists (especially feminists), and economists (especially within neoliberal or Marxist approaches).¹³ In the legal field there is an obvious gap of knowledge about the legal status and rights of migrant domestic workers.

Majority of the legal scholars were interested in the issue of human trafficking, servitude and forced labour. Some of the legal scholars are analyzing the situation of migrant domestic workers in specific countries of destination such as the UK¹⁴, US,¹⁵ Canada and other countries, or according countries of origin, such as the Philippines, Indonesia, etc.¹⁶

US academics and Human Rights Research centres are leading in this field. They are actively supporting human rights' organizations working with abused migrant domestic workers¹⁷ and bringing their cases to justice.¹⁸ Similar advocacy efforts have just recently started in the EU. For example studies are prepared by scholars in cooperation with WIDE network¹⁹ and RESPECT-network.²⁰

European legal scholars started addressing migrant domestic workers' rights rather in EU laws and policies, but not within European human rights system. The articles of Virginia

November 20, 2011); This type of campaigns has sensitized the society over the issue of forced labour and servitude and also encouraged reporting about the migrant women and men working within private households. However their contribution for the actual empowerment is rather dubious as further discussed in this research.

¹³ It is important to mention these interdisciplinary monographs: Lutz, ed., *Migration and Domestic Work: A European Perspective on a Global Theme*; Slany, Kontos and Liapi, eds., *Women in New Migrations: Current Debates in European Societies*; Bridget Anderson and Annie Phizacklea, *Migrant Domestic Works: a European Perspective*, (Leicester: Department of Sociology, University of Leicester, 1997).

¹⁴ Bridget Anderson and Ben Rogaly, *Forced Labour and Migration to the UK* (London: Centre on Migration Policy and Society in collaboration with Trade Union Congress, 2005) and Bridget Anderson, *A very private business: migration and domestic work*, COMPAS working paper no. 28 (Oxford: University of Oxford, 2006).

¹⁵ Margaret Satterthwaite, *Beyond Nannygate: Using Human Rights Law to Empower Migrant Domestic Workers in the Inter-American System*, Center for Human Rights and Global Justice Working Paper, Economic and Social Rights Series, no.8, 2006 (New York: NYU School of Law, 2006); Nicola Piper, ed., *New Perspectives on Gender and Migration: Empowerment, Rights, and Entitlements* (New York: Routledge, 2007).

¹⁶ *Canadian Journal of Women and Law* should be mentioned as it had special issue to cover domestic work regulations in Israel, Sweden, Canada, US, France, Belgium, Switzerland, Ghana, Netherlands, Asia and Middle East. As was noted in the Editorial: "This special issue reflects an important Canadian contribution to the international initiative to regulate decent work for domestic workers." in: Elizabeth Sheehy, "Editorial," *Canadian Journal of Women and Law* 23, no. 1 (2011): iii-viii.

¹⁷ Alex Freeman et al., *Left Out: Assessing the Rights of Migrant Domestic Workers in the United States, Seeking Alternatives* (New York: Human Rights Center, Uc Berkeley and International Human Rights Clinic, Boalt Hall School Of Law, 2003); Satterthwaite, *Beyond Nannygate*.

¹⁸ The American Civil Liberties Union et al., *Amici Curiae*, in case: United States District Court for the District of Columbia, *Lucia Mabel Gonzalez Paredes v. Jose Luis Vila and Monica Nielsen*,.

¹⁹ Frank and Spehar, *Women's labour migration in the context of globalisation*.

²⁰ Schwenken, "Domestic Slavery" versus "Workers Rights".

Mantouvalu and Norbert Cyrus could be mentioned as exceptions.²¹ All in all, this field remains under-researched in the field of European human rights law. Therefore I contribute to legal academic field with this master thesis.

Recognition of migrant domestic workers' rights is emerging within international labour and human rights system. Domestic workers labour rights were recognised June 2011 by the International Labour Organization (ILO). ILO has adopted Domestic workers' convention, which emphasise the rights of migrant domestic workers.²² In addition to it, European Court of Human Rights (ECtHR) has made a landmark judgment in the case *Siliadin v. France*²³ concerning domestic servitude and forced labour. It was the first case imposing positive obligations under the Article 4 of the European Convention of Human Rights (ECHR).²⁴ As for 2011, there are two Article 4 cases pending in the ECtHR against the UK.²⁵ What is more, the EU Fundamental Rights Charter (FRCh) containing chapter on workers rights became legally binding with the Treaty of Lisbon.²⁶ Therefore, I argue that European Human Rights System has a growing potential to advance the rights of migrant domestic workers and to compensate the lack of access to justice at national and EU levels.

The aim and objectives of this research

The aim of this research is to analyze the Human Rights avenues for protection of migrant domestic workers within the EU. Practical outcomes of EU level policies are compared in the three most influential EU member states: the UK, France, and Germany.²⁷ In

²¹ Virginia Mantouvalu, „Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers,” *Industrial Law Journal* 35 (December 2006): 395-414; also Virginia Mantouvalu, „Modern Slavery: The UK Response,” *Industrial Law Journal* 39, no. 4 (2010): 425-431; Cyrus, “Being Illegal in Europe”.

²² International Labour Organization. *Domestic Workers Convention, No. C189*, adopted 16 June 2011, 100th Session of the Conference, Geneva: ILO, 2011.

²³ *Siliadin v. France*, (application no. 73316/01). ECtHR Chamber Judgment delivered on July 26, 2005. 43EHRR16 (2006).

²⁴ Holly Cullen, “*Siliadin v France*: Positive Obligations under Article 4 of European Convention of Human Rights,” *Human Rights Law Review* 6, no.3 (2006): 585 – 592.

²⁵ *Kawogo v the United Kingdom* (application no. 56921/09), communicated to the Government in June 2010; *C.N. v the United Kingdom* (application no. 4239/08), communicated to the Government in March 2010.

²⁶ *Treaty of Lisbon* entered into force on 1 December 2009.

²⁷ These countries are chosen, firstly, as their interests often frame and set policies for the rest of EU. Secondly, these are traditional migrants receiving countries with the different patterns of migration – while UK and France

this comparison, the focus is placed on national immigration laws and attempts to regularize domestic labour. It is questioned how ever increasing ‘securitization’ and criminalization within the EU and national migration policies affects the rights of migrant domestic workers.

Methodology

This work is based on qualitative research methodologies. Inter-disciplinary approach and feminist perspective are deployed for the holistic analysis of migrant domestic workers’ phenomenon. First chapter is conducted as a prescriptive research of the secondary sources: monographs, studies, and academic articles within the realm of relevant disciplines, such as law, sociology, political sciences, and economics. In the second chapter, the EU legal framework analysis is based on primary and secondary sources. Primary sources reflected in this research are EU laws and policy documents. Secondary sources – academic studies in the field and reports of Human Rights institutions and organizations. Third chapter contains institutional analysis of the EU, CoE, and ILO mechanisms applicable for protection of migrant domestic workers’ rights. Enforcement of migrant domestic workers’ rights is analysed through the European Court of Justice (ECJ), the ECtHR, and European Committee of Social Rights (ESC). What is more, in order to go beyond formal laws, research includes reports from the leading non-governmental organizations (NGOs) working in the field.²⁸ Thesis is enriched with insights from participative observation of the International Domestic Workers’ Network representatives’ study visit.²⁹ Eventually, thesis is concluded with the final remarks.

represents post-colonial trends of migration, Germany was well-known for its guest-workers’ migration policies in post-war period.

²⁸ RESPECT Network, WIDE Network, organizations: Kalaayan, Solidar.

²⁹ Study visit of International Domestic Workers’ Network representatives to Budapest, on 20 and 21 of April, 2011, as part of campaign for the adoption of the ILO Domestic Workers Convention (C 189).

CHAPTER 1 - PHENOMENON OF MIGRANT DOMESTIC WORKERS

This chapter consists of 3 sections, which give the holistic picture of migrant domestic workers in the EU. Here is provided a description of ‘push’ and ‘pull’ factors for women international movement in such a gendered labour division, as domestic work. First chapter aims to explain underlying rationales behind women migration - global inequality overlapping with gender roles and the final outcome – stratified rights of migrant domestic workers.

Section 1: ‘Feminization of migration’

First section is dedicated to the debate over phenomenon of ‘feminization of migration’. It provides not only numbers but also explanations on how and why women migrate. It shows that women’s role in migration is specific, because migration policies and their outcomes are gendered.

Nicola Piper convincingly summarizes 4 reasons for the emergence of ‘feminization of migration’ phenomenon:³⁰ Firstly, because of the increased ‘statistical visibility’ of women migration due introducing gender segregated data. Secondly, because women take part in all the routes of migration in a geographical sense and according the type of migration. Thirdly, because of augmenting unemployment of men and fourth, reason being – “growing demand for feminized jobs in destination countries”.³¹ These four reasons or symptoms of “feminization of migration” in one or another way are reiterated and supplemented by various other migration and gender scholars.³²

Statistical visibility

Mirjana Morokvasic and Christine Catarino argue, that women were never absent from migration. According to them, it was just the male researchers who “thought them to be

³⁰ Piper, ed., *New Perspectives on Gender and Migration*, p. 4.

³¹ Piper, ed., *New Perspectives on Gender and Migration*, p. 4.

³² For example: Lidia Morris, Mirjana Morokvasic, Christine Catarino, Helma Lutz, Anja K. Frank and Andrea Spehar, etc.

absent” or unimportant.³³ The ‘Prototype migrants’ were thought to be men, especially in the context of labour migration. This connects with the words of Joan Acker that “the worker in social reality is a man”.³⁴ Thus, according to feminist scholars, the “discovery” of the ‘feminization of migration’ in 1970s by some classic migration authors has an ironic side.³⁵ For example Ravenstein has described migration of women as early as 1885.³⁶ Data also indicates that in 1960 women were migrating almost on equal rates (47%) with men.³⁷ So question remains, why 1970s were thought to be the beginning of women migration?

1970s were marked by two important parallel events. One is being Second Wave Feminism, which has marked 1960s and 1970s, as a social movement, which challenged the invisible gender norms and sex roles.³⁸ However, Helma Lutz already in the late 90’s summarises that Second Wave feminism has failed to include the migrant women. She argues, that feminists in the receiving countries have ignored migrant women, as these „groups of women are positioned differently towards each other and <...> they face different opportunities as well as structural constraints in the performing their agency.”³⁹

On the other side, we see 1970s, as a beginning of family reunification policies in Western Europe, especially guest-worker, countries, such as Germany and Austria, as well as in post-colonial states, like the UK and France.⁴⁰ Family reunification was a legal migration channel directed towards women and children willing to unite with their ‘bread-winner’ husbands and fathers.

³³ Mirjana Morokvasic and Christine Catarino, “Women, Gender, Transnational migrations and Mobility in France,” in *Women in New Migrations: Current Debates in European Societies*, eds., Slany, Kontos and Liapi, p. 52 -53.

³⁴ Joan Acker, “Hierarchies, jobs, bodies: a theory of gendered organizations,” in *The social construction of gender*, Judith Lorber, Susan A. Farrell, eds., (London: Sage, 1991), p. 150.

³⁵ Morokvasic and Catarino, “Women, Gender, Transnational migrations and Mobility in France,” p. 57.

³⁶ Ernest George Ravenstein, “The laws of migration,” *Journal of Royal Statistical Society*, vol. XLVIII (June, 1885): 167-227.

³⁷ Piper, ed., *New Perspectives on Gender and Migration*, p. 4.

³⁸ Gloria Cowan, Monja Mestlin and Julie Masek, “Predictors of feminist self-labelling,” *Sex Roles* 27, no. 7-8, (1992): 321-330, DOI: 10.1007/BF00289942, (accessed: October 15, 2011).

³⁹ Helma Lutz, “Limits of European-ness: Immigrant Women in Fortress Europe,” *Feminist Review*, no. 57 “Citizenship Pushing the Boundaries,” (autumn, 1997):93-111, p. 107.

⁴⁰ Lutz, “Limits of European-ness.”

Current statistics are gender segregated therefore migration of women is a well established fact. As for 2010, it is estimated that there were around 105 million women migrants (living in other country than they were born) in the world⁴¹. Women make up around half (49%) of the total number of migrants⁴² (See the Annex 1, Table 1; the Annex 2, Table 2; the Annex 3, Table 3; The Annex 4, Table 4). Regarding Europe, Ayres' and Barber's study states that there were "between 18.1 and 19,7 million of women migrants" in 2004 in the EU 25. Thus in the EU-25 women constitute 52.4 per cent of all migrants⁴³. The UN gender segregated migration statistics shows that this percentage (52,4) has not changed significantly – it was 52.3 per cents of women within the European region in mid-2010.⁴⁴ Thus, existence of migrant women and their increasing numbers in Europe cannot be contested. However, the statistics must be evaluated critically. It is very likely that the real numbers of women migrant are much higher because there is more women than men, work and reside irregularly and therefore do not appear on the statistics.⁴⁵

Type of migration

Phenomenon of women migration is accompanied by the myths and stereotypes. For a long it has been thought that women are just "passive victims" within the global migration.⁴⁶ Only recently, feminist authors started denying (and then were followed by migration scholars) the perception that women are only "followers" of their "bread-winner" husbands.⁴⁷

⁴¹ UN Department on Economic and Social Affairs (UNDESA), *Trends in International Migrant Stock: The 2008 Revision*, http://www.un.org/esa/population/migration/UN_MigStock_2008.pdf, (accessed: 21 October, 2011).

⁴² UNDESA, *Trends in International Migrant Stock*:

⁴³ Ron Ayres and Tamsin Barber, *Statistical Analysis of Female migration and Labour Market Integration in the EU*, Working Paper, WP 3, FeMiPol Project, 2006, in: Slany, Kontos and Liapi, eds., *Women in New Migrations*.

⁴⁴ UNDESA, *Trends in International Migrant Stock*.

⁴⁵ Slany, Kontos and Liapi, eds., *Women in New Migrations*.

⁴⁶ Krystyna Slany, Maria Kontos and Maria Liapi, eds., *Women in New Migrations: Current Debates in European Societies*, p. 52

⁴⁷ Supported by Vicki Pascalia, *Free movement, social security and gender in the EU*, (Oxford: Hart Publishing, 2007). Slany, Kontos and Liapi, eds., *Women in New Migrations*; Frank and Spehar, *Women's labour migration in the context of globalisation*; Piper, ed., *New Perspectives on Gender and Migration*; Lutz, ed., *Migration and Domestic Work*; Helen Schwenken, "Domestic Slavery" versus "Workers Rights"; Satterwaite, *Beyond*

While family reunification remains the broad channel for women migrant women, it is indicated that more and more women migrate autonomously for work, and other reasons.⁴⁸ Therefore ‘feminization of migration’ indicates not only the changes in the percentage of women in stock migration, but also “changed” reasons and migration patterns.⁴⁹

Nicola Piper argues, that family reunification remains as one of the ‘three long-established principles to admit permanent residents’, other two being ‘economic considerations and humanitarian concerns’.⁵⁰ Later she adds that it is rather the outcome of the ‘genderised’ migration policies, which provided women with the only possibility.⁵¹ It was insightfully argued by Mirjana Morokvasic and Christine Catarino that women even used legal channels of entry as family reunification but there was always happening “parallel for labour recruitment”.⁵² Authors insist that women migration should be considered as a ‘labour migration’ even when women remain at home as “housewives”. Helma Lutz summarizes that perception of “family reunification” policy as ‘women-only’ migration avenue is an outcome of “patriarchal habits being reinforced by the legislation of the countries of immigration.”⁵³ She comes up with the two opposite trends in the European society: whereas European women tend to become emancipated from traditional roles, migration laws push the immigrant women into traditional role of wife dependent on ‘bread-winner’ men.⁵⁴

Despite these gender stereotypes reflected in law, in the reality migrant women were maintaining their own strategies how to improve the livelihoods. Illustrative example could be

Nannygate; Anderson, *Doing the dirty work?*; Lydia Morris, *Managing Migration: Civic Stratification and Migrants’ Rights*, (London: Routledge, 2002).

⁴⁸ According Frank and Spehar, *Women’s labour migration in the context of globalisation*

⁴⁹ Krystyna Slany, Maria Kontos and Maria Liapi, eds., *Women in New Migrations: Current Debates in European Societies*, (Cracow: Jagelonian University Press, 2010), p. 8.

⁵⁰ Nicola Piper, ed., *New Perspectives on Gender and Migration: Empowerment, Rights, and Entitlements*, p. 12

⁵¹ Nicola Piper, ed., *New Perspectives on Gender and Migration: Empowerment, Rights, and Entitlements*, p.

⁵² Mirjana Morokvasic and Christine Catarino, “Women, Gender, Transnational migrations and Mobility in France”, in *Women in New Migrations: Current Debates in European Societies*, eds., Slany, Kontos and Liapi, p. 52 -53.

⁵³ Helma Lutz, “Limits of European-ness: Immigrant Women in Fortress Europe”, *Feminist Review*, no. 57, Citizenship Pushing the Boundaries (Autumn, 1997):93-111, p. 105.

⁵⁴ Helma Lutz, “Limits of European-ness: Immigrant Women in Fortress Europe”, *Feminist Review*, no. 57, Citizenship Pushing the Boundaries (Autumn, 1997):93-111, p. 105.

‘arranged marriages’ with German men with Polish or Thai women.⁵⁵ In this way, women from Eastern Europe or Global South strive to overcome the legal barriers and to access the countries of destination with at least some set of rights.

What is more, women participate in the different geographical streams of migration – “South -South”, “South -North”, “North - North”. This trend is confirmed by the recent statistics, which indicate that women appear within different streams of migration on an even keel with men. There are some slight variations among the different regions in the world. UN statistics indicates that among all the regions, share of women migrants’ is the highest in Europe (52.3%) and the lowest in Asia (44.6%) and Africa (46.8%).⁵⁶ 7,7 per cent is a considerable difference of women migrants between South-North and North-North streams. In particular, as South-South migration also makes up around half (47%) of the total migration that is equal to 74 million migrants).⁵⁷

Anja K. Frank and Andrea Spehar claims that women tend to migrate to those countries in which they can be more empowered and in which there are less gender constraints.⁵⁸ Nana Oishi claims that the opposite trend is also present as some women tend to go to the culturally ‘close’ regions. For example, as Muslim women prefer moving to other Muslim countries – Indonesian women moves to United Arab Emirates or Saudi Arabia.⁵⁹

However, I agree with the insights of Ruba Salih and Helma Lutz, who argues, that within the European society migrant women are expected to conform gender stereotypes, whereas European women are encouraged to fight them. Ruba Salih describes this

⁵⁵ Mirjana Morokvasic, “Fortress Europe and Migrant Women”, *Feminist Review*, No. 39, Autumn 1991, p. 69 - 84; Maria Kontos, Kyoko Shinozaki, “Integration of New Female Migrants in the German Labour Market and Society,” in *Women in New Migrations: Current Debates in European Societies*, eds., Slany, Kontos and Liapi, p. 83-120.

⁵⁶ UNDESA, *Trends in International Migrant Stock*:

⁵⁷ UNDESA, *Trends in International Migrant Stock*:

⁵⁸ Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*.

⁵⁹ Nana Oishi, *Women in Motion – Globalization, State Policies, and Labor Migration in Asia*, (Stanford: Stanford University Press, 2005), p. 111.

phenomenon as locking women “within a set of normative and culturally gendered rules.”⁶⁰ Helma Lutz stressed that migrant women find themselves trapped in the “jungle of legislation and policy making” in the EU countries.⁶¹ Migrant women are required to fulfil perceived ‘cultural background’ criteria of the countries of origin in order to access the country of destination. Helma Lutz provides a striking example from the UK, where virginity tests used to be conducted only for brides from Muslim and Asian countries.⁶² However, at the same time migrant women are “forced into ‘Western’ model of nuclear family” and ideals of ‘romantic love’.⁶³ There is a big debate among feminist scholars whether migration empowers women or not. This debate will be touched upon while analyzing women migration for domestic work in the EU (see Section 2 of this chapter).

Unemployment among men v. Unemployment among women

It is alarming that within the period between 1994 and 2004 “unemployment among women increased by 13.2 million” worldwide, thus in 2004 there were around 77.9 million of unemployed women.⁶⁴ Unemployment among women seems as a strong “push” factor for women labour migration. Saskia Sassen supports previous claim as in the face of economic crisis women dominated sectors such as health and social protection are first ones, where public spending is cut off.⁶⁵

Nicola Piper opposes, that the unemployment among women is not the driving factor for their labour migration. It is the “increasing inability of men to find full-time employment in the countries of origin” what makes women to become “bread-winners” abroad.⁶⁶ Piper supports her claim by providing United Nations Population Fund (UNFPA) observation that

⁶⁰ Ruba Salih, “Moroccan migrant women: transnationalism, nation-states and gender, *Journal of Ethnic Migration Studies*, no.4 (October 2001): 655-671, p. 656.

⁶¹ Lutz, “Limits of European-ness,” p.104.

⁶² Lutz, “Limits of European-ness,” p.104.

⁶³ Lutz, “Limits of European-ness,” p.104.

⁶⁴ Lisa Söderlindh, “Decent Work Still the Exception to the Rule” published by Inter Press Service under Labour category, 16 May 2006. <http://www.ipsnews.net/news.asp?idnews=33249>, (accessed: March 14, 2011).

⁶⁵ Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton: Princeton University Press, 1991).

⁶⁶ Piper, ed., *New Perspectives on Gender and Migration*, p. 4.

indicates how African women started to migrate more intensively (above the global average) at the times of high rates unemployment among men.⁶⁷

Vicki Paskalia has emphasized that even in the Europe women move on their own in order to support their families left back in the countries of origin.⁶⁸ This is especially true for the Central and Eastern European countries. Worldwide, women ‘bread-winners’ phenomenon is prevalent in the Far East region – the Philippines, Indonesia, etc. Women from the latter countries migrate for work in the Global North or even in the neighbouring countries, which are better-off in economic terms.

It should be noted that “women’s’ share of total remittances are less than that of men”.⁶⁹ I further argue that lower volume of women remittances is rather outcome of gender stereotypes within labour market. Generally, women receive of less for the same job or for the undervalued ‘feminized’ labour sector.

Demand for feminized labour

‘Feminization of migration’ is related with the specific demand for women migrants in the global labour market.⁷⁰ UNIFEM indicates that women are increasingly needed for particular skilled and unskilled ‘feminine’ jobs in service and manufacturing industries and agriculture (See the Annex 5, Table 5).⁷¹

Particular demand for women labour can also be explained by other forms of ‘feminizations’ – ‘feminization of industrial labour’, ‘feminization of irregular migration’ and ‘feminization of poverty’. Before elaborating on abovementioned concepts, I draw attention on overall on two dimensions of sex labour divisions. The phenomenon of vertical labour segregation indicates their low position of female workers within the sector. This is also

⁶⁷ Piper, ed., *New Perspectives on Gender and Migration*, p. 5.

⁶⁸ Paskalia, *Free movement, social security and gender in the EU*.

⁶⁹ Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p.32.

⁷⁰ Patrick A Taran and Eduardo Geronimi, *Globalization, Labor and Migration: Protection is Paramount*, (Geneva: ILO, 2002), 10.

⁷¹ UNIFEM, “Gendered Basis for Women’s Migration for Work”, in *Empowering Women Migrant Workers in Asia: A Briefing Kit*, 2004, in: Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p. 32.

described by so called ‘glass ceiling’ effect, as very few women access the highest positions.⁷² Horizontal labour segregation shows those women are overrepresented in certain sectors such as care, housekeeping, services, and etc.⁷³ I elaborate further only on horizontal dimension, as domestic work is one of the ‘feminine’ sectors.

‘Feminization of industrial labour force’ indicates that formal and informal jobs in manufacturing industry demands women workers because of stereotypical qualities attached to gender.⁷⁴ Women workers are perceived as “submissive, suited to simple repetitive tasks, abundant and needy, cheap and pliable”.⁷⁵ The most important is that it is simply cheaper to employ young and flexible migrant woman, “than local workers or male migrants.”⁷⁶ Such reasoning implies to “deterioration of working conditions in pre-dominantly female jobs.”⁷⁷ Subsequently, these “deteriorating” conditions start to spread in the previously men-dominated sectors, such as manufacturing.

The phenomenon of “feminization of irregular migration” is overcrossing with abovementioned concept.⁷⁸ Janice Peterson adds that positions of female workers are characterized by inability to have official contracts and safety.⁷⁹ This is especially true in the context of migration. “Feminization of irregular” migration indicates an “increasing demand for female migrant labour in **informal** domestic service and in the **sex service** sectors in the European countries <...> in the context of the lack of formal channels for immigration”.⁸⁰ So

⁷² Robert M. Blackburn and Jennifer Jarman, *Segregation and Inequality*, GeNet Working Paper No. 3 January 2005(Cambridge: University of Cambridge, 2005), <http://www.genet.ac.uk/workpapers/GeNet2005p3.pdf> , accessed: 20 November, 2011, p. 9-12.

⁷³ Blackburn and Jarman, *Segregation and Inequality*, p. 9-12.

⁷⁴ Frank and Spehar, *Women’s labour migration in the context of globalisation*, p.21

⁷⁵ UNIFEM, “Gendered Basis for Women’s Migration for Work”, in *Empowering Women Migrant Workers in Asia: A Briefing Kit*, 2004 in: Frank and Spehar, *Women’s labour migration in the context of globalisation*, p. 32.

⁷⁶ Frank and Spehar, *Women’s labour migration in the context of globalisation*, p.23.

⁷⁷ Frank and Spehar, *Women’s labour migration in the context of globalisation*, p.22.

⁷⁸Slany, Kontos and Liapi, *Women in New Migrations*, p. 8.

⁷⁹ Janice Peterson, “The Feminization of Poverty,” *Journal of Economic Issues* 21, no. 1 (March 1987): 329-337. <http://www.jstor.org/stable/4225831> (accessed March 20, 2011).

⁸⁰ This term is also used by Morokvasic, Phizacklea, Campani, Kofman and other important authors, in: Slany, Kontos and Liapi, *Women in New Migrations*, p. 8 - 9.

not only migrant women are needed as a cheap labour, they also are wanted to be ‘irregular’ and thus easy to control.⁸¹

“Feminization of poverty” is another important phenomenon. Joan C. Williams argues that in the society men are perceived as ‘ideal’ workers, and women – as those who are supposed to do the reproductive work at home.⁸² Thus, employers discriminates women workers and make them dependent on men. However, in face of feminisation of industrial work such claim can be reversed.

Conclusion can be drawn that all three types of above discussed ‘feminizations’ within labour are attributed to low paid either export intensive or, usually, irregular service sectors. Therefore women can hardly create sustainable livelihoods in their countries of origin and in the countries of destination (if compared with nationals). Subsequently this leads to poverty, vulnerability and discrimination of women migrant workers. Despite these negative aspects, women migrate as they wish “to escape oppressive or violent environments and to create a better life.”⁸³ Main motivation is wage, as in the receiving countries wage is still relatively higher than in the country of origin. Second section further in greater detail elaborates on an emerging sector of EU domestic labour.

Section 2: Growing Demand for Domestic Work in EU

In this section, category of women migrants is narrowed down to migrant domestic workers. Domestic work is described as a work implemented in a private household and understood as a ‘reproductive’ work, traditionally undertook by women, this includes –

⁸¹ UN Global Migration Group Report, International Migration and Human Rights: Challenges And Opportunities On The Threshold Of The 60th Anniversary Of The Universal Declaration Of Human Rights, p. 41.

⁸² Joan C. Williams, “Deconstructing Gender,” *Michigan Law Review* 87 (1989): 797- 822.

⁸³ Slany, Kontos and Liapi, *Women in New Migrations*, p. 8.

cleaning, cooking, child rearing also care of elders, except professional health care.⁸⁴ In the literature, the term “domestic work” sometimes is used as broader definition including care (except professional), or narrower, then domestic work is limited to cleaning and cooking, but elder and child care, falls under definition of ‘care work’. In this paper, the broader definition is applied. Also some authors use the term ‘foreign domestic workers’.⁸⁵

It is estimated that globally there are 17-25 million of women who work as migrant domestic workers.⁸⁶ It is said to be “the largest sector driving international female labour migration.”⁸⁷ Philippines migrant domestic women self-organization counted that in Europe there were around half million of them.⁸⁸ Thus, real numbers were and are supposedly much higher. Statistics are problematic due the irregular status of migrants and it gets even more complicated in the case of domestic work.

Domestic work is still not perceived as a formal work in the EU, thus it is hard to count or trust official statistics. Floya Anthias and Maja Cederberg, stressed that it is “potentially largest informal sector employing migrant women” in Europe.⁸⁹ Feminists have analyzed the reasons why this large sector is so ‘invisible’. They have come up with important answers entrenched within the concept of ‘domestic work’ which will be examined further.

Concept of Domestic work from the feminist perspectives

Insights of feminist scholars are vital for analysis of domestic work. These insights reveal why domestic work was left to self-regulation. Famous feminist legal scholar, Frances

⁸⁴ Also some authors uses the term ‘foreign domestic workers’, as for example do Peter Weinert, *Foreign Female Domestic Workers: Help Wanted*, Geneva: ILO, 1991.

⁸⁵ For example: Peter Weinert, *Foreign Female Domestic Workers: Help Wanted* (Geneva: ILO, 1991).

⁸⁶ Kerry Pannell and Meryl Altman, “Closing the Gap: Feminist Perspectives on Policies Affecting Immigrant Labour in the Domestic Services industry in Europe”, Paper presented at conference *New Migration Dynamics: Regular and Irregular Activities on the European Labour Market*, Nice, 2007, p. 35. : http://www.unice.fr/migractivities/03_TravailDomestique.pdf#page=23 (accessed: 20 November, 2011).

⁸⁷ Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p. 40. Also it is said that migrant domestic work is “single and most important sector for women” in Hon Kong, Malaysia, Singapore, Taiwan, the Gulf States, Jordan and Lebanon and other countries in which there are legal channels for such labour migration.

⁸⁸ Lutz, “Limits of European-ness,” p. 101.

⁸⁹ Floya Anthias and Maja Cederberg, “Gender, Migration and Work: Perspectives and Debates in the UK”, in *Women in New Migrations*, Slany, Kontos and Liapi, eds., p. 35.

Olsen, elaborated on the notion of ‘domesticity’ and market/home dichotomy.⁹⁰ She claims that the sphere of ‘market’ is a ‘battlefield’ for men. This ‘battlefield’ is regulated by state, but ‘safe heavens’ or ‘refuge’ of home are left immune from the reach of state. Martha Fineman has criticized the existing dichotomies of public/private, state/civil society and market/family.⁹¹ She calls for the state intervention in the ‘private’ family life in order to protect the privacy of individual (usually of women or children).

Gendered notions of ‘domesticity’ have heavily impacted the policy-makers who were usually men applying the ‘male standard’.⁹² Thus, domestic work was not and still largely is not considered as a formal work, rather as a ‘private issue’.⁹³ Domestic work of migrant women is seen as something ‘natural’ to do according to gender roles. Hence a line between women/worker is absent. Annie Phizacklea describes the phenomenon of the emergence of migrant domestic workers’ as a failure to reach real equality among spouses in Europe:

The hiring a full-time domestic worker means that patriarchal household and work structures can go unquestioned, women pursuing career and a family need not ‘rock the boat’ and any guilt over exploitation is assuaged by knowledge that a less fortunate woman is being provided with work.⁹⁴

Most influential Marxist migration authors (e.g., Castles and Kosack) called migrant workers as ‘sub-proletariat’.⁹⁵ Marxist feminism authors add “sub-sub-category” within the latter – women migrant workers. Women were always treated as “a reserve army of labour for capitalism”, so it is even truer for the migrant women.⁹⁶ If in general women have freed men

⁹⁰ Frances Olsen, “Family and the Market: A Study of Ideology and Legal Reform,” *Harvard Law Review* 96, no. 7 (1983): 1497-1578.

⁹¹ Martha Albertson Fineman, “Intimacy Outside of the Natural Family: The Limits of Privacy,” *Connecticut Law Review* no.23 (1990-1991):955.

⁹² Catharine MacKinnon, “Difference and Dominance: On Sex Discrimination,” in *The Moral Foundation of Civil Rights*, eds. Robert K. Fullinwider and Claudia Mills (Rowman and Littlefield, 1986).

⁹³ Catharine MacKinnon “Difference and Dominance on sex discrimination,” in *Feminist Legal Theory*, (Vestview press, 1991).

⁹⁴ Annie Phizacklea, “Migration and Globalization: A Feminist Perspective”, in *The New Migration in Europe: Social Constructions and Social Realities*, eds. Khalid Koser and Helma Lutz, (Basingstoke: Macmillan, 1997) in: Lutz, “Limits of European-ness”, p. 101.

⁹⁵ According S. Castles and G. Kosack, *Immigrant Workers in the Class Structure of the Western Europe*, (Oxford: Oxford University Press, 1973) found in: Slany, Kontos and Liapi, *Women in New Migrations*, p. 27.

⁹⁶ According to Beechey and Bruegel, found in Slany, Kontos and Liapi, *Women in New Migrations*, p. 27.

from family obligations, so that the capitalist system could fully ‘exploit’ them, the same happened with ‘emancipated’ European women. Now they are in need to be freed by migrant domestic workers.⁹⁷

In general, Marxist feminism has criticized the unpaid and undervalued ‘reproductive’ work of women at home. However, Maria Kontos and Kyoko Shinozaki noted that at this point Marxist feminism has failed as it was not ‘shared experience of all women’.⁹⁸ Kontos and Shinozaki rightly argue, that experience of domestic workers was overlooked, as they were the ones who gained income from this “reproductive” activity.

Feminism thought further splits into those who argue that migrant domestic work is further ‘deskilling’ and ‘victimizing’ women from other countries – global patriarchal system, if you want as it was already illustrated by quote of Annie Phizacklea. Floya Anthias and Maja Cederberg put it that way:

(white, Western, middle class) women <...> leave behind their roles as primary carers in the household, these are taken over by the women from the global south, for whom this represents an employment opportunity.⁹⁹

Feminists argue that migrant domestic workers are exploited in the households dominated by men or by female employers within ‘asymmetrical relationships’.¹⁰⁰ Helma Lutz describes it as new “binary division in terms of ‘racialised’ gender relations: the European vis-à-vis ‘other’ woman.”¹⁰¹ Bridget Anderson warns that importance of racial aspect shall better not be overlooked.¹⁰² It is a general warning from the camp of feminist essentialist, as other types of ‘feminism’ also tend to reduce women realities to the single and

⁹⁷ Slany, Kontos and Liapi, *Women in New Migrations*, p. 27

⁹⁸ Kontos and Shinozaki, “Integration of New Female Migrants in the German Labour Market and Society” p. 99.

⁹⁹ Anthias and Cederberg, “Gender, Migration and Work: Perspectives and Debates in the UK”, p. 35.

¹⁰⁰ Kontos and Shinozaki, “Integration of New Female Migrants in the German Labour Market and Society” p. 99

¹⁰¹ Lutz, “Limits of European-ness,” p. 102

¹⁰² Anderson, *Doing the dirty work?*

overriding role – ‘being a woman’. Martha Minow calls such trend as “unstated feminist norm” when other roles and characteristics such as race, class, ethnicity, etc. are sidelined.¹⁰³

Some feminists find migration of women as an empowering experience as it allows to escape from “gendered relations of power within ethnic community” and to become ‘bread-winners’ themselves.¹⁰⁴ For example, Floya Anthias and Maja Cederberg comprehend the migration of women as “potential for women’s emancipation”. Nevertheless authors have stressed that emancipation of migrant domestic workers can be “severely undercut by the reality of gendered as well as racialized structures and processes in receiving societies.”¹⁰⁵

Domestic work is one of the ‘autonomous migration strategies’ for many women worldwide. Women undertake such opportunity in order to improve their own current situation on the other occasions of their children. Some examples drawn from the studies: Schmoll has described that Tunisian women are investing in education of their daughters,¹⁰⁶ other study of Anna Rotkirch, reveals how women from Eastern Europe are taking their sons out of country in order to ‘save them’ of widespread alcoholism and drug abuse in the country.¹⁰⁷

From the prism of radical feminism, it shall be stressed that migrant domestic workers conform to their reproductive role because of the type of job they are performing. In addition to this, it is somewhat complicated when mothers migrate in order to pay for education and ‘emancipation’ of their children. From the radical feminist approach, it could be again interpreted as ‘women-mother sacrifice’, which is required from women but not from men.

¹⁰³ Martha Minow, “Foreword: Justice Engendered,” *Harvard Law Review* no. 101 (1986):10.

¹⁰⁴ Anthias and Cederberg, “Gender, Migration and Work: Perspectives and Debates in the UK,” p.42.

¹⁰⁵ Anthias and Cederberg, “Gender, Migration and Work: Perspectives and Debates in the UK,” p.42.

¹⁰⁶ Schmoll C., “Pratiques spatiales transnationales et stratégies de mobilité des commercantes tunisiennes,” *Revue Européenne des Migrations Internationales* 21, no.1 “Femmes, genre, migration et mobilités” (2005):131-154, in Morokvasic and Catarino, “Women, Gender, Transnational Migrations and Mobility in France,” p.68.

¹⁰⁷ Anna Rotkirch, “Sauver ses fils: migrations trans-européennes comme stratégies maternelles,” *Migrations Société* 17, no. 99-100 (May-June, 2005):161-172, in Morokvasic and Catarino, “Women, Gender, Transnational Migrations and Mobility in France,” p.60.

Therefore, according to radical feminists, migration is further ‘enslaving’, not empowering experience. Lydia Morris also contributes to this *empowerment vs. enslavement* debate:

For gender the precise dynamic occurs through women’s association with the private sphere, which limits their employment options and confines them to caring and/or domestic work.¹⁰⁸

However, further she raises the point that ‘gender precise dynamic’ creates a ‘protected employment niche’ for migrant women and thus can be empowering.¹⁰⁹

Empowerment within domestic work, which is perceived as a low status job, sounds quite ironically in the face of intersectional discrimination (See 3 Section of Chapter I). Controversially, domestic work can become attractive for men because “of the legal channels and breadth of destinations ‘on offer.’”¹¹⁰ For example, in the Philippines more and more men are trying to enter nursing schools so that they could migrate.

Growing Demand for domestic workers in the EU

Social scholars¹¹¹ and especially, feminist scholars¹¹² draw attention to the changed gender roles within the European society. EU institutions found a solution for shrinking market of the EU labour. The solution is to include women in the active employment. The famous gender equality slogan produced by these EU institutions states “equal pay for equal work.”¹¹³ However, it seems that such slogan is only applicable for the EU citizens or highly skilled migrant women.

Women work at home or so called “love labour” (take care of household, children and ill) were not reconsidered and shared equally among all family members. The EU Member

¹⁰⁸ Morris, *Managing Migration*, p.141.

¹⁰⁹ Morris, *Managing Migration*, p.141.

¹¹⁰ Piper, ed., *New Perspectives on Gender and Migration*, p. 6.

¹¹¹ Majda Hrzenjak, Vicki Paskalia, Patrick A Taran and Eduardo Geronimi, Helma Lutz, Norbert Cyrus, and etc.

¹¹² Bridget Anderson, Janice Peterson, Margaret L. Satterthwaite, and etc.

¹¹³ EU has adopted various legislative and policy measures on this issue. Professor Noreen Burrows emphasizes “inclusion in the Treaty of the equal pay principle [Article 119 of EC], the equal pay Directive, the case law of the European Court of Justice [Defrenne case] and now more recently, the mainstreaming of equality principles into the European Employment Strategy and the European Social Inclusion agenda.” in Noreen Burrows, “Equal Pay for Equal Work: The Impact of European Law”, published in EU official website, <http://ec.europa.eu/education/programmes/lip/jm/more/confgender03/burrows.pdf>, (accessed: March 21, 2011), 2.

States also are not removing the burden of family responsibilities from women by establishing accessible and affordable childcare and care for elderly institutions.

Majda Hrzenjak defines that there is ‘boosting demand among middle class of European households’ for migrant domestic workers.¹¹⁴ It shall be accented that not only upper classes or very rich people are in need for maids, nannies and house-keepers but majority of the families in Western Europe. In the EU, “two career” household model is spreading and bringing about “reproductive crisis”.¹¹⁵ It means that more and more women in the EU are not willing /or can not manage with a paid job and her unpaid “love labour”. European women prefer to pay for ‘other’ women to fulfil *their* duties at home. Hence, global economic inequalities intertwine with race and gender and women from ‘poorer’ countries come to Europe in order to free European women from duties at home.¹¹⁶ That is how so called ‘global care chains’ are created.¹¹⁷

Peculiarities of domestic work in Europe

Majda Hrzenjak points out that for European women it is psychologically easier to employ non-European woman as domestic worker because this women are understood as ‘Other’.¹¹⁸ Unfortunately, this ‘Other’ usually has a negative meaning of ‘being inferior’ or as Bridget Anderson calls it - “processes of ‘othering’”.¹¹⁹ The latter concept illustrates how the racial stereotypes play an important role when employers are choosing their employees for domestic work as some employers are looking for submissive and needy women.

Among other challenges within demand in the EU Majda Hrzenjak notices under-regulation of domestic work. The EU ‘private’ households are resistant to declare the work performed at their homes within the Tax or Labour inspectorates. This ‘resistance’ links with

¹¹⁴ Majda Hrzenjak, *Invisible Work* (Ljubljana: Mirovni Institut, 2007)69.

¹¹⁵ According Hrzenjak, *Invisible Work*.

¹¹⁶ According Annie Phizaclea, Bridget Anderson, Lydia Morris, Helma Lutz and other feminist scholars.

¹¹⁷ ‘Global care chains refers to “an international network system of care-giving stratified by class and often, ethnicity” in: Frank and Spehar, *Women’s labour migration in the context of globalisation*, p. 40.

¹¹⁸ Hrzenjak, *Invisible Work*, 47 – 50.

¹¹⁹ Anderson, *A Very Private Business: Migration and Domestic Work*.

‘domesticity approach’, which explains why it is inappropriate to look at home as a ‘place for employment’. “Domesticity approach” declares that home is a “safe heaven” of privacy and intimacy, but not for state regulations and labour inspections.¹²⁰

Moreover, domestic work has a low status within European society as there are no career opportunities and as it is low-paid. Local women undertake this kind of job only if there are no other jobs available. Currently domestic job is undertaken by migrant women from the ‘New’ EU countries and the ‘Global South’.¹²¹ The former are in better position than the latter in terms of legal status and rights. However, women from ‘New’ EU members will be outsourced in such ‘low status’ job like domestic work.¹²² Thus, ‘Old’ EU countries¹²³ are in need for more female migrants from the Third Countries¹²⁴ in order to fill in the labour gaps and to manage “reproductive and care crisis”.¹²⁵

Typology of domestic work

Domestic work can be performed in several ways: **‘live in’**, when the women live and work in the same household; **‘live out’**, when women have a separate accommodation; **full time** employment – when women work for one household; hourly or **part-time** employment – when they are able to work for several employers.

‘Live in’ type of domestic work increases women dependency upon an employer. Studies show that local domestic workers are especially not keen to go for ‘live in’ type of job. They prefer to live separately and to work for several employers. In this way, local domestic workers lessen the dependency. Migrant women, on the contrary, find ‘live in’ situation as an advantage. They receive not only job, but also a place to live. What is more, dependency upon employer is especially high when the work permit of migrant domestic

¹²⁰ Domesticity and Market dichotomy according Olsen, “Family and the Market.”

¹²¹ Lutz, “Limits of European-ness.”

¹²² The term ‘New EU members’ refers to countries which have joined EU in 2004 and 2007. The argument especially is applicable to Central and Eastern European countries (CEE).

¹²³ The term ‘Old EU countries’ refers to EU-15, prior the enlargement in 2004.

¹²⁴ The term ‘Third Countries’ refers to non-EU and non-EFTA countries, which are covered by Schengen Agreement.

¹²⁵ Hrzenjak, *Invisible Work*.

worker is connected with specific employer. Migrant domestic workers who are accompanying diplomats are in the worst position. Not only their legal status is dependent but also diplomats are immune from any kind of inspections and usually – even criminal charges.¹²⁶

What is more, domestic work sector is highly informal. Informal contract (or absence of it) is acceptable for both parties - employee and employer. Both parties usually choose to ignore work permit or legal immigration status. Norbert Cyrus adds that generally in the European society there is a much higher tolerance for undeclared work than it is, for example, the in US.¹²⁷ This kind of ‘tolerance’ was also noticed by the Global Migration Group (GMG). GMG stressed the EU shadow economy maintains the need for the irregular, vulnerable migrants.¹²⁸

According to neo-classical economic theory, the initiation of migration takes place when there is a demand for labour force in wealthy countries, there is a responsive supply from the ‘poorer’ countries.¹²⁹ In the EU there is a noticeable emergence of migrant domestic workers’ recruitment and placement agencies.¹³⁰ The absence of clear regulatory framework in the field of domestic work in general and for migrant domestic work in particular creates a perceived ‘impunity’ for such ‘suppliers’ and ‘employers’. Therefore, only in extreme cases, such agencies or employers are found indebted migrant domestic workers or exploiting them.

The nature of ‘workplace’

As it was discussed in the beginning of this section, domestic work sector is gender segregated. It is seen as extension of the women’s reproductive role at home. The ‘workplace’

¹²⁶ Satterwaite, *Beyond Nannygate*.

¹²⁷ Cyrus, “Being Illegal in Europe,” in *Migration and Domestic Work*, Lutz, ed., 180.

¹²⁸ UN Global Migration Group Report, *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights* (New York: GMG, October 2008), 41.

¹²⁹ Massey D. S., et al. “Theories of International Migration: A Review and Appraisal,” *Population and Development Review* 19, no. 3 (New York: UN Population Council, 1993):431- 466.

¹³⁰ Helen Schwenken, “RESPECT for All: The Political Self-Organization of Female Migrant Domestic Workers in the European Union,” *Refuge* 21, no 3 “Global Movements for Refugee and Migrant Rights” (2003), <http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/21299/19970>, accessed 21 October 2011.

is covered under the ‘privacy of home’, which until now was immune from any kind of state interventions.¹³¹ Whereas a farm now are perceived not as exclusive property of farm owner but also as a workplace which is target for labour inspections, such developments have not taken place with regards to domestic work.

Feminists legal scholars have fought for that ‘home’ could be seen as a place of sexual abuse and domestic violence. There is one more step to be reached – to recognize ‘home’ as a formal workplace. In some countries, it is done. For example, Canada, South Africa, Sweden and Uruguay allow labour inspectors to check private households or have other enforcement measures, such as grievances’ procedure.¹³² However, in other countries where domestic work is regulated important labour rights are missing. For example, in South Africa, domestic work is regulated, but Labour Relations Act provides that, collective bargaining, organizing and inspections cannot take place within this sector.¹³³

The nature of ‘work’

South African regulation is still an exemplary in comparison with the EU. South African labour legislation equates domestic work as a regular paid ‘work’,¹³⁴ whereas in the EU it is still considered to be something in between ‘help’ and ‘work’.¹³⁵ The difference is not only in linguistics, there is a substantial difference in approach too. ILO study revealed that only 19 countries out of 65 compared worldwide “had specific laws or regulations dealing with domestic work.”¹³⁶ Regarding Western Europe, “domestic work is not considered valid work

¹³¹ Only recently international and national mechanisms reached the privacy of ‘home’ in order to combat the violence against women has reached the ‘home’. . This will be further discussed in the Chapter 3. This will be further discussed in the Chapter 3.

¹³² International Domestic Workers’ Network (IDWN), Pamphlet for International Labour Conference 99th Session, ILO: Geneva, June 2010), p. 10.

¹³³ South Africa, *Labour Relations Act 2000*, Chapter 3 “Collective Bargaining”, Part A “Organisational Rights” Section 17, “Restricted rights in domestic sector.”

¹³⁴ South Africa, Department of Labour, No. R., *Basic Conditions of Employment Act*, No 75 of 1997, Sectoral Determination 7: “Domestic Worker Sector.”

¹³⁵ European Parliament, Resolution on regulating domestic help in the informal sector 2000/2021(INI), text adopted on 30 November 2000, (author: Brussels, 2000)..

¹³⁶ International Labour Organization, *Stopping Forced Labour: Global Report under Follow up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 89th session,

for the allocation of a work or resident permits.”¹³⁷ Attitude of Western European countries is at least not responsible as ILO has recognized that “domestic workers experience a degree of vulnerability that it is unparalleled to other workers” because of the specific nature of this work.¹³⁸

‘Specific nature’ could be described further as isolation of migrant domestic workers in the private household. Migrant domestic workers legal status often is irregular and usually they do not have written labour contracts. What is more, there is a “special relationship between employer and employee, which is “highly emotional, personalized and typified by mutual dependency.”¹³⁹ This type of relationship was described by Judith Rollins as ‘maternalism’. ‘Maternalism’ refers to “women's supportive intrafamilial roles of nurturing, loving and attending to affective needs.”¹⁴⁰ However, this relationship is rather asymmetrical. Migrant domestic workers are often required to show compassion as being ‘one of the family’, whereas their treatment usually indicates ‘otherness’ – special rules, separate utensils, etc.¹⁴¹

Social Status of Migrant Domestic Workers

Migrant Domestic Workers are perceived as vulnerable because of the grounds of intersectional discrimination – on race, nationality, gender, class.¹⁴² What is more, domestic work sector is in an extremely low position among other occupations.¹⁴³ This position also depends on whether domestic work is regulated or not. In addition to this, there is a difference

Report I (B), Report of the Director General,. Geneva: ILO p. 30, in: Frank and Spehar, *Women's labour migration in the context of globalisation*, p. 43.

¹³⁷ Frank And Spehar, *Women's Labour Migration In The Context Of Globalisation*, p. 41.

¹³⁸ International Labour Organization, *Stopping Forced Labour*, p. 47, in: Frank and Spehar, *Women's Labour Migration in the Context of Globalisation*, p. 43.

¹³⁹ Frank and Spehar, *Women's Labour Migration in the Context of Globalisation*, p. 41.

¹⁴⁰ Judith Rollins, *Between Women: Domesticity and Their Employers*, (Philadelphia: Temple University Press, 1985), p. 179.

¹⁴¹ Hrzenjak, *Invisible Work*,

¹⁴² Slany, Kontos, and Liapi, eds., *Women in New Migrations*.

¹⁴³ Olsen, “Family and the Market.”

among the social status of ‘live in’ or ‘live out’ domestic workers.¹⁴⁴ Overall, legal migration status is the most important factor for the social status. There is number of legal statuses among migrant domestic workers: whereas some of them are undocumented migrants or (rejected) asylum seekers, others came into country legally (as tourists or students) but overstayed their visa or came through ‘family reunion’ and, thus, are dependent on husbands. Finally some of them came legally with the purpose of employment in domestic sector. In the latter case for the social status it is important to know whether migration and employment status is dependent upon specific employer.

All these factors create what Nicola Piper called the ‘axis of stratification’. She includes “combined effects of gender, ethnicity, legal status, skill level, and mode of entry or exit” as well as socio-economic status and religion.¹⁴⁵ She adds that “gendered and geographic stratification of migration” makes an influence upon the “labour market experience, entitlements and rights” for migrant women.¹⁴⁶ Lydia Morris links the issue of ‘stratified rights’ with classification of migration statuses and described it as ‘devices of inclusion and exclusion’.¹⁴⁷

Nicola Piper stresses the importance of the “increasing diversification and polarization, resulting in highly stratified migratory movements”.¹⁴⁸ The notion of ‘polarization’ shows the broadening gap between highly skilled and un-skilled migrants. Such ‘polarisation’ depending upon (perceived) level of skills is paramount in the EU labour migration policies. ‘Diversification’ portrays differences among the migrant groups such as countries of destination, streams and the modes of migration. Thus increasing ‘diversification’ among migrant domestic workers in terms of countries of origin is also a noticeable trend in the EU.

Paradigm shift: from ‘victims centred’ to ‘human rights based’ approach

¹⁴⁴ Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p.41.

¹⁴⁵ Piper, ed., *New Perspectives on Gender and Migration*, p.8.

¹⁴⁶ Piper, ed., *New Perspectives on Gender and Migration*, p.9.

¹⁴⁷ Morris, *Managing Migration*, p.146.

¹⁴⁸ Piper, ed., *New Perspectives on Gender and Migration*, p.8.

All of the above mentioned processes have the impact on migrant domestic workers access to rights. In most of the cases migrant domestic worker are in fact excluded from the ‘systems of rights’, especially labour rights. The risk of migrant domestic worker becoming a victim of intersectional discrimination should be acknowledged but not exaggerated in human rights framework. Focus on their ‘vulnerabilities’ leads to further victimization and ‘dis-empowerment.’ Anti-slavery and anti-trafficking activists praise for the ‘victim centered’ approach in the name of the ‘human rights’.¹⁴⁹ They employ “grand human rights narrative of ‘victims-saviours-savages’” by displaying domestic worker as a powerless victim, employer as heartless abuser and some NGOs as saviours.¹⁵⁰

There is a need for the *paradigm shift* as migrant domestic workers are not supposed to be regarded as ‘potential’ victims, and be protected only once it is too late. For example, UN Rights of Persons of disabilities convention has accelerated the paradigm shift towards persons with disabilities.¹⁵¹ Persons with disabilities started to be regarded as agents of their lives, not as objects. Similarly, ILO Domestic workers convention embodies such paradigm shift. Convention provides that all domestic workers (including migrant women) shall be regarded from the ‘human rights based’ or even from ‘labour rights based’ approach as bearers of rights.

In the following Chapter I analyse the EU labour and migration policies concerning migrant domestic workers from ‘human rights based’ approach. I identify the main challenges at the EU and national level within three countries: France, Germany, and the UK.

¹⁴⁹ For example “Victim-Centered” approach is promoted by Anti-slavery International (www.antislavery.org), The AIRE centre (www.airecentre.org), also often mentioned in the EU project “Combat Trafficking”(combattrafficking.eu); embodied in CoE Convention Against Trafficking (CETS. 197) which will be discussed in depth in the Chapter 3.

¹⁵⁰ Makau Mutua, “A Third World Critique Of Human Rights”, 8 – 49.

¹⁵¹ Rosemary Kayess and Phillip French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities," *Human Rights Law Review* 8, no. 1 (2008): 1-34.

CHAPTER 2 - LEGAL STATUS OF MIGRANT DOMESTIC WORKERS IN EU

In this chapter I discuss common EU policies aimed at migrant labour and fight against illegal immigration. I claim that strengthening ‘securitization’ and ‘anti-trafficking’ approach has in fact a negative impact on access to rights, especially labour rights of migrant domestic workers. What is more, in the EU, there is a widening gap among highly skilled and low skilled migrants in terms to rights attached. This phenomenon contributes to further marginalization of migrant domestic workers.

Further, I explore how these EU policies play out on the ground, by providing examples from France, Germany, and the UK.¹⁵² I take into consideration legal channels of entry for migrant domestic workers and possibilities to receive a formal labour contract in the abovementioned countries.

What is more, I elaborate on the perspectives of migrant domestic workers’ regularization in the EU by applying the ‘needs based approach’.¹⁵³ I claim that the ‘needs based approach’ can be beneficial for creating legal migration channels for domestic workers. Subsequently, the legal entry enables migrant domestic workers to access their rights. I argue that strong emphasis on gender mainstreaming in the EU shall be taken into consideration for empowerment of migrant domestic workers as ‘women workers’.

¹⁵² Regarding the UK, EU level migration policies are relevant to a lesser extent as the UK is not taking part in the Schengen agreement.

¹⁵³ ‘Needs based approach’ is the keyword for migration policies in “Lisbon Strategy for Growth and Jobs” (2009 December 1) and reiterated in Communication from European Commission, “Europe 2020: a Strategy for Smart, Sustainable and Inclusive Growth”, COM(2010) 2020, European Commission: Brussels, 3.3.2010.

Section 1: Trapped between the EU migration and labour policies

In this section I elaborate on the main EU legislation within common migration policies. I demonstrate how the EU legislation creates a variety of legal migration statuses according official (such as skills) and unofficial (such as nationality, race and gender) criteria.¹⁵⁴ The abovementioned criteria indicate what type of migrants to promote and which ones – to restrict. From this point, I argue that migrant domestic workers create additional ‘stratum’ among both of Third Country Nationals (TCNs) and EU nationals. TCNs’ legal migration status is not equal, compared with the EU citizens. Migrant domestic workers from Third countries are given lesser possibilities for the legal entry. Once they (usually) are labelled as ‘illegal migrants’ there are almost no possibilities for regularization. Hence such migrants are pushed into the ‘double illegality’ whereas EU nationals working for the private household in another EU country would be only found as engaging in ‘undeclared work’.¹⁵⁵ Both categories of migrant women (either from new EU countries or from Third countries) are vulnerable because of ‘particularities of domestic work’. As it was discussed in the previous chapter, at EU level, there is ongoing invisibility of the domestic sector due its ‘feminine and private nature’. This ‘invisibility’ was not adequately addressed in the form of the legally binding EU directives or regulations. European Parliament within a decade has issued only two resolutions concerning the question of ‘domestic work’.¹⁵⁶ Also only two EU institutions - European Economic and Social Committee (EESC) and Committee on Women's Rights and Equal Opportunities have published their opinions on this matter.¹⁵⁷

¹⁵⁴ Ryszard Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights* (Strasbourg: Council of Europe Publishing, December 2005).

¹⁵⁵ Hrzenjak, *Invisible Work*, 59-61.

¹⁵⁶ Even the first EP resolution is concerned with ‘domestic help’ and only second with ‘domestic work’: European Parliament resolution on regulating domestic help in the informal sector (2000/2021(INI)); European Parliament resolution of 12 May 2011 on the proposed ILO convention supplemented by a recommendation on domestic workers, (P7_TA-PROV(2011)0237 - B7-0296/2011);

¹⁵⁷ European Economic and Social Committee, Opinion on the professionalization of domestic workers, EESC, SOC/372, 26 May 2010; European Parliament Session document FINAL A5-0301/2000, on 17 October 2000, REPORT on regulating domestic help in the informal sector (2000/2021(INI)) Committee on Women's Rights and Equal Opportunities, Rapporteur: Miet Smet.(Miet Smiet Report).

Overall, the situation in the EU is quite controversial: while European Commission is ‘pushing’ directives towards promotion of highly skilled migrants through Blue Card Policy, Members States adopt (together within the frame of European Council or/and individually) restrictive measures against “unwanted”, but needed migrants.¹⁵⁸ Migrant domestic workers are increasingly needed due demographic and social changes within the EU. These social changes are also partly the outcome of the EU gender mainstreaming and ‘inclusive’ labour policies.

2.1.1 Out of the scope of EU legal labour migration policies

In this sub-section I give institutional overview of the developments in the EU common labour migration policies. Further I explain main changes starting from the Treaty of Amsterdam and finishing with the Treaty of Lisbon. I do not intend to elaborate on these treaties as I focus on the specific EU directives.

The EU institutional developments in labour migration policies

In the first chapter it was discussed, the migrant domestic workers become ‘vulnerable’ when access to legal work depends on the residence permit. Majda Hrzenjak stresses that in EU „immigration policies prevent them from obtaining work and residence permits“. ¹⁵⁹ This situation could be distinguished from the one in USA. Researchers indicate that in USA there is “a clear political preference for the declaration of work over the control of immigration status.”¹⁶⁰ In the EU policies the opposite is true. I claim that such trend of ‘securitization’ further undermines the rights of domestic workers. Therefore, I further illustrate how domestic work sector remained ‘invisible’ at EU level legal labour migration policies.

¹⁵⁸ Elena Jurado and Annie Bruzzone, *Rethinking migration: Work and Welfare in a Mobile Economy*, (London: Policy Network, 2008). <http://www.policy-network.net/uploadedFiles/Publications/Publications/Rethinking%20immigration-online.pdf> (accessed: March 15, 2011).

¹⁵⁹ Hrzenjak, *Invisible Work*, 60.

¹⁶⁰ Papademetriou, D. G., K. O’Neil and M. Jachimovich, *Observations on Regularization and Labour Market Performance of Unauthorised and Regularized Immigrants*, (Washington: Migration Policy Institute, 2004). Cited in Cyrus, “Being Illegal in Europe,” p. 180.

Labour migration from Third Countries nowadays is one of the highest concerns in the EU, as the labour force is crucial future factor for the “area of freedom, security and justice”.¹⁶¹ In 2009 report European Commission has foreseen that in order to ensure the stable growth of EU economy, EU will need additional 50 millions migrant workers from Third countries in 2060.¹⁶² Such need will arise because of the continuous decrease of the working age population.¹⁶³

It has to be reminded that the EU has started from purely economic cooperation among the countries. According to functionalist theory, the EU common labour migration policies emerged as an “overspill” from economic interest – in order to ensure the further growth of the EU economy.¹⁶⁴ After the Treaty of Amsterdam, the European Commission (EC) and the European Parliament (EP) started to develop policies labour migration at EU level. These supra-governmental institutions have framed migration from Third Countries as a solution for the EU own problems, such as: shrinking economy because of demographic changes (ageing and reproductive crisis); the need for temporary migrants to fill in the gaps in the EU labour market; the need for seasonal workers in the sectors of agriculture and tourism; the need for highly skilled migrants in order to compete with other developed countries.¹⁶⁵ The very first attempt to create common labour migration policy was made after Tampere Conclusions.¹⁶⁶

After Tampere Programme has finished, in 2004 a new phase of EU cooperation has started within the field of migration, so called ‘Hague Programme’.¹⁶⁷ Following the European Council Conclusions made in Hague, the European Commission has proposed a ‘Policy Plan

¹⁶¹ David O’Keefe, *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing, 1999), 351.

¹⁶² European Commission, *Communication Justice, Freedom and Security in Europe Since 2005: an Evaluation of the Hague Programme and Action Plan, An extended report on the evaluation of the Hague Programme*, COM (2009) 263 final, (Brussels: Author), 22.

¹⁶³ According to Eurostat, “EUROPOP 2008 Convergence Scenario” in: European Commission, *Communication Justice, Freedom and Security in Europe Since 2005*.

¹⁶⁴ As given by the functionalist theory, in the Chapter 1 in Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law*, 2nd ed. (Cambridge: Cambridge University Press, 2010).

¹⁶⁵ This is also known as Lisbon Agenda.

¹⁶⁶ Tampere European Council of October 1999.

¹⁶⁷ Hague European Council of November 2004.

on Legal Migration.’¹⁶⁸ This Plan was aimed at creating general framework and specific measures for highly skilled workers, seasonal workers, Intra-Corporate Transferees and remunerated trainees. ‘A Policy Plan on Legal migration’ has reiterated that the “access to the labour market is crucial for the integration of third-country nationals”.¹⁶⁹ However, migrant domestic workers were once again overlooked and left at discretion of Member State. The latter had to decide whether to create a legal migration channel for domestic labour sector. For example, Spain, Italy, Greece and Cyprus have created a quota system for migrant domestic workers, whereas the UK and Ireland have opened borders only for migrants from European Economic Area (EEA).¹⁷⁰ It should be noted that both the UK and Ireland are not taking part in Schengen zone, thus it can be concluded that they were less influenced by the restrictive EU immigration policies. On the other hand, the UK is also not taking part in the EU social policies and only partly – as it concerns cooperation in the field of Home Affairs and Justice.¹⁷¹ Scandinavian countries, Netherlands and Germany have been criticized by migrant domestic workers self-interest groups for not including the need for migrant domestic workers “in their managed migration policies.”¹⁷² In addition to this, all ‘old EU’ countries remain most restrictive towards low skilled migrants from Third Countries, who are willing to engage in the low income sector, like domestic work.

Further I provide overview on how migrant domestic workers were left out from the EU labour migration policies for self-employed, highly skilled, seasonal workers. They also were precluded from the possibility to qualify for long term residents. Afterwards I discuss which of the EU legal migration channels are used by migrant domestic workers in the reality.

Not self-employed

¹⁶⁸ Communication from the Commission ‘A Policy Plan on Legal Migration’ COM(2005) 669 final, Brussels, 21.12.2005.

¹⁶⁹ Communication from the Commission COM(2005) 669 final, under 1.1. “The political context,” p. 9.

¹⁷⁰ According Maria Gallotti, *The Gender dimension of domestic work in Western Europe*, International Migration Papers No. 96, Geneva, ILO, 2009, in: Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p.54

¹⁷¹ <http://ue.eu.int/showPage.aspx?id=249&lang=en>,

¹⁷² Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p.54.

Following the European Council decisions made in Tampere, there was drafted a Proposal for EU directive dealing with the employed and self-employed migrants.¹⁷³ This Proposal for directive considered ‘a flexible framework’ allowing Member States or the EU institutions to react to demographic and economic changes. This ‘flexible framework’ allows to include ‘new categories of required migrants’ or to limit those, who are not needed anymore in the national labour market.¹⁷⁴ This Proposal was said to provide “rights to third-country nationals whilst respecting Member States discretion to limit economic migration”.¹⁷⁵

The domestic workers are increasingly required among middle class European households.¹⁷⁶ Thus, domestic work sector, would easily meet ‘economic needs test’ not even at national, but as well as at EU level.¹⁷⁷ The situation of domestic workers is still not adequately addressed at EU level. Currently, each Member State can decide individually on how they want to deal with the demand for such labour. Most of the Member states have chosen to ignore such demand within their national labour migration policies.

As a consequence, only few of migrant domestic workers were recruited legally through migrant labour recruitment agencies. They fall under EC directive establishing ‘conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities.’¹⁷⁸ Majority of migrant domestic workers were pushed further to ‘double illegality’ as this Proposal has replaced dual residence and work permit system “by a combined title authorizing both residence and work with one administrative act, the

¹⁷³ Commission of the European Communities, Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities (COM(2001)386).

¹⁷⁴ Commission of the European Communities, (COM(2001)386), p. 4

¹⁷⁵ Commission of the European Communities, (COM(2001)386) p. 4

¹⁷⁶ Hrzenjak, *Invisible Work*, 60.

¹⁷⁷ ‘Economic needs test’ means that priority is given to nationals to fill in the employment gaps, and only in the absence of such persons, employer could invite migrant workers from Third Countries. It is also called the principle of ‘*Respect for the domestic labour market situation*’.

¹⁷⁸ Commission of the European Communities, (COM(2001)386).

“residence permit – worker” and in case of self-employed persons – “residence permit – self-employed person.”¹⁷⁹

It was noted in the first chapter, that due the economic crisis “informalisation and precarious self-employment are also expected to rise” and to increase a ‘feminization of migration.’¹⁸⁰ However, there is an ongoing debate whether migrant domestic workers can be regarded as ‘self-employed’ when in fact they work for another person. For example in Ireland domestic workers can be perceived either as employed or self-employed.¹⁸¹ In the UK, Stafftax indicates that “in most cases domestic workers do not meet HMRC [HM on Revenue and Customs] criteria for self-employment.”¹⁸² In fact, in the UK both ways are possible for the nationals, but not for migrant women. In the UK migrant domestic workers’ permit is attached to a specific employer, for whom this domestic worker had been previously working at least for a year.¹⁸³ The similar situation is noticeable in Germany and France. Regarding the latter, only highly skilled persons Third countries can come legally, thus not domestic workers. As concerns the internal EU migration from Central and Eastern European countries (CEE), the picture is different in case of the UK – it is relatively easy to get legal employment within the low skilled sector. France and Germany solve the problem of demand by ‘turning the blind eye’ on the migrant women working in the private households.

¹⁷⁹ Commission of the European Communities, (COM(2001)386) p. 6.

¹⁸⁰ According to Dütting, *Economic Change and migration*, in: *The European Feminist Forum: A herstory* (2004-2008), Aletta, The Netherlands, 2009; found in: Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p. 45.

¹⁸¹ Ireland Public Service Information provided by the Citizens Information Board, “Domestic workers’ employment rights in Ireland,” http://www.citizensinformation.ie/en/employment/types_of_employment/full_time_employment/domestic_workers_in_ireland.html (accessed: November 11, 2011).

¹⁸² According Stafftax, which is “UK’s original domestic payroll service”, “Domestic workers & self employment,” <http://www.stafftax.co.uk/domestic-workers/self-employment> (accessed: November 11, 2011).

¹⁸³ United Kingdom, Home Office Border Agency, “Domestic Workers,” <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/othercategories/domesticworkers/> (accessed: November 11, 2011).

Not highly skilled

The EU labour market has to attract highly skilled workers from Third Countries in order to have a competitive economy. According to the EC, “whereas 55 per cent of the US migrants are highly qualified, this is only true for the 5 percent of migrants in the EU”.¹⁸⁴ An absolute majority - 85 per cents of the EU labour migrants coming from Third Countries have “only limited skills”.¹⁸⁵ The Blue Card Directive was introduced with an aim to attract highly skilled migrants.¹⁸⁶ It is obvious, that migrant domestic workers are excluded from the scope of application of this Directive. Firstly, because domestic work is not considered as a ‘work’; secondly it is perceived as ‘low value’ work not needing any ‘skills’, as any women or girl have them ‘by nature’; and thirdly - it is low paid.¹⁸⁷ Therefore, the ‘Blue Card’ gates are closed for majority of women, because of lower end ‘feminine’ professions, and for migrant domestic workers, in particular, because of the ‘stigma’ attached to the sector.

Blue Card entitles highly skilled migrant workers with similar to EU citizens’ rights and provides opportunity to obtain EU citizenship. Anja K. Frank and Andrea Spehar expressed a legitimate concern that Blue Card intends to “institutionalise discrimination on the basis of skill level in the acquisition of labour rights”.¹⁸⁸ This notice brings back to Martin Ruhs and Philip Martin debate on *numbers v. rights*.¹⁸⁹ Authors claim that the more persons will be entitled to rights, the lower protection will be given and *vice versa*. The similar idea was raised by Joseph H. Carens, who argued that the more accessible for migrants becomes the

¹⁸⁴ Council of the European Union. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. Published in the Official Journal of the European Union, L 155/17 on 18.6.2009.

¹⁸⁵ Steffen Angenendt and Roderick Parkes, “The Blue Card Impasse,” <http://www.europeanunionbluecard.com/>, (accessed: March 20, 2011).

¹⁸⁶ EU Council Directive 2009/50/EC, 25 of May 2009.

¹⁸⁷ Hrzenjak, *Invisible Work*, 59-61.

¹⁸⁸ Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p.66.

¹⁸⁹ Martin Ruhs and Philip Martin, “Numbers vs. Rights: Trade-Offs and Guest Worker Programs,” *International Migration Review* 42 No. 1 (2008):249–265.

institute of citizenship, the less work permits will be given.¹⁹⁰ It seems that the EU opted for fewer migrants, but with more rights. From such EU logic it follows that migrant domestic workers remain ‘invisible’ in terms of having rights and entitlements *because* they make up the largest share of migrant women within EU. To provide rights for such a large group, like migrant domestic workers would amount to ‘feminisation of rights’ – deteriorating enforcement mechanisms and level of protection.

Not seasonal

In a Policy plan on legal migration EC has raised a concern about facilitation of seasonal work in the EU countries. The EU directive on Seasonal Workers is aimed at “certain sectors, mainly agriculture, building and tourism, where many immigrants work illegally under *precarious conditions*”.¹⁹¹ Migrant domestic workers working under even more ‘atypical’ and ‘precarious conditions’ were left unmentioned.

There are prerequisites for the sector to be covered by the category of ‘seasonal work’. Such sector has to include “*well-defined jobs*, normally fulfilling a *traditional need* in the Member State in question”.¹⁹² Requirement of ‘well definition’ is *a priori* disadvantaging migrant women. It was emphasized by the feminist authors analysed in the first chapter that ‘domestic work’ is still largely not considered as a ‘formal job.’ Majda Hrzenjak stresses that domestic work is “unregulated, uncertain and non-valued segment dominated by women workers”.¹⁹³ The discretion was left for Member States to decide what can be understood as their ‘traditional need’. This clause is highly questionable, as mainly ‘male dominated’ professions (constructions, agriculture) were recognized as ‘valuable’ and thus migrant

¹⁹⁰ Joseph H. Carens, "Citizenship and civil society: What rights for residents?", in *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe*, eds., R. Hansen, P. Weil (New York: Berghahn, 2002):100-118.

¹⁹¹ Proposal for a Directive of the European Parliament and of The Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final, Brussels, 13.7.2010.

¹⁹² European Parliament and of The Council, COM(2010) 379 final.

¹⁹³ Hrzenjak, *Invisible Work*, 60.

workers were ‘needed’.¹⁹⁴ It is a failure that Seasonal Workers Directive is not applicable for migrant domestic workers. This directive promises some protection for migrant workers, such as labour related rights and the access to “high level of the healthcare”.¹⁹⁵ In the directive, it was emphasized that seasonal migrant workers are also protected by EU Fundamental Rights Charter (FRCh), in particular on the following articles:

Article 12 on freedom of assembly and association, Article 21(2) on non-discrimination, Article 31 on fair and just working conditions, Article 34 on social security and social assistance, Article 35 on health care and Article 47 on the right to an effective remedy and to a fair trial.¹⁹⁶

However, it is also true, that specifics of the work in household are not ‘seasonal’ but rather ‘long term’. Migrant domestic workers take care of the household permanently. They take care for elders or children till the former die, or the latter – grow up. All in all, it remains unclear how migrant domestic workers enter the EU in the absence of the legal migration avenues for employment in domestic work?

Other legal entry avenues

RESPECT Network unites organizations working with migrant domestic workers in the EU. This advocacy organization identifies that “maybe some of them are smuggled, but most of them arrive completely legally in Europe.”¹⁹⁷ Thus women usually enter the EU as spouses, as students or even, as tourists.

As it was discussed in the first chapter, the channel of family reunification is especially important for migrant women all over the EU. Family reunification provides a legal entry for women willing engage in the domestic work. Since 2005, there is a directly applicable Directive for family reunification at EU level.¹⁹⁸ This directive provides a legal entry on the one side. On the other side, women become dependent on their husbands. This further makes

¹⁹⁴ Building and agriculture are clearly male dominated, to the lesser extent – tourism.

¹⁹⁵ European Parliament and of The Council, COM(2010) 379 final..p.5.

¹⁹⁶ European Parliament and of The Council, COM(2010) 379 final., p.5.

¹⁹⁷ According to interview with coordinator of RESPECT Network, 28.11.2000, in: Schwenken, “*Domestic Slavery*” versus “*Workers Rights*”, p. 11.

¹⁹⁸ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, (applicable as of 3 October 2005).

them more vulnerable, especially in the domestic violence situations. (See discussion in the Chapter 3, Section 1).

It seems that family reunification avenue will be even more expanding as ECJ has interpreted this directive in quite generous manner. For example in the case *Metock and others v Minister for Justice, Equality and Law Reform*, it was decided that TCN, who becomes a spouse of EU national, is entitled with rights adequate to EU citizen.¹⁹⁹ What is more, it was indicated that it must be done “irrespective of his/her prior legality of residence status in the EU.”²⁰⁰ Thus it is one of the ‘creative residence status regularization’ practices on the ground.

Other legal entrance avenues for migrant women are arranged on touristic and to lesser extent – on student visas. In latter cases, legal entrance usually ends up in overstaying visa and leads to irregular status of residence. What happens for migrant domestic workers with irregular residence status will be further discussed in the Section 2 of this chapter.

2.1.2 Regulation of Domestic Work in the EU

This part aims at looking closer to the nature and particularities of the domestic work. I demonstrate how the EU labour policies are promising a decent work for all, but overlook the issues of domestic workers. Domestic workers are acknowledged only as a national or, at best, the EU level issues, not involving migration from Third Countries. Thus the EU attempts to address ‘professionalization’ of domestic work are highly criticised. “Au pair” programme, launched by Council of Europe, is given as an exemplary case, how it would be possible to manage circular migration of migrant domestic workers. However, within this programme there are serious failures and weaknesses, thus lessons must be drawn for creating alternatives. (See the Annex 6, Table 6).

Decent Work: a right or a privilege in the EU?

¹⁹⁹ *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, Case C-127/08, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0127:EN:HTML>.

²⁰⁰ *Metock and Others v Minister for Justice*, , Case C-127/08.

The EU boasts for taking active part in labour rights and human rights protection. In the reality measures to implement these rights seem to be rather declarative than efficient. The EU has undertaken to implement “Decent Work Agenda in the World”. This agenda elaborates on the better management of economic migration. It states that migration should foster development of sending countries, and to promote phenomenon of “brain circulation”, but not “brain drain”.²⁰¹

In 2006 the EU assumed to take actions in order “to manage migratory flows more effectively, *protect migrants from exploitation* and ensure *better treatment* of migrants’ resident on their territory.”²⁰² However, domestic work issues were left unmentioned under chapter on ‘migrant work’ within the agenda. Domestic work was portrayed as a general challenge for women within developing world as there “workers in the informal economy are *effectively excluded from rights at work and from social protection*.”²⁰³ It was claimed that ‘informal economy’ and ‘poor quality jobs’ prevail “to a lesser extent, in the industrialized countries”.²⁰⁴ Therefore, it seems that the EU level policies do not consider seriously existence of domestic work sector dominated by the migrant women within the EU Member States. UN Economic and Social Committee (ECOSOC) follow up report of this Agenda has acknowledged the opposite fact. ECOSOC regarding the EU has stressed, that there is:

the important nexus between international **migration** and **social development**, and stresses the importance of effectively enforcing labour laws applicable to migrant workers and members of their families, including, *inter alia*, any related to remuneration, conditions of health, safety at work and the right of freedom of association, and reaffirms that migrants, **regardless of their immigration status**, should be accorded the protection of all human rights;²⁰⁵

²⁰¹ Brain drain phenomenon means that persons having relatively high education migrate for employment in relatively ‘low’ skilled sector, as their qualifications are not recognized in the receiving country. This is also called as a ‘deskilling’ effect.

²⁰² Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Promoting decent work for all: the EU contribution to the implementation of the decent work agenda in the world, COM(2006) 249 final, Brussels, 24.5.2006. p. 9.

²⁰³ Commission of the European Communities, Promoting decent work for all COM(2006) 249 final, p. 9.

²⁰⁴ Commission of the European Communities, Promoting decent work for all COM(2006) 249 final, p. 9

²⁰⁵ ECOSOC Resolution 2008/18, Promoting full employment and decent work for all, para. 27.

The EU has stated that there is no need to take any specific measures as the Lisbon Strategy and the European Social Agenda already goes “beyond the objectives of the decent work agenda”.²⁰⁶ New Lisbon Strategy for Growth and Jobs addresses only the situation of European women living within EU. This Agenda stresses that such women should be entitled to affordable childcare.²⁰⁷ Renewed European Social Agenda emphasizes the need to ‘increase skills’ and to ‘integrate legal migrants’. Such integration shall be implemented at EU level by giving more rights for migrant workers ‘beyond the job-place’. Primarily, these entitlements and rights enshrined in the agenda were foreseen for economically active people.

The Europe 2020 strategy was launched in 2010 as a response for global economic crisis. This strategy has changed Lisbon Strategy for Jobs and Growth. The ‘Europe 2020’ has involved so called ‘flagship initiatives’. One of these initiatives is "An agenda for new skills and jobs". This ambitious initiative intends to give a role for the migrant workers:

To modernise labour markets and empower people by developing their of skills throughout the lifecycle with a view to increase labour participation and better match labour supply and demand, **including through labour mobility**.²⁰⁸

The Europe 2020 strategy has stressed that in the EU there are ‘challenges’ for the growth of EU economy: lower women participation in the labour market (63% in comparison with 76% of men); shorter working hours (than in other developed countries) and ageing situation. It means that the EU intends to increase women work, to prolong working hours and to encourage reproduction of the society. These ‘challenges’ are going to be met only by further increasing ‘double load’ for European women – at work and at home. This ‘double load’ currently is managed by the ‘invisible’ migrant women in private homes.²⁰⁹ Regarding the needs of European women EC merely has stated that “access to childcare facilities and

²⁰⁶ Commission of the European Communities, Promoting decent work for all COM(2006) 249 final, p. 5.

²⁰⁷ Council Decision of 12 July 2005 on guidelines for the employment policies of the Member States.

²⁰⁸ European Commission, “Europe 2020”, COM(2010) 2020 , p. 4.

²⁰⁹ European Commission, “Europe 2020”, COM(2010) 2020, p. 5.

care for other dependents will be important.” EC has not expressed any clear intentions to take steps at EU level. Thus ‘reproductive work’ issues are left for the member states to decide.²¹⁰

Regarding migration, EC has committed to “promote intra-EU labour mobility and better match labour supply with demand with appropriate financial support from the structural funds”.²¹¹ However, only “flexible” and “comprehensive” measures are promised for the workers from non-EU countries. In addition to this, within the frames of the ‘Europe 2020’ strategy, migrants will be covered with ‘anti-poverty initiative’. This initiative aims “to develop a new agenda for migrants’ integration to enable them to take **full advantage** of their potential.”²¹² Undoubtedly, the EU will take advantage of migrant domestic workers within such demographic situation, but whether their rights will be considered?

In a nutshell, none of above discussed EU ‘grand-strategies’ were aimed at solving the situation of migrant women within domestic work sector. Adequate solutions from the EU side could be regularization of domestic work as formal work at EU level. Also the EU shall provide special legal migration channel for domestic workers. It is simply a must in the current situation of ever increasing demand for childcare and long term in house care within the EU member states. EC has recognised the demand within domestic work sector.²¹³ However, up till now migration for the ‘feminine’ jobs was not addressed in the form of legally binding measures. It was rightly criticized by Taran and Geronimi that the EU has created legal labour migration avenues only for ‘male dominated sectors’.²¹⁴

Attempts to Address Domestic Work in EU level: from ‘help’ to ‘work’

²¹⁰European Commission, “Europe 2020”, COM(2010) 2020, p. 16.

²¹¹European Commission, “Europe 2020”, COM(2010) 2020, p. 17.

²¹²European Commission, “Europe 2020”, COM(2010) 2020, p. 18.

²¹³ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Implementation of the Barcelona objectives concerning childcare facilities for pre-school-age children*, Brussels, COM(2008) 638 final, 3.10.2008. Report from European Commission on Long-Term Care in the European Union, published on 28 April 2008.

²¹⁴ According Patrick A. Taran and Eduardo Geronimi, *Globalization, Labor and Migration: Protection is Paramount*, (Geneva: ILO, 2002).

The EU praises for application of ‘needs based assessment of the EU labour markets’ in the “Lisbon Strategy for growth and jobs.” The EU has overlooked or sidelined ‘the need’ for migrant domestic workers for a long.²¹⁵ Only in 2000 EP has issued a resolution ‘on regulating domestic help in the informal sector’. EP has acknowledged the presence of migrant domestic workers within this resolution.²¹⁶ However, such ‘acknowledgment’ involved some fallacy in the measures proposed. Firstly, EP has stressed the need to describe the concept of ‘domestic help’, but afterwards EP was calling to recognize ‘domestic help’ as a ‘work’ with full labour rights and social protection. Secondly, EP has framed this issue of ‘domestic help’ from the pure economic approach. In its resolution EP has stressed the importance for ‘national budgets’ to receive taxes from domestic sector.²¹⁷ However, domestic workers’ contribution for ‘social reproduction’ and ‘growth of economy’ was not recognised.²¹⁸ Thirdly this resolution has equated ‘demand and supply’ of undeclared domestic work with a ‘problem’ and ‘stresses the importance’ to ‘combat’ it.²¹⁹ In the same resolution, EP further collates ‘domestic help’ with an opportunity for a ‘new long-term employment’.²²⁰ This ‘controversy’ can be explained, as the ‘creation of new jobs’ is an option only for unemployed European women, but not for migrant domestic workers, who are actually in the EU countries performing this type of job.

Regarding migrant women, the EP has called for ‘specialised reception centres’, where these women could recover after severe abuses.²²¹ Further this resolution demanded ability to get ‘regular work permits’ for migrant women engaging in domestic work.²²² Finally the EP

²¹⁵ “Lisbon Strategy for growth and jobs”, COM (2008) 349, p.4.

²¹⁶ European Parliament, Resolution on regulating domestic help in the informal sector (2000/2021(INI)), para. Q

²¹⁷ European Parliament, Resolution on regulating domestic help in the informal sector (2000/2021(INI)), para. 3.

²¹⁸ Frank and Spehar, *Women’s Labour Migration in the Context of Globalisation*, p. 74.

²¹⁹ European Parliament resolution on regulating domestic help in the informal sector (2000/2021(INI)), para. 2, para.5, and para. 9.

²²⁰ European Parliament resolution on regulating domestic help in the informal sector (2000/2021(INI)), para. 13.

²²¹ European Parliament resolution on regulating domestic help in the informal sector (2000/2021(INI)), para. 14.

²²² European Parliament resolution on regulating domestic help in the informal sector (2000/2021(INI)), para. 16.

has asked Member States to ensure the ‘minimum level of working conditions’ for migrant domestic workers working in the households of diplomats.²²³

All in all, this resolution, had applied the image of ‘migrant domestic worker’ as a sole victim in need for shelter, but not for full protection of her labour rights. In addition to this, it the level of protection for the migrant domestic workers of diplomats is ‘minimum’, whereas EU nationals in the “domestic work sector in principle falls within the scope of existing directives on employment and occupations <...> eventually establishing **European** rules on the social rights of workers.”²²⁴ Finally, it is left for Member States to decide whether and how to respond for this resolution. National governments are choosing the line of ‘combating undeclared jobs’ while implementing the ‘European employment strategy’.

The very recent attempt to address the issue of migrant domestic workers at EU level was caused by the adoption of the ILO Domestic Workers’ Convention.²²⁵ This attempt has resulted in the European Economic and Social Committee’s (EESC) opinion “on the professionalization of domestic workers”²²⁶ and EP resolution “on the proposed ILO convention supplemented by a recommendation on domestic workers”.²²⁷ It should be noted that even within these developments the rights of migrant domestic workers, as ‘workers’ were largely ignored by the EU institutions. The EU institutions rather have applied ‘victim centered’ approach and portrayed migrant domestic workers as prototype ‘victims’.

Within the EESC opinion, the migrant domestic workers are perceived to be in need for access to justice, than for real protection of their labour rights:

1.10. Combat the considerable amount of illegal work in this sector and protect migrant women who are in **irregular circumstances** and **suffer abuse**: eliminate the double penalty affecting women when, if they complain to the police that they have suffered

²²³ European Parliament resolution on regulating domestic help in the informal sector (2000/2021(INI)), para. 18.

²²⁴ European Parliament resolution on regulating domestic help in the informal sector (2000/2021(INI)), para. 5.(emphasis added).

²²⁵ International Labour Organization, Domestic Workers’ Convention, no. C189.

²²⁶ European Economic and Social Committee, Opinion on the professionalisation of domestic workers, EESC, SOC/372, 26 May 2010.

²²⁷ European Parliament, B7-0296/2011.

violence and even **sexual abuse** or not **been paid** or, are **sent back** to their country of origin.²²⁸

What is more, the protection of abovementioned rights is not indicated as obligation at national or at EU level. These rights were perceived as ‘transnational’. Therefore, references were given to the European Convention on the Legal Status of Migrant Workers²²⁹ and to the Convention on Action against Trafficking in Human Beings.²³⁰ This approach portrays migrant domestic workers as, primarily, victims of trafficking. Such attitude was highly criticized by Helen Schwenken, as it narrows the debate on migrant domestic work to sole abuse. Such debate does not contribute for the empowerment of migrant domestic workers.²³¹ RESPECT Network member has aptly noted, that:

It’s no use in a way to change laws [...] when you have basically women who don’t make use of it, when the self esteem is completely down.²³²

Nevertheless, the EP and the EESC agree that there should be a legal channel for migrant domestic workers. The European Economic and Social Committee stresses that “domestic work should be covered by the *selective* immigration, which today targets people who are highly qualified.”²³³ ‘Low skilled’ migrants are subjected to ever increasing the EU and national ‘securitization’ measures. ‘Migrant domestic work’ is perceived as not requiring skills, thus it falls into the category of low skilled professions. However it does not reflect the real level of qualifications of women doing this job. Migrant domestic workers, especially from CEE countries are educated but their qualifications are not recognised in the EU receiving countries. Thus in the following section I discuss the status of migrant domestic workers within framework of the EU fight against illegal migration and against undeclared employment.

²²⁸ European Economic and Social Committee, „SOC/372, para. 1.10.

²²⁹ Council of Europe, (ETS No. 93),.

²³⁰ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Strasbourg.

²³¹ Schwenken, “*Domestic Slavery*” versus “*Workers Rights*”, p. 8-12.

²³² Interview with RESPECT/SOLIDAR, conducted by Helen Schwenken in 2000-11-28, in: Schwenken, “*Domestic Slavery*” versus “*Workers Rights*” p. 7.

²³³ European Economic and Social Committee, SOC/372, para. 1.10.

Section 2: The EU fight against illegal immigration: protection or threat?

In the previous sub-section it was mentioned that legal migration and work possibilities for migrant domestic workers are partly thwarted because prevailing fight against illegal immigration, human trafficking and terrorism. ‘Illegal immigration’ is seen as an explicit threat for the national security within the EU security framework. Claude-Valentin Marie notes, that migrants are in illegal situation, because of different reasons, thus can not be perceived as a homogenous group.²³⁴ Even in ‘Decent Work Agenda for World’ human trafficking was equated with ‘illegal migration’ and emphasis was made on the measures combating to both of them.²³⁵ The same approach was deployed in the ‘Policy Plan on Legal Migration,’ where equation was even broadened by adding a category of ‘illegal employment.’²³⁶ In this plan, informal economy was described as “a clear “pull factor” for illegal immigration, as well as a catalyst for exploitation” thus in need to be ‘combated.’²³⁷

This attitude is criticized by Norbert Cyrus, Wendy Chapkis and other migration scholars, as increasing criminalization of illegal immigration push migrant domestic workers into the deeper shadow. The EU competences in the field of “fight against illegal migration” will be further analyzed in this chapter. First of all, I will make an overview of developments of common EU policies, which can be described as creation of “Fortress Europe”.²³⁸

It was indicated, that ‘illegal immigrants’ are one of the four major groups identified by European Commission, as taking undeclared jobs.²³⁹ For them and their employers special dis-incentives were created – Returns Directive and Employers Directive. The former aims to

²³⁴ Claude-Valentin Marie, *Preventing Illegal Immigration: Juggling Economic Imperatives, Political Risks and Individual Rights* (Strasbourg: Council of Europe Publishing, 2004), 13- 14.

²³⁵ Commission of the European Communities, Promoting decent work for all, COM(2006) 249 final. p. 9.

²³⁶ Communication from the Commission COM(2005) 669 final, under 1.1. The political context, p. 4. as follows: „Admission of economic immigrants is as inseparable from measures on integration on the one hand, as it is from the fight against illegal immigration and employment, including trafficking, on the other.“

²³⁷ Communication from the Commission, COM(2005) 669 final, , under 1.1. The political context, p. 4.

²³⁸ Bob Hepple, “Race and Law in Fortress Europe,” *The Modern Law Review* 67, no. 1 (January 2004):1-15.

²³⁹ According Communication from the Commission of 7 April 1998 on undeclared work , COM(98) 219 final, European Commission: Brussels, 1998.04.07, in: Undeclared work, http://europa.eu/legislation_summaries/employment_and_social_policy/job_creation_measures/c11710_en.htm .

return everyone ‚illegally’ staying within EU to their countries of origin or if that is not possible - to ‘safe Third Countries’.²⁴⁰ Whereas latter aims to punish Employers who employ undocumented migrants.²⁴¹ In the context of bilateral readmission agreements it seems that returns and deportations of undocumented migrants is said to lie at the heart of ‘fight against illegal immigration.’²⁴²

In EU, there is an obvious trend for increasing border controls, penalties for human trafficking, facilitation of removals and deportations are introduced to fight illegal immigration. This trend was even strengthened due economic crisis in EU and Arab Spring. Despite, the robustness of these measures, it is estimated, that at the moment in the EU, there are about 8 million of irregular immigrants, unequally distributed among Member States.²⁴³ Most of these migrants, who are not detained, have no choice, but to work for the informal or so called, shadow economy. Legal residence in EU is a prerequisite for legal work. Such conditionality came about as an outcome of abovementioned policies aimed at combating illegal migration. EU declares the Human Rights as the fundamental principle. However budgeting reveals the real aspirations and priorities. It is quite illustrative, that FRONTEX agency’s „total budget for 2008 was more than 70 M[illion] EUR“²⁴⁴, whereas Fundamental Rights Agency (FRA) in 2008 received 15 million EUR.²⁴⁵

²⁴⁰ Communication from the Commission to the European Parliament and the Council in View of the European Council of Thessaloniki on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and The Return of Illegal Residents, COM(2003) 323, Commission of the European Communities:Brussels, 3.6.2003 final, p. 8.

²⁴¹ *Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, in, OJ L 168/24, 30.6.2009 (Employers’Directive).

²⁴² For example in 2003, “Council has authorised the Commission to negotiate Community readmission agreements with 11 third countries/entities (Morocco, Sri Lanka, Russia, Pakistan, Hong Kong, Macao, Ukraine, Albania, Algeria, China and Turkey) and the Commission has successfully concluded negotiations with Sri Lanka, Hong Kong and Macao. Negotiations with most of the other countries, in particular with Russia, Ukraine and Morocco are well underway.” in European Communities, COM(2003) 323, p.14.

²⁴³ According European Union Agency for Fundamental Rights, [http:// infoportal.fra.europa.eu](http://infoportal.fra.europa.eu) (accessed: March 18, 2011).

²⁴⁴ Frontex, “Budget and Finance”, http://www.frontex.europa.eu/budget_and_finance.

²⁴⁵ According Official EU information. http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/114169_en.htm, (accessed: March 18, 2011).

Subsequently, EU framework on fighting illegal migration will be discussed on the issues concerning migrant domestic workers and access to their rights. Firstly the impact of returns directives is addressed, then is is elaborated on the fight against undeclared work and finalised with the anti-trafficking legislation.

Returns directive and Readmission agreements

Returns directive was adopted by the EP in 2008.²⁴⁶ This Returns directive is important for migrant domestic workers as it “applies to third-country nationals staying illegally on the territory of a Member State.”²⁴⁷ Thus the ‘illegal residence’ can result in the ‘removal’ or the ban to re-enter EU.²⁴⁸

Only this [deportations] will ensure that the message gets across that immigration must take place within a *clear legal procedural framework* and that **illegal entry and residence will not lead to the desired stable form of to it residence.**²⁴⁹

This was a strong statement of Thessaloniki Council in 2003. The abovementioned ‘stable form of residence’ is something that majority of migrant domestic workers want. Nevertheless, they find themselves trapped within EU legal framework, which is not providing legal entrance for domestic work. However, some of the migrant domestic workers do not intend to stay and want to come back to countries of origin, where (usually) their dependent families reside. In any case, something they all clearly do want is deportations. The threat of deportations becomes the means of manipulation for the benefit of employers. They threaten to use it if their domestic workers would try to complain about the conditions or abuses. Thus EU ‘deportation’ policy in absence of legal entry and residence channels becomes a halter for migrant domestic workers to access their rights.

²⁴⁶ Directive 2008/115/EC of The European Parliament and of The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008.

²⁴⁷ Returns’ Directive 2008/115/EC, Art. 2.

²⁴⁸ Returns’ Directive 2008/115/EC, Art. 8 and Art.11.

²⁴⁹ European Communities, COM(2003) 323, p. 8.(Emphasis added.)

Readmission agreements are integral part of returns policies, as there should be place where you can ‘deport’ so called ‘illegal immigrants.’ Seville European Council was urging to “speed-up” the negotiations with third countries and to finalise readmission agreements.²⁵⁰ Since then it seems, that readmission agreements are prerequisite for the cooperation with EU. It was expressed by Council of Thessaloniki that those countries, which negotiate, can expect ‘more generosity from EU’, especially as concerns to:

more generous visa policy with respect to the co-operating countries or increased quotas for migrant workers, closer economic co-operation, trade expansion, additional development assistance, better market access or WTO compatible tariff preferences.²⁵¹

For example in Cotonou Agreement with 78 African, Caribbean and Pacific (ACP) states article 13 on it is stressed that:

Each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State’s request and without further formalities.²⁵²

This clause is talking only about the nationals of ACP, and same provision applies for the EU nationals, staying illegally in ACP countries. However subsequent clause is talking about bilateral agreements which favour EU interests for deporting illegally staying ‘third country nationals’, who are not nationals of ACP:

These agreements shall also cover, if deemed necessary by any of the Parties, arrangements for the readmission of third country nationals and stateless persons. <...> Adequate assistance to implement these agreements will be provided to the ACP States.²⁵³

Similar provisions are included in the EU neighbourhood policies, especially for ‘securing’ eastern and southern EU borders after enlargements in 2004 and 2007,

Regarding bilateral readmission agreements already in 2003, there were a strong willingness to negotiate with third countries.²⁵⁴ Latter in EU policies, these countries were

²⁵⁰ European Communities, COM(2003) 323, p. 10.

²⁵¹ European Communities, COM(2003) 323, p. 14.

²⁵² Cotonou Agreement, Article 13, para. 5, clause i) in: *Partnership Agreement ACP-EC*, Signed in Cotonou on 23 June 2000 (Revised in Luxembourg on 25 June 2005), http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/cotonou_2006_en.pdf (accessed: November 11), p.14.

²⁵³ Cotonou Agreement, Article 13, para. 5, clause ii). in: *Partnership Agreement ACP-EC*, p.14.

²⁵⁴ “Council has authorised the Commission to negotiate Community readmission agreements with 11 third countries/entities (Morocco, Sri Lanka, Russia, Pakistan, Hong Kong, Macao, Ukraine, Albania, Algeria, China

called as ,safe third countries‘, especially in asylum cases. It looks ironic, having in mind that Pakistan, Sri Lanka and China are among those ‘safe third countries.’

The abovementioned developments among EU and sending countries have direct impact on migrant domestic workers, as they are usually residing ‘illegally’ in EU. It is of the special importance to stress that EU development initiatives while providing funding to governments, shall make the best to ensure, that women needs would be better addressed in domestic politics. As it was discussed in first chapter poverty and unemployment of women are the main ‘pull’ factors for ‘feminisation of migration.’ It is also a failure of negotiating third countries, not to come up with the proposal for legal migration channel for migrant domestic workers. Having said that, the issue of the fight against undeclared work in EU will be discussed further.

Undeclared work and EU Employers’ directive

The fight ‘employers’ directive’ is part of EU efforts to fight ‘undeclared work.’ The overall fight against ‘undeclared work’, worsens the situation of migrant domestic workers. It puts at risk, not only of those who are irregularly staying, but also of those who are legally resident but do not have a possibility for regularization of their work. This is of the special importance for all domestic workers given the confusion surrounding the concept of domestic work in EU, as it was discussed in the first section of this chapter.

Directive ‘on sanctions and measures against employers of illegally staying third-country nationals’ aims to impose the certain penalties, which Member States must to enforce.²⁵⁵ It is interestingly, *how* the Council address the issue of employment of undocumented persons:

and Turkey) and the Commission has successfully concluded negotiations with Sri Lanka, Hong Kong and Macao.“ In European Communities, COM(2003) 323, p.14.

²⁵⁵ Employers’ Directive, 2009/52/EC.

A key pull factor for illegal immigration into the EU is the possibility of obtaining work in the EU without the required legal status. Action against illegal immigration and illegal stay should therefore include measures to counter that pull factor.²⁵⁶

Wendy Chapkis aptly claims, that real solution is ‘reducing barriers to legal immigration’.²⁵⁷ As she argues, it should be done instead of “underfunded programs in labour exporting countries and limited protections and increased prohibitions in destination countries.”²⁵⁸ This is especially true for the domestic work. While the prohibitions and financial sanctions are generally clear and punitive, the directive leaves the space for leverage for Member states, as concerns the work of ‘private’ nature. As for example the Article 5 on Financial sanctions states:

Member States may provide for reduced financial sanctions where the **employer** is a natural person who employs an illegally staying third-country national for his or her **private purposes** and where no **particularly exploitative working conditions** are involved.²⁵⁹

This creates somewhat of conundrum in the whole logic of this law, as the private employer of migrant domestic worker can avoid or get lesser sanction. On the other hand, the Directive includes the expulsion of such ‘illegal residents.’ Thus law stands on the side of the private employer, if ‘no particular exploitation’ is found. However, working for the ‘private purposes’, it is not a mitigating circumstance for the illegally staying and working Third country national, who will be deported in any case.

Further, EP has launched quite different attitude on the ‘fight on undeclared’ work, where it recognises the specific situation of domestic workers and insightfully states, that:

fight against undeclared work performed by illegal immigrants cannot be effective without opening up channels for legal migration in order to guarantee the third-country labour which the Union needs, be it highly skilled or less skilled.²⁶⁰

²⁵⁶ Employers’ Directive, 2009/52/EC., para. (2).

²⁵⁷ Wendy Chapkis, “Trafficking, Migration and the Law: Protecting Innocents, Punishing Immigrants,” *Gender and Society* 17, no. 6 (December, 2003):923-937, p.933.

²⁵⁸ Chapkis, “Trafficking, Migration and the Law, p.933.

²⁵⁹ Employers’ Directive, 2009/52/EC, Article 5, para. 3.

²⁶⁰ Employers’ Directive, 2009/52/EC. para. 79.

What is more, EP called for ‘sectoral and general’ measures to address the issue of undeclared work within “domestic care sector, where there is a significant concentration of women who are third-country nationals and, in many cases, not legally resident in the Union”.²⁶¹ However EP generally supports the sanctions for employers and thus has welcomed the abovementioned Employers directive. EP regretted only because of “the absence of measures to combat the exploitation of third-country nationals who are staying legally in the Union”.²⁶² Finally EP, brought to attention the issues of trafficking and invited Member States to sign Council of Europe Convention on Action against Trafficking in Human Beings.²⁶³

It shall be stressed, that EP has been much more progressive than EC in its resolution on the issue of undeclared work in general, and domestic work in particular. However, EC directive is legally binding EU Member States, whereas EP resolution is still a mere declaration. Even in this progressive ‘declaration’ the domestic work performed by migrant women is still perceived from the lenses of powerlessness – the accents are put on their vulnerabilities, but not possibilities. Thus the issue of human trafficking will be discussed further in greater detail.

The fight against trafficking and anti-smuggling of human beings

In EU level the fight against human trafficking has started in 1997.²⁶⁴ Firstly, the Joint Action “to combat trafficking in human beings and sexual exploitation of children” was undertaken by Member States.²⁶⁵ Later, in 2002 it was changed by the Framework Decision on combating trafficking in human beings.²⁶⁶

²⁶¹ Employers’ Directive, 2009/52/EC. para. 21.

²⁶² Employers’ Directive, 2009/52/EC. para. 75.

²⁶³ Employers’ Directive, 2009/52/EC. para. 81.

²⁶⁴ “Fight against trafficking in human beings”, http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_trafficking_in_human_beings/133137_en.htm

²⁶⁵ Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, OJ L 63 of 04.03.1997.

²⁶⁶ Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) OJ L 203/1, 1.8.2002.

Developments in fight against illegal immigration were raising the issues of trafficking and smuggling in human beings as moral grounding, thus it is not surprising, that sexual exploitation of children and women became the exemplary cases. There is no doubt that these crimes must be addressed and perpetrators punished. However, the image of ‘saving the most powerless’, gave the advantage to curb ‘illegal immigration’ by penal measures. For example, in 2003, Council of Thessaloniki has equated the smuggling with trafficking: “fight against illegal immigration should be intensified with priority to combating trafficking and smuggling.”²⁶⁷ further EU level cooperation in the field of anti-trafficking and anti-smuggling was rather fruitful. In 2002, Council came up with the Directive defining the facilitation of unauthorised entry, transit and residence.²⁶⁸ This directive was ‘accompanied’ by Council Framework Decision on the strengthening of the penal framework to prevent the latter activities.²⁶⁹ These ‘developments’ in EU level reflects with the words of Helen Schwenken, that “the fight against trafficking is used to delegitimize and even destroy the safer mechanisms of irregular migration.”²⁷⁰ The similar idea was raised by Spijkeboer, who has rightly noted that migrants are forced to choose increasingly unsafe ways to get to the country, to get in contact with smugglers, as there are no legal alternatives left.²⁷¹

Wendy Chapkis has criticized similar trend in US anti-trafficking legislation, where it is further differentiated among ‘genuine’ victims and ‘economic’ migrants, as follows:

The line drawn between the innocent victim and the wilful illegal immigrant used to determine punishment and protection is not only a dangerous one, but it is a distinction that does not hold. Most trafficking victims are also economic migrants. Their victimization most often involves high debts and abusive working conditions, not outright kidnapping and imprisonment.²⁷²

²⁶⁷ http://europa.eu/pol/rights/index_en.htm.

²⁶⁸ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17, 5.12.2002.

²⁶⁹ Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA), OJ L 328/1, 5.12.2002.

²⁷⁰ Schwenken, “*Domestic Slavery*” versus “*Workers Rights*”, p.11.

²⁷¹ Spijkeboer T., *The Human Costs of Border Control*, p.127–139. *European Journal of Migration and Law* 9 (2007), Leiden: Martinus Nijhoff Publishers, 2007, p. 127.

²⁷² Chapkis, “Trafficking, Migration and the Law”, p.931.

Similar ‘securitization’ trend is maintained when talking about domestic workers in EU or within Organization for Security and Co-operation in Europe (OSCE). For example report draws picture of young girls or even children forced into domestic servitude without their consent.²⁷³ They are perceived ‘genuine’ victims and described as ‘powerless’, ‘deceived’ and etc. These cases exist, however majority of migrant women who undertakes domestic work, in fact come legally and on their own will. The research of Wendy Chapkis has shown, that the main motivator for migrant women to prolong their ‘illegal stay’ or to ‘suffer from continuous abuses’ is money.

In other words, increasing ‘anti-trafficking’ and securitization is not adding anything in terms of labour rights or empowerment for most of migrant domestic workers, not to talk about responding to their real needs. This idea is only strengthened within the bigger picture of EU policies for expulsion of third country nationals and fight against undeclared work.

Section 3: Legal status of migrant domestic workers in three EU Member States

However, the final picture ‘on the ground’ depends a lot on the measures and legislations in the national level. Thus domestic work regularization initiatives and mobility programmes in will be compared in France, Germany and the UK.

2.3.1. France

In 2000 EP resolution on domestic help, France was mentioned as an exemplary country, as here there are ‘service employment cheques’ system in the place.

Service employment cheques firstly “were introduced for a trial period from 1 December 1994 to 31 March 1996.”²⁷⁴ Later the law was “repealed by Article L.129-2 of the Labour

²⁷³ Organization for Security and Cooperation in the Europe, *Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude*, Research paper on Trafficking in Human Beings for Domestic Servitude in the OSCE Region: Analysis and Challenges, OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2010.

²⁷⁴ Miet Smiet Report, EP document FINAL A5-0301/2000, p.11

Code, and inserted in the law of 29 January 1996 to encourage employment in the provision of services to individuals.”²⁷⁵

The service employment cheque is a form of payment intended to pay for services performed in individuals homes while reducing the red tape involved in employing workers. It is non-specific. It covers all services of a domestic or family nature, for whatever length of time, provided that they are carried out at the home of the person paying by means of the cheque. This includes the care of [*sic!*] invalids or children, coaching for school children, odd gardening jobs and activities covered by the national collective agreement (September 1998) on domestic work.²⁷⁶

As rapporteur Miet Smet, noted that despite this initiative domestic workers are still “often badly paid, have part-time contracts and are employed on a casual basis.”²⁷⁷ It is not surprising, as this system aims to ease the employment procedures for employer, but do not intend to give robust protection of labour rights for employees. For example, there “is no employment contract (for employees working less than eight hours and less than four consecutive weeks in the year).”²⁷⁸ However it introduces hourly pay, provides the minimum wage, requires payslips, and social security contributions. It was a relative success, as in 1997, there were 254 695 employees using such service employment cheques system.²⁷⁹

All in all, this scheme is largely created for employing nationals, but not providing legal migration channel for foreign domestic workers. What is more, there are incentives to provide same ‘low tariff’ and ‘flexible contract’ for organizations and companies, who intend to make such business.²⁸⁰ In France, domestic work has long been a job for female migrants, especially undocumented: “as far back as 1984, almost 53.8% of illegal immigrants were employed as domestic workers.”²⁸¹ However, French regularization of domestic work is rather exemplary for the rest of EU countries.

²⁷⁵ Miet Smet Report, EP document FINAL A5-0301/2000, p.11

²⁷⁶ Miet Smet Report, EP document FINAL A5-0301/2000, p.11

²⁷⁷ Miet Smet Report, EP document FINAL A5-0301/2000, p.11

²⁷⁸ Miet Smet Report, EP document FINAL A5-0301/2000, p.12

²⁷⁹ Miet Smet Report, EP document FINAL A5-0301/2000 p.12

²⁸⁰ Miet Smet Report, EP document FINAL A5-0301/2000, p.12

²⁸¹ C.V Marie, “De la clandestinité à l’insertion professionnelle régulière” in *Travail et Emploi*, no. 22, (December 1984):21-29.

2.3.2. Germany

Service cheques system not long after Germany, was tried out in Germany:

Service cheques were introduced in Germany in 1997, and offered fiscal incentives to people employing domestic workers who were declared and properly paid. To use the service cheques, private employers have to pay all the relevant social charges. They are then eligible for rebates provided that the wages paid are above a certain threshold and relate to more than ten hours work a week. The tax rebate is proportional to income, thus favouring higher-income households which have greater demand for domestic help.²⁸²

This system was not so successful as in France and ,only few hundred people‘ have in fact used it.²⁸³ However Germany have found its own recepy, it was called 'intermediary offices'.

Persons wishing to use this service contact the intermediary offices, which are responsible for recruiting workers, paying the relevant social insurance contributions and providing replacement staff if necessary. The worker concerned is employed on the same financial basis as a salaried employee and has a regular status.²⁸⁴

There were 15 such ‘intermediary offices’ in 1997 in Germany, and they were “cofinanced by the public authorities.”²⁸⁵ This scheme also is intended to employ locals or already legally resident migrant women having work permit – those who came by family reunification. The inventory rotating 3 months polish women coming with turistic visa, system thus is functioning on the edge of legality in Germany. After expiration of interim period for workers from ‘New EU’ member the intra-EU movements may intensify.

2.3.3. The United Kingdom

In the UK the situation is quite different from France and Germany, as there is “no minimum wage, but there is a system of universal social protection.”²⁸⁶ The very critical point, stressed in the previous section, that “action to combat undeclared work focuses on the workers rather than the employers.”²⁸⁷ The fight against undeclared work has created obstacles for migrant workers for “claiming social security benefits such as unemployment

²⁸² Miet Smiet Report, EP document FINAL A5-0301/2000, p.13

²⁸³ Miet Smiet Report, EP document FINAL A5-0301/2000, p.13

²⁸⁴ Miet Smiet Report, EP document FINAL A5-0301/2000, p.14.

²⁸⁵ Miet Smiet Report, EP document FINAL A5-0301/2000, p.14.

²⁸⁶ Miet Smiet Report, EP document FINAL A5-0301/2000, p.14.

²⁸⁷ Miet Smiet Report, EP document FINAL A5-0301/2000, p.14.

benefit and income support.”²⁸⁸ But on the other hand, the UK policies were aimed at commercialisation, as here the domestic work was not provided by state institutions, nor encouraged via organizations, voluntary work or companies as it was done in Germany. In the UK, government has passed The Working Family Tax Credit (1999) law, which “is an attempt to combat poverty by providing compensatory support for families (one or two parents with children) on low incomes (£3.60 per hour)” as it “contributes half of the minimum wage earned by a domestic worker with a dependent family.”²⁸⁹

As concerns migrant domestic workers in UK, since 1997 the immigration legislation has issued work permits attached to the specific employer. This situation was changed thanks to advocacy organization *Kalyaan* :

In 1997 the law was changed and over 4,000 ‘hidden’ domestic workers began to be regularised. Since then migrant domestic workers in the UK are admitted as workers in their own right, with a right to change employers.²⁹⁰

Migrant domestic workers according to current immigration legislation can change their employers, but not the sector. Thus their employment possibilities after leaving the ‘specific’ employer are still limited.

This section has demonstrated that EU is relatively weak in providing real ‘needs based’ approach on labour migration. On the other hand EU is relatively strong in the ‘security’ issues – especially displaying undocumented migrants as threat for the ‘welfare’. Rapporteur Miet Smet stresses the importance to address the issue of migrant domestic workers within EU. She notes that undocumented women are trapped into especially complicated situation:

Illegal immigrants are generally paid less and work more, as they often live in the household and are forced to continue working, without a break, until late at night. Those who do have a work permit, on the other hand, are often blackmailed by the threat that their work permit will not be renewed.²⁹¹

²⁸⁸ Miet Smet Report, EP document FINAL A5-0301/2000, p.14.

²⁸⁹ Miet Smet Report, EP document FINAL A5-0301/2000, p.14.

²⁹⁰ European Network Against Racism, *Gender and Migration*, ENAR - Fact Sheet 42 - February 2010, p.13.

²⁹¹ Miet Smet Report, EP document FINAL A5-0301/2000, p.17.

The “powerlessness” is enforced in absence of legal avenues. Irregular migration status is compounded with their isolation, their visa dependency on employer or husband, and reliance of their families’ on the remittances. This situation makes claiming migrant domestic workers’ rights rather virtual than real. There is a very narrow corridor provided for them to access the justice for migrants in irregular situations. Migrant domestic workers are targeted in the EU ‘ant-trafficking’ policies and in the general fight against ‘undeclared work.’ In the ‘jungle’ of EU legislation there is only one claim you can make, if you are undocumented migrant. You have to claim being trafficked and to show all your willingness to cooperate and to be useful for the investigation in exchange for renewable short-term visa for six months. Is it all what migrant domestic need? The answer from International Domestic Workers Network is clear - it is not enough.²⁹² Therefore, the question of the next chapter is raised how human rights can address the needs of migrant domestic workers? What channels there are for accessing the justice in the European Human Rights System?

²⁹² Study visit of International Domestic Workers’ Network representatives to Budapest, on 20 and 21 of April, 2011, as part of campaign for the adoption of the ILO convention “Decent Work for Domestic Workers”.

CHAPTER 3 - ACCESS TO JUSTICE FOR MIGRANT DOMESTIC WORKERS

The EU is covered by the ‘robust’ European Human Rights system. This system prevents abuses in various fields of life - employment relationships, private relationships, promotes gender equality and remedies discrimination. However, migrant domestic workers are often left without any kind of legal protection for their labour and human rights. Irregular status of their residence and work creates challenges to undertake such cases to justice in the national level.

Within this chapter I underline the paramount importance of legal migration status. Migration legal status is the major obstacle for accessing and enjoying the human rights as the main enforcement mechanisms are national courts. Lydia Morris aptly describes the rights of migrants “as manifestation of an emergent post-national society in which migrants can increasingly draw on trans-national rights located outside the nation state.”²⁹³ Nicola Piper furthers this thought by stressing the importance of the regional human rights mechanisms. She draws the lessons from the Inter-American System:

The most progressive example here is the Inter-American Human Rights System and the creation of its own Rapporteurship on migrant workers. It could, therefore, be argued that it is at the regional rather than global level where substantial progress can be made with regard to migrants’ rights. Multilateral binding instruments are often perceived by states as open-ended undertakings which compromise their sovereignty in the migration area. Therefore, regional agreements could be seen as less threatening.²⁹⁴

This statement is also applicable for the European Human Rights System. Therefore instead looking closer into domestic jurisdictions where, not much is promised for non-citizens, I will research the avenues for empowerment within European human rights mechanisms. These mechanisms provides different ways to frame the claims. Migrant domestic workers are suffering from the discrimination on the intersectional grounds such as being women, being (irregular) migrant, also because of their colour, ethnicity or/and social status.

²⁹³ Morris, *Managing Migration*, p.143.

²⁹⁴ Piper, ed., *New Perspectives on Gender and Migration*, p.23.

European human rights mechanisms are addressing these issues and providing different avenues. Therefore, the challenge is to explore which avenue is the best in addressing the actual needs of migrant domestic workers. Margaret Satterthwaite argues that advocates must be creative to use human rights mechanisms for advancing migrant domestic workers' rights.²⁹⁵ She is seconded by Nicola Piper, who argues from 'political process' approach on rights, rather from purely 'legalistic' one:

When rights exist on paper, the challenge lies in guaranteeing their **implementation** and **institutional avenues for claiming** them. When rights are not recognized by governments, efforts to **advance** and expand rights not yet enshrined in law are highly important.²⁹⁶

Robin L. West states that human right victories further serve for 'ennobling politics'.²⁹⁷ She claims that Human rights have the potential to bring about the change in politics, which results in the 'changes on the ground'. Paul Johnston thought that rights are not about States signing conventions, but about real people demanding them.²⁹⁸ The same is attitude is taken by migrant domestic workers' organizations. They argue, that empowerment is the key for claiming their rights.²⁹⁹ Similarly it is proposed by Thomas Risse and Stephen C. Ropp within their 'spiral model'.³⁰⁰ This model relies on the 'internal' and 'external' pressures towards governments for making the human rights effective in the reality.

Therefore, in the first section I examine pros and cons for the empowerment of migrant domestic workers by framing claims in three different ways: as 'migrant victims', 'migrant women', and 'migrant workers'. In the second chapter I elaborate on how these claims can be enforced within different European Human Rights mechanisms. I compare three main

²⁹⁵ Satterthwaite, *Beyond Nannygate*.

²⁹⁶ Piper, ed., *New Perspectives on Gender and Migration*.

²⁹⁷ Robin L. West "Ennobling Politics", in: *Law and Democracy in the Empire of Force*, eds. Jefferson Powell and James Boyle, University of Michigan Press, 2009.

²⁹⁸ Paul Johnston, "Organize for What? The Resurgence of Labor as Citizenship Movement", in: *Rekindling the Movement: Labor's Quest for Relevance in the 20th Century*, (eds), Lowell Turner, Harry C. Katz, and Richard W. Hurd, Ithaca, N.Y: Cornell University ILR Press Press.

²⁹⁹ Frank and Spehar, *Women's Labour Migration in the Context of Globalisation*.

³⁰⁰ Thomas Risse and Stephen C. Ropp, and Kathryn Sikkin (eds.), *The Power of Human Rights: International Norms and Domestic Change*, (Cambridge: Cambridge University Press, 1999), especially in Thomas Risse and Stephen C. Ropp, "International Human Rights Norms and Domestic Change: Conclusions", pp. 234 – 278.

European human rights complaint mechanisms - European Court of Justice, European Court of Human Rights and European Social Committee. In this comparison I will focus on the possible effect for accessing and advancing actual rights for migrant domestic workers, first being – access to justice. I will also rely on the UN and ILO provisions expanding the rights for migrant workers and in particular, for migrant domestic workers.

Section 1: Framing claims

Helen Schwenken notes that there are several avenues for framing migrant domestic workers' rights claims. First one is widely used and acknowledged way – to depict migrant domestic workers as powerless victims of trafficking. Second one represents it as women's rights concern. It is especially relevant for the cases of sexual abuse and domestic violence. Third way is to make the claim of migrant workers' rights.³⁰¹ The latter 'framing' seems to be the least explored, but the most promising for migrant domestic workers. I will reshape this categorization, with a clear stress on the migration status as it is the main obstacle for accessing the rights. Therefore, in this section I will discuss the avenues for 'migrant victims', 'migrant women' and 'migrant workers.' Other important grounds of discrimination such as race, age, disability, ethnicity, class and etc. will be briefly mentioned, but not discussed deeper due the limitation of the research. I do not intend to split the group of migrant domestic workers, whom all are women (within the scope of this research) and all are workers (from the approach of feminism).

3.1.1. Migrant as a 'Victim'

I explore the issue of access to justice, as it concerns trafficking in women for the purpose of domestic servitude. Ratna Kapur criticises the 'victimisation rethoric' from the perspectives of feminism. She criticises women image as victim within both international

³⁰¹ Schwenken, "*Domestic Slavery*" versus "*Workers Rights*".

migration and in the family life.³⁰² Here I will separate the issues of trafficking and domestic violence. The rationale is, that ‘trafficking’ refers to specific experience of migrants, whereas domestic violence refers to the abuses suffered (usually) by women and children within the private relations. Trafficking is seen from the perspectives of the international organised crime whereas domestic violence has the very local focus on a domestic unit.

Phenomenon of ‘trafficking’ for a long had a connotation with prostitution and sexual exploitation. Helen Schwenken notes that it has changed in 2000, when the UN “has passed substantially widened definition of trafficking that included abusive and exploitative situations in domestic work.”³⁰³ She refers to the Protocol supplementing the UN Convention against Transnational Organised Crime.³⁰⁴ Since then the term of ‘modern slavery’ and ‘domestic servitude’ started to be used.

Regarding the rights of the ‘victims’ of trafficking, there is a twofold European Human Rights mechanism – at EU and at CoE level. OSCE and other inter-governmental organizations in also are playing active role, however the do not fall within the scope of this research.

EU measures

It was discussed in the previous Chapter that in EU level, there is a binding Framework Decision on combating trafficking in human beings.³⁰⁵ Trafficking includes “the exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude.”³⁰⁶ Article 7 of this Framework Decision elaborated on the ‘Protection of and assistance to victims.’³⁰⁷ However, this article has

³⁰² Ratna Kapur, “The Tragedy of Victimisation Rethoric: Ressurecting the ‘Native’ Subject’ in International/Post-Colonial Feminist Legal Politics.

³⁰³ Helen Schwenken, p.9.

³⁰⁴ UN Convention against Transnational Organised Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, Geneva, 2000.

³⁰⁵ Council Framework Decision (2002/629/JHA).

³⁰⁶ Council Framework Decision (2002/629/JHA), Art. 1, para. 1, cl. d).

³⁰⁷ Council Framework Decision (2002/629/JHA), Art. 7.

foreseen only investigation into the crime, and some additional assistance for children victims, but not for women or migrants.

Women and migrant ‘victims’ were treated according a Framework decision on the standing of victims in criminal proceedings.³⁰⁸ This decision elaborated on the general protection of the ‘victims’ and their rights. It had foreseen recognition of victim, right to receive information, right to protection, also ‘specific’ assistance and ‘communication safeguards’.³⁰⁹ It aimed to facilitate the situation for the “victims’ resident in another Member State” but was not addressing the right to stay after proceedings for TCN and especially - irregular migrants.³¹⁰ It has just merely stated that “each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.”³¹¹

In order to clarify the situation for victims of trafficking, in 2002 Commission has adopted a proposal ‘on a *short-term* residence permit issued to victims of smuggling or trafficking in human beings who co-operate with the competent authorities.’³¹² Such conditionality and uncertainties remain after the victim has already agreed to cooperate. It serves as a deterrence measure, rather than a ‘sufficient incentive’ how it was praised by the European Commission.³¹³ (See the Annex 7, Table 7).

Council of Europe measures

Council of Europe has a firm standing against trafficking. Convention on Action against Trafficking in Human Beings was adopted in 2005.³¹⁴ It declares that trafficking is “a

³⁰⁸ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), OJ L 82/1, 22.3.2001.

³⁰⁹ Council Framework Decision (2001/220/JHA), Art. 1, Art. 3, Art. 8, Art.6, Art. 5.

³¹⁰ Council Framework Decision (2001/220/JHA), Art. 11.

³¹¹ Council Framework Decision (2001/220/JHA), Article 3.

³¹² Commission of the European Communities, Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002.

³¹³ Commission of the European Communities, COM(2002) 71 final, para. (5)

³¹⁴ Council of Europe, Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005.

violation of human rights and an offence to the dignity and the integrity of the human being.”³¹⁵ Article 3 of this convention provides the open-ended list of non-discrimination grounds for implementing the provisions foreseen in this convention. Migration status is not explicitly mentioned among them and falls into the category ‘other status.’³¹⁶ Regarding preventive measures, the CoE convention is more advanced than one of EU, as it refers for the initiatives “to enable migration to take place legally.”³¹⁷ However, further reading of this convention calls for strengthening border controls in the name of ‘broader measures.’³¹⁸ A separate chapter of this convention elaborates on the “Measures to protect and promote the rights of victims, guaranteeing gender equality.”³¹⁹

This Convention is meaningful because there is a supervisory mechanism established. It consists from Group of experts on action against trafficking in human beings (GRETA) and Committee of the Parties. Therefore State Parties’ compliance with the Convention is being constantly monitored. What is more, it involves civil society and various anti-slavery organizations and initiatives to contribute for the implementation of this convention.

All in all, it can be concluded, that measures suggested by Council of Europe are taking into consideration victims’ situation and needs more seriously. However, there is a certain threshold for migrant domestic workers’ to be held as victims of trafficking – that is abusive and powerless situation reached by means of:

the **threat** or use of **force** or other forms of **coercion**, of **abduction**, of **fraud**, of **deception**, of the **abuse of power** or of a position of **vulnerability** or of the giving or receiving of **payments** or **benefits** to achieve the consent of a person having **control over another person**.³²⁰

³¹⁵ Council of Europe Convention, (CETS No. 197).

³¹⁶ Council of Europe Convention, (CETS No. 197). Art.3, goes as follows:

“The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

³¹⁷ Council of Europe Convention, (CETS No. 197). Art. 5. para. 4.

³¹⁸ Council of Europe Convention, (CETS No. 197). Art. 7, para. 1.

³¹⁹ Council of Europe Convention, (CETS No. 197).Chapter III, Art. 10-17.

³²⁰ Council of Europe Convention, (CETS No. 197).Art. 4, para. a). Emphasis added.

Helen Schwenken in her research, stresses, that because using ‘trafficking’ avenue domestic workers end up too often equated with ‘powerlessness.’ She upholds this position by adding that “dominant identity of the migrant women within the trafficking is the one of victim.”³²¹ Further, she draws to attention interesting insight from her interview with RESPECT network representative. According the latter, organizations which undertake trafficking avenue for migrant domestic workers “are not groups of self-organized women, <...> [but] are male dominated organizations.”³²² Migrant domestic workers empowerment organizations criticise anti-trafficking organizations as the latter are “advertising the most extreme cases of violence”, portraying the ‘modern slavery’ in courts. Eventually, they only ask for “temporary permit on humanitarian ground” for the benefit of ‘victim’.³²³ Such ‘framing’ strengthens the stigmatization of domestic sector. Moreover, it do not address the causes and do not eradicate the ‘vulnerabilities’ attached with the domestic work.

“Anti-trafficking” avenue only deals with the outcomes when the problem reaches sufficiently serious degree. It has to ‘at least’ amount to “sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude.”³²⁴ This condition makes the access to justice difficult in the early stage, thus women procrastinate in fear of deportation. On the other hand, it is the only avenue tailored for undocumented migrants as it addresses the issues of residence permit, repatriation and etc. In the following sub-section it is examined what benefits and drawbacks has the framing migrant domestic workers’ rights as women rights’ claims.

³²¹ Schwenken, “*Domestic Slavery*” versus “*Workers Rights*”, p.11.

³²² Schwenken, “*Domestic Slavery*” versus “*Workers Rights*”, p.11.

³²³ Schwenken, “*Domestic Slavery*” versus “*Workers Rights*”, p.11.

³²⁴ Council of Europe Convention, (CETS No. 197)., Art. 4, para. a).

3.1.2. Migrant as a 'Women'

Migrant domestic workers can benefit by addressing their issues as women rights' issues. In the first chapter it was discussed the very central role of the gender for the concept of 'domestic work.' In the second chapter exclusion from EU level labour migration policies was also explained by the 'genderised' policy-making. Therefore in this section it will be examined on how certain protections that are applicable for 'women', could be translated into protection of migrant domestic workers.

There is strong international commitment to end up the discrimination of women in various fields of life – from employment, to access to justice. Such commitment is expressed in United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).³²⁵ Its Optional protocol has established the individual complaint mechanism within CEDAW Committee.³²⁶ CEDAW has also addressed the violations happening in private sphere. In particular, violence against women was acknowledged according the General Recommendation No. 19 of the CEDAW Committee.³²⁷ However, as concerns rights of migrant women this convention seems to be not very helpful. There is no article addressing migrant status. This is a serious drawback in the context of 'feminisation of migration.' Anja K. Frank and Andrea Spehar notes that whether or not migrant women issues will be addressed, largely depends from the personalities in the CEDAW Committee and their personal convictions.³²⁸ In addition, when there is no article, there is no obligation to report on it. Thus, there were cases of "exclusion of women migrants' concerns from official and NGO reports to the CEDAW committee."³²⁹ What is more interesting, EP called EU, as a

³²⁵ United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979.

³²⁶ United Nations Convention on the Elimination of All Forms of Discrimination against Women Optional Protocol, 1999, Art.1.

³²⁷ UN Committee on violence against women, General Recommendation No. 19 of the CEDAW (11th session, 1992).

³²⁸ Frank and Spehar, *Women's Labour Migration in the Context of Globalisation*, p.61.

³²⁹ Frank and Spehar, *Women's Labour Migration in the Context of Globalisation*, p.61.

legal personality,³³⁰ to “become a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its optional protocol.”³³¹

Regarding rights of migrant women more beneficial are very recent developments within the Council of Europe. Since the April of 2011, European human rights mechanism was enriched with the Convention on preventing and combating violence against women and domestic violence.³³² Terms ‘violence against women’ addresses to the concerns of migrant domestic workers as it includes:

all acts of gender-based violence that result in, or are likely to result in, **physical, sexual, psychological or economic harm** or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in **private life**;³³³

In addition to this, convention includes migration status among the grounds of non-discrimination and stresses its importance of it for protection of victims.³³⁴

At EU level there are no separate Directive addressing the issue of violence against women. However, even EU can join abovementioned convention as a legal entity, just before adoption of this CoE convention EP passed a resolution addressing need to unify the legal framework within EU member states on the issue of gender based violence.³³⁵ In a meanwhile, CoE Convention against domestic violence seems to respond to the needs of migrant domestic workers in situations of abuse much better, than it is done in EU or CoE anti-trafficking legislation. (See the Annex 8, Table 8). However, it has a serious weakness. That is the Article 78 on reservations, which explicitly targets the Article 59 on the residence

³³⁰ After the Treaty of Lisbon, 1 December 2009.

³³¹ European Parliament resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, (2010/2209(INI), Strasbourg, 5 April 2011, para. 29.

³³² Council of Europe Convention on preventing and combating violence against women and domestic violence, (CETS No. 210), 12 April, 2011.

³³³ Council of Europe, (CETS No. 210), Article 13, para. a.

³³⁴ Council of Europe, (CETS No. 210), Article 4, para. 3. , as follows:

“The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, **migrant** or refugee status, or other status.”

³³⁵ European Parliament, (2010/2209(INI)).

Status. Article 78 gives the possibility for “any State or the European Union <...> not to apply or to apply only in specific cases or conditions” with the abovementioned Article 59 upon special declaration.³³⁶ Within just short lapse of time (since April 2011), the convention has already 17 Parties States. Among them most important receiving countries with the exception of the UK: France, Germany, Spain, Portugal and Scandinavian countries.³³⁷

EP has acknowledged that violence against women can take place in the number of forms:

sexual abuse, rape, domestic violence, sexual assault and harassment, prostitution, trafficking of women and girls, violation of women's sexual and reproductive rights, **violence against women at work**, violence against women in conflict situations, violence against women in prison or care institutions, and several harmful traditional practices;³³⁸

Abovementioned forms of violence are addressing migrant domestic workers situation as it includes the violence happening in the workplaces. In addition, this resolution has ‘highlighted’ that “migrant women, including undocumented migrant women, and women asylum-seekers form two subcategories of women that are particularly vulnerable to gender-based violence.”³³⁹ What is more, it has addressed the very specific offence, which is often experienced by migrant domestic workers, when employers are retaining the documents. Therefore EP has called on:

the EU and its Member States to establish a legal framework that gives immigrant women the **right to hold their own passport and residence permit** and makes it possible to hold a person **criminally responsible** for taking these documents away;³⁴⁰

EP calls for holistic and comprehensive approach on the violence against women, domestic violence and gender-based violence. However, it is likely that after reaching European Commission these generous calls and urges will be curbed by the economic constraints, and in Council - by ‘securitization’ approach in case of migrant women.

³³⁶ Council of Europe, (CETS No. 210), Article 78, para.2.

³³⁷ According to CoE official website on Convention on preventing and combating violence against women and domestic violence, “Signatures and ratifications”, accessed: http://www.coe.int/t/dghl/standardsetting/convention-violence/source/flash/map/examples/zoom_and_description/map_en.htm, 2011-11-20.

³³⁸ European Parliament, (2010/2209(INI)), J.

³³⁹ European Parliament, (2010/2209(INI)). para. 7.

³⁴⁰ European Parliament, (2010/2209(INI)). para. 28.

On the other hand current situation presents an opportunity for migrant domestic workers advocacy and lobbying organization, to call for better integration of the needs of their members.

In a nutshell, abovementioned parallel developments in the Council of Europe and the EU, are likely to strengthen the protection of women, among them – migrant domestic workers. CoE convention is unique tool, as it also establishes a monitoring mechanism - a Group of experts on action against violence against women and domestic violence (GREVIO).³⁴¹ Beside General monitoring, GREVIO is able to pass General recommendations according the Article 69 of the Convention. This possibility allows GREVIO to interpret and expand the scope of the convention. What is more State Parties committee is involved in monitoring as well as national parliaments and the Parliamentary Assembly of CoE (PACE).³⁴²

Women Empowerment avenue

There is a body of legislation in EU ensuring equal rights for women and men in a workplace. However it is not yet applicable migrant domestic workers for two reasons. Firstly, domestic work is not yet conceptualized as a formal ‘work’. Secondly, equality measures are applicable primarily for EU citizens. EU indicates in its policies, that empowerment of women coming from third countries shall happen within their countries of origin. Therefore, women empowerment initiatives are implemented via European Development Fund (EDF). EC document on ‘Gender Equality and Women Empowerment in Development Cooperation’ does not mention empowerment of migrant women.³⁴³ This ignorance towards migrant women within the EU is reiterated in the Action Plan.³⁴⁴

³⁴¹ Council of Europe, (CETS No. 210), Article 66.

³⁴² Council of Europe, (CETS No. 210),, Articles 67 and 70.

³⁴³ Commission of the European Communities, COM(2007) 100 final.

³⁴⁴ European Commission, Commission Staff Working Document “EU Plan of Action on Gender Equality and Women's Empowerment in Development 2010-2015”, SEC(2010) 265 final, Brussels, 8.3.2010.

Victories of ‘Women’ mechanisms must be acknowledged, especially as it concerns domestic violence. It is important, that ‘privacy’ of home argument was rebutted for protection of women against violence and sexual abuse. This is promising development for migrant domestic workers’ rights advocates. They can further such arguments by claiming that home is also a ‘workplace’. Various labour rights and human rights violations can happen in this ‘workplace.’ Therefore, there is an overriding interest for protection of domestic workers’ rights.

3.1.3. Migrant as a ‘Worker’

In Europe, as well as in Americas, not much has been achieved by declaring migrant workers rights at UN level. The EU countries have absolutely ignored the existence UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.³⁴⁵ The latter convention was not ratified by any of EU members or other major migrants’ receiving countries.³⁴⁶ Thus it is famous as being the least ratified convention among UN core Human Rights documents. At the regional level situation is more promising, as there are several conventions recognising the rights migrant workers. For example, European Convention on the Legal Status of Migrant Workers and European Social Charter containing Article 19 on equal treatment of migrant workers. Abovementioned Convention and Charter together with European Convention on Social Security³⁴⁷ form “an ensemble of rights that strengthens the protection of migrant workers.”³⁴⁸

Regarding EU, the General Framework Directive on legal migration should be mentioned.³⁴⁹ This directive is a horizontal instrument created „to guarantee a common

³⁴⁵ United Nations, Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by General Assembly resolution 45/158 of 18 December 1990, New York, 18 December 1990.

³⁴⁶ UN Treaties Collection, UNTS database, Chapter IV Human Rights, 13th document, (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en, accessed: 2011-11-20).

³⁴⁷ Council of Europe, European Convention on Social Security (ETS no. 78).

³⁴⁸ According official CoE information on Migration chapter, (http://www.coe.int/t/dg3/migration/documentation/Default_conv_en.asp, accessed: 2011-11-20).

³⁴⁹ Communication from the Commission COM(2005) 669 final.

framework of rights to all third-country nationals in *legal* employment already *admitted* in a Member State.³⁵⁰ However all above mentioned legal documents have certain limitations regarding the rights of migrant domestic workers. Nevertheless, various human rights institutions are interpreting these documents in progressive manner by using ‘integrated approach.’ This leads towards undocumented migrants’ inclusion and recognition of their human rights. According to Article 1 of ECHR, this Convention is applicable to all the persons within jurisdiction of the member state the same is true for EU Fundamental Rights Charter which promises similar level of protection as ECHR. (See more on these provisions in Section 2 respectively under ECJ and ECtHR).

The CoE

European Convention on the Legal Status of Migrant Workers was opened for a signature in 1977 and finally went in to force six years later.³⁵¹ This convention covers main matters actual for migrant workers legal status. It elaborates on migrant worker’s rights within all the phases starting from recruitment, employment and finishing with return. It is beneficial for migrant domestic workers, as it discusses the issues of work and residence permit, as well as conditions of work.³⁵² Regarding work conditions it is foreseen, that “migrant workers authorised to take up employment shall enjoy treatment not less favourable than that which applies to national workers <...>.”³⁵³ It is important that actual enforcement of such working conditions is foreseen via labour inspections.³⁵⁴ Thus the equal treatment is promised for migrant workers from contracting countries also in other issues – social security, social and medical assistance.³⁵⁵

³⁵⁰ Communication from the Commission COM(2005) 669 final, p. 6.

³⁵¹ Council of Europe, (ETS No. 93),

³⁵² Council of Europe, (ETS No. 93), Art. 8, Art.9., Art.16.

³⁵³ Council of Europe, (ETS No. 93), Art.16.

³⁵⁴ Council of Europe, (ETS No. 93), Art.21.

³⁵⁵ Council of Europe, (ETS No. 93), Art.18, Art. 19.

What is more, there is foreseen the ‘right to access the courts or administrative authorities in the receiving country’. It is established in the article 26 that countries have to ensure the equal treatment for migrant workers within legal proceedings, to provide legal assistance, and where it is needed – translation and interpretation in his/her language.³⁵⁶

So far, this convention seems to address the needs of migrant domestic workers the best. However, the scope of application of this Convention is rather limited. It cover only “nationals of any **contracting party legally employed and resident** on the territory of another **contracting party**, provided that the duration of **a work contract exceeds six months**.”³⁵⁷ Thus it is applicable only among the states that ratified this convention. This may be beneficial for the migrant domestic workers coming from Central and Eastern Europe, but not for those from the Global South. From sending countries only Turkey, Moldova and Ukraine have ratified it. As for receiving countries - France, Italy, Netherlands, Norway, Portugal, Sweden and Spain have undertook to implement the provisions discussed above. Having 7 important receiving countries to ratify this convention is a big victory, given the traditional ‘securitization’ approach from the national governments.

In addition, this convention has its supervisory mechanism, so called - consultative committee. This committee “examines periodically the reports with the information on the application of the Convention submitted by the contracting parties.”³⁵⁸ As it was mentioned another mechanism for protection of migrants’ rights is under ESCh is European Social Committee. This committee is applying the European Convention on the Legal Status of

³⁵⁶ Council of Europe, (ETS No. 93), Art.26, goes as follows:

„1.Each Contracting Party shall secure to migrant workers treatment not less favourable than that of its own nationals in respect of **legal proceedings**.<...>

2. Each Contracting Party shall provide migrant workers with **legal assistance** on the same conditions as for their own nationals and, in the case of civil or criminal proceedings, the possibility of obtaining the assistance of an **interpreter** where they cannot understand or speak the language used in court.” (Emphasis added).

³⁵⁷ According official CoE information on Migration chapter, (http://www.coe.int/t/dg3/migration/documentation/Default_conv_en.asp, accessed: 2011-11-20).

³⁵⁸ According official CoE information on Migration chapter, (http://www.coe.int/t/dg3/migration/documentation/Default_conv_en.asp (accessed: 20 November, 2011).

Migrant Workers in its collective complaint mechanism. (See the Section 2 of this chapter for further discussion).

Council of Europe is initiating Regional and Ministerial conferences on the issue of migration. In 2008 there was held 8th ministerial conference, where have participated Ministers responsible for the migration issues.³⁵⁹ This conference has proved, that current convention brought the better understanding on overall migration situation in the ministerial level. It was especially beneficial, as the challenges for migrant domestic workers were recognised. This conference in its final declaration has expressed the general principle as follows:

Promote and protect the human rights of migrants and those of persons of immigrant background and guarantee their rights to equal treatment and opportunities, with special attention to gender equality and the rights of women.³⁶⁰

What is more, it has foreseen strengthening “the role of labour inspectors” among the specific measures.³⁶¹ This conference stressed the importance of measures aimed to prevent and help “<...> isolated migrant women to avoid, in particular, situations of vulnerability and abuse” among actions to be taken by the States.³⁶² In this way, the migrant domestic workers’ situation is addressed rather in the labour relation matters than in overly in criminal matters, as it was in while framing issues in the context of trafficking and gender based violence.

The EU

Those excluded from Long Term permit, and not covered by the Single Permit Directive are supposed to be covered by the General framework directive. General Framework Directive is a horizontal instrument with an aim „to guarantee a common framework of rights

³⁵⁹ 8th Council of Europe Conference of Ministers Responsible for Migration Affairs, Kyiv, 4-5 September 2008.

³⁶⁰ Council of Europe. Final Declaration of 8th Council of Europe Conference of Ministers Responsible for Migration Affairs, “Economic migration, social cohesion and development: towards an integrated approach”, CDMG (2008) 43fin, Kyiv, 4-5 September 2008, para.1.

³⁶¹ Council of Europe. CDMG (2008) 43fin, para. C (iv)

³⁶² Council of Europe. CDMG (2008) 43fin, para.10.

to all third-country nationals in *legal* employment already *admitted* in a Member State, but not yet entitled to the long-term residence status.³⁶³ Migrant domestic workers could benefit from the provisions of such framework, but there is a prerequisite – to have a *legal work contract*. Thus only in some countries it can be applicable to migrant domestic workers' situation, where the domestic work has been regularized. (See Section 2 of this Chapter for further discussion).

3.1.4. Migrant as 'Domestic Worker'

The very recent development in the international Human Rights and labour law field finally gave the recognition for 'domestic work' as work. For migrant domestic worker's rights including the rights as workers and addressing their vulnerabilities, as women workers. The brake-through has happened this June (2011), when International Labour Organization (ILO) in its 100th Session has adopted Domestic workers' convention.³⁶⁴ This convention gives due attention to the rights of migrant domestic workers.

PACE has passed a recommendation for the governments of State Parties and a resolution for CoE application in its own procedures on the issue of migrant women within labour market.³⁶⁵ PACE recognises "protection of the fundamental rights of migrant women in the Council of Europe member states", as the essential issue.³⁶⁶ Hence, recommendation encourages respective governments to adhere provisions of the ILO convention on Domestic Workers.³⁶⁷ In addition to this, PACE brings to attention the need to ratify CoE conventions on anti-trafficking, legal status of migrant workers and domestic violence (as it was discussed in this chapter).³⁶⁸ Also, recommendation made proposals for concrete actions such as

³⁶³ Communication from the Commission, COM(2005) 669 final., p. 6.

³⁶⁴ International Labour Organization, Convention C189.

³⁶⁵ Council of Europe Parliamentary Assembly, Recommendation 1970 (2011) *Protecting migrant women in the labour market*, Text adopted by the Assembly on 15 April 2011 (18th Sitting); Council of Europe Parliamentary Assembly, Resolution 1811 (2011) *Protecting migrant women in the labour market*, Text adopted by the Assembly on 15 April 2011 (18th Sitting).

³⁶⁶ Council of Europe Parliamentary Assembly, Recommendation 1970 (2011), Art. 2.

³⁶⁷ Council of Europe Parliamentary Assembly, Recommendation 1970 (2011), Art. 3.3.

³⁶⁸ Council of Europe Parliamentary Assembly, Recommendation 1970 (2011), Art. 3.1. and Art. 3.2.

awareness raising campaigns on various women labour migration related issues (among them - domestic work) as well as anti-discrimination and empowerment activities for women.³⁶⁹

What is more, PACE has stressed the importance to strengthen cooperation among CoE countries and sending countries “in order to respect the human rights of migrant women, promote gender equality, including in civil law, and empower women.”³⁷⁰ Regarding EU, it was emphasised that EU immigration and social policies have to include issues of migrant women. As concerns cooperation with EU, CoE member states were called to “re-examine <...>the availability of legal migration channels for women.”³⁷¹

Resolution gives the effect, that it it can serve as a reference in other CoE Human rights mechanisms – among them ESC and ECtHR. It will be elaborated on the possible effect for claiming rights in second section of this chapter. Here attention is focused on the domestic work provisions of the resolution. Article 8 elaborates specifically on the needs of migrant domestic workers. It is foreseen, that domestic work should be recognised “under national labour law.”³⁷² What is more, PACE called governments to “develop independent visa schemes for migrant domestic and care workers which would allow **legal entry**, provide a standardised **working contract**, and allow for a **change of employer** and **type of work**.”³⁷³ This is a strong statement in context of non-existence of such legal entry, as in Germany and France, and the further provisions are applicable for UK – as domestic work visa is overly restrictive and dependent on particular employer. The latter aspect was addressed separately, as PACE urged, that visas shall not be “tied to particular employers.”³⁷⁴ Moreover, it has addressed the migrant domestic workers’ rights from the perspective from the labour law:

Provide migrant domestic workers with **labour rights** and **protection**, especially as regards clearly defined **work tasks**, daily **hours of work** and **rest periods**, **wages** (at least the minimum

³⁶⁹ Council of Europe Parliamentary Assembly, Recommendation 1970 (2011), Art. 3.4. and Art. 3.5.

³⁷⁰ Council of Europe Parliamentary Assembly, Recommendation 1970 (2011), Art. 3.6.

³⁷¹ Council of Europe Parliamentary Assembly, Recommendation 1970 (2011), Art. 3.8.

³⁷² Council of Europe Parliamentary Assembly Resolution 1811 (2011), Art. 8, para. 1.

³⁷³ Council of Europe Parliamentary Assembly Resolution 1811 (2011), Art. 8, para. 3.

³⁷⁴ Council of Europe Parliamentary Assembly Resolution 1811 (2011), Art. 8, para. 4.

wage or equivalent) and method of **payment**, standards of **night work** and **overtime**, **leave** periods, standards of **termination** of employment and **social security** protection;³⁷⁵

In addition to it PACE stressed, that ‘all forms of abuse and harassment’ shall be prevented and if it still happens – migrant domestic workers shall have the “right to seek legal remedies against employers that mistreat them.”³⁷⁶ PACE resolution was firm on access to the rights among them to access to justice for “migrant women in the labour market, irrespective of their occupation or immigration status.”³⁷⁷ Concrete proposals aimed at separation of labour and migration issues, also at establishing ‘protective immigration’ status for victims of mistreatment in the labour relations.³⁷⁸

A month later than the PACE, the EP also has adopted a resolution on the ILO Domestic workers’ convention.³⁷⁹

Section 2: Claiming rights

In this section I compare three most relevant European human rights mechanisms. I examine relevant case law of European Court of Justice (ECJ) in terms of advancing the rights for Third country nationals in the EU. Further I elaborate on the European Court of Human Rights (ECtHR) jurisprudence concerning rights of migrants. I draw attention on the cases on ECHR Article 4 on slavery, servitude and forced labour. I will analyze as the prospects to make labour rights claims through European Social Rights Committee (ESC) under Article 19 on the rights of migrant workers of European Social Charter within CoE countries.

3.2.1. Role of the European Court of Justice

I will briefly discuss how ECJ has received jurisdiction over the matters of migrant workers. One of four core freedoms is movement of persons. ECJ is overlooking that

³⁷⁵ Council of Europe Parliamentary Assembly Resolution 1811 (2011), Art. 8, para. 5.

³⁷⁶ Council of Europe Parliamentary Assembly Resolution 1811 (2011), Art. 8, para. 6.

³⁷⁷ Council of Europe Parliamentary Assembly Resolution 1811 (2011), Art. 7.

³⁷⁸ Council of Europe Parliamentary Assembly Resolution 1811 (2011), Art. 7.4.5 and Art. 7.4.6.

³⁷⁹ European Parliament, B7-0296/2011.

interstate movement of persons would not be violated as happened in the famous *Laval* and *Viking* cases concerning freedom of movement EU nationals with a purpose of employment in another EU country.³⁸⁰ However, these cases were rather controversial and criticised by ETUC, as promoting “social dumping”.

ECJ is less concerned with the rights and freedoms of TCN, unless they would be highly skilled and would be able to apply for the long term residence permit or to acquire EU citizenship according to the EU Blue Card policy. However, EU Fundamental Rights Charter provides some basic rights for “everyone” including undocumented migrants. Therefore in the times of judicial activism ECJ has contributed for the advancement of the labour rights of EU citizens and as well for legally residing migrant workers, even undocumented migrants.

Migration issues are covered under the Title IV of EU Treaty. Title IV covers the issues of “visas, asylum, immigration and other policies related to free movement of persons.”³⁸¹ ECJ jurisdiction is expanding, as migration issues are further discussed in the detail in the above-discussed EU directives and regulations. Directives and regulations are legally binding EU member states and have a direct effect.³⁸²

What is more, ECJ relies on EU Fundamental Rights Charter as general principles of law, according Article 220 EC.³⁸³ Since December, 2009 the Treaty of Lisbon came into force. According to this treaty FRCh becomes legally binding EU instrument. Charter is important document as it consolidates civil, political and economic, social and cultural rights and thus avoids the artificial division between these rights. Regarding migrant domestic worker rights it is important to stress the Chapter IV on the Solidarity. Articles 27 - 35 covers the most important labour rights, for example Article 31 is the important one, as it provides

³⁸⁰ Case C-438/05 *Viking* (2007) ECR I- 10779-10840 and Case C-341/05, *Laval* [2007] ECR I-11767-11894.

³⁸¹ Title IV of EU Treaty.

³⁸² Direct effect means, that any person can challenge national laws or policies while relying on the EU directives and regulations directly. Direct effect can be either vertical or horizontal. Vertical direct effect means, that person can challenge acts made by the state and its institutions. Horizontal direct effect means, that persons can challenges.

³⁸³ Arnall, *Legal order* and Tamara K. Hervey, Jeff Kenner, *Economic and Social Rights under The EU Charter of Fundamental Rights - a Legal Perspective*, Hart Publishing:Oregon, 2003, p. 12.

the fair and just working conditions for “everyone”.³⁸⁴ Also article 34 elaborates on the “Social security and social assistance”. Second provision of this article ensures this right for legal migrant workers within EU with “social security benefits and social advantages.”³⁸⁵ Third provision elaborates on the social assistance and housing as it is entitled to “for all those who lack sufficient resources”.³⁸⁶ The question remains whether it is applicable for migrant domestic workers?

Jenifer Tooze argues, that it is applicable for migrant domestic workers – but only for legally residing ones.³⁸⁷ EU regulations 1408/71/EEC and 1612/68/EEC provides the clearer guiding on the social security and assistance for Third Country Nationals than for example it is done by European Social Charter.³⁸⁸ These two directives establishes the principle of non-discrimination on the basis of nationality (1408/71/EEC) and on application of social security schemes (1612/68/EEC) for non-EU citizens, who are staying or/and working legally within EU countries.

It was expressed, by Craig and de Búrca that “Articles 45, 49 and 56 TFEU protects EU nationals residing and or working within another state <...> from employed to job-seekers and students.”³⁸⁹ Two exemplary cases where ECJ has upheld the freedom of movement and

³⁸⁴ EU Fundamental Rights Charter, Art. 31 goes, as follows:

“1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.”

³⁸⁵ EU Fundamental Rights Charter, Art. 34 para.2 goes, as follows:

“Everyone residing and moving legally within the European Union is entitled to social **security benefits** and **social advantages** in accordance with Community law and national laws and practices.”

³⁸⁶ EU Fundamental Rights Charter, Art. 34 para.2 goes, as follows: In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

³⁸⁷ Jenifer Tooze, “Social Security and Social Assistance,” in *Economic and Social Rights under The EU Charter of Fundamental Rights*, eds. Hervey and Kenner, p.179.

³⁸⁸ Jenifer Tooze, “Social Security and Social Assistance,” in *Economic and Social Rights under The EU Charter of Fundamental Rights*, eds. Hervey and Kenner, p.179.

³⁸⁹ Paul Craig, and Gráinne de Búrca, *The evolution of EU law* (Oxford university press, New York, 2011), p.526.

prohibition of discrimination the grounds nationality (Art. 12 of TEC) are *Levin v Staatssecretarías van Justitie* and *Lawrie-Blum v Land Baden-Württemberg*.³⁹⁰

The main limitation of the European Court of Justice is that it do not have individual complaint mechanism. ECJ has so called “preliminary rulings procedure.”³⁹¹ It means that ECJ receives cases according to preliminary references from the national courts, when the question concerns the EU law and there is no well established interpretation in the field. The decisions of ECJ are capable to ensure and in some instances to widen the scope of EU policies within the national level. Especially, when ECJ judges take so called judicial activist approach. For example in cases *Defrenne v Sabena*³⁹² and *Blaizot v University of Liège*³⁹³ ECJ has applied the provisions from other regional and international labour treaties, such as ILO and ESCh.³⁹⁴ Judicial activism within ECJ can bring about real changes after ILO Domestic workers convention came into existence June 2011. Firstly, there is a need for ECJ to recognise domestic work as an occupation with all the labour law safeguards. This is an issue, as for example domestic work was explicitly singled out under derogation provision within the EU Working Time Directive 2003/88/EC. This directive provides that for “family workers” there can be made exceptions. However ECJ interpreted this directive in a broader sense. For example in the *Jaeger* case they applied the principle that “duty on call” is considered to be counted as a work time and must be remunerated.³⁹⁵

Regarding migration issues ECJ has been taking initiative to ensure implementation of Long-Term Residence Directive (2003/109/EC). This directive can be invoked also to cover migrant domestic workers, who are legally living in the EU five consecutive years.³⁹⁶ Nevertheless, Long Term Residence directive remains largely ignored by the EU countries.

³⁹⁰ Case 53/81, *Levin v Staatssecretarías van Justitie* [1982] ECR 1035 and Case 66/85, *Lawrie-Blum v Land Baden-Württemberg* [1987] 3 CMLR 389

³⁹¹ According to

³⁹² Case 149/77 *Defrenne v Sabena III* [1978] ECR 1365.

³⁹³ Case 24/86 *Blaizot v University of Liège* [1988] ECR 379

³⁹⁴ Hervey and Kenner, *Economic and Social Rights under The EU Charter of Fundamental Rights*, p. 12.

³⁹⁵ Case C-151/02, *Landeshauptstadt Kiel v Norbert Jaeger*.

³⁹⁶ Directive 2003/109/EC concerning status of third country nationals, who are long term residents.

ECJ has found that 20 of total 27 member states are not complying with the latter directive. Hence ECJ has delivered rulings against three countries and as for October 2011, there were pending case against Netherlands - Dutch Raad van State (C-502/10).³⁹⁷

Another landmark case was *Zambrano v. Office national de l'emploi (ONEm)*.³⁹⁸ This case raised the issue whether Third country national, who is parent of the child granted with EU citizenship, is supposed to be eligible for long term work and residence permit. ECJ in this case decided favourably, but this decision has created contentions among Member States. So far only around half million of TCN has benefited from this directive. In France and Germany, there were only around 2000 persons, using this “new avenue for mobility within the EU.”³⁹⁹ Also it was noted, that EU countries are interpreting directive in a very restrictive manner, and this includes “high fees <...> illegal obstacles to intra-EU mobility and the watering down of the right of equal treatment and protection against expulsion.”⁴⁰⁰ As for example in France there were high fees for acquiring long term residence permit. The application of the Long-Term Directive would be beneficial step for the regularisation of the status for those migrant domestic women, who are willing to reside in the EU.

Regarding the influence of ECJ decisions Cholevinski notes that migrant workers in EU benefits mostly following from European neighbourhood policies. For example, in the cases of Turkish migrants working in Germany or persons from Maghreb countries - in France.⁴⁰¹

³⁹⁷ Reference for a preliminary ruling from the Raad van State (Netherlands) lodged on 20 October 2010 — *Staatssecretaris van Justitie v M. Singh* (Case C-502/10) in Official Journal of the European Union, C 346/35, 18.12.2010. Accessed: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:346:0035:0035:EN:PDF>, 2011-10-20.

³⁹⁸ Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, European Court of Justice, Judgement of The Court (Grand Chamber) on 8 March 2011, Accessed: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A62009J0034%3AEN%3AHTML>, 2011-10-20.

³⁹⁹ Migration Policy Group, “European Commission deplores weak impact of EU long-term residence directive,” Migration News Sheet, October, 2011, accessed: <http://www.migrationnewssheet.eu/european-commission-deplores-weak-impact-of-eu-long-term-residence-directive>, 2011-10-20.

⁴⁰⁰ Migration Policy Group, “European Commission deplores weak impact of EU long-term residence directive”.

⁴⁰¹ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 29 – 41.

3.2.2. Role of the European Court of Human Rights

The European Court of Human Rights (ECtHR) functions within the frames of Council of Europe.⁴⁰² This court is called ‘conscience of Europe’ with a reason. ECtHR delivers judgements for the protection of human rights within the jurisdiction of 47 State Parties of the European Convention of Human Rights (ECHR).

ECtHR has a power to interpret Convention’s provisions. Court uses this power quite creatively and hence rules on the issues that *prima facie* would not fall under the scope of ECHR. For example convention contains no article on right to seek asylum. Nevertheless, ECtHR examines a lot of cases coming from asylum seekers.⁴⁰³ ECtHR protects all types of applicants who claim that their rights were violated, because ECHR has a broad scope of application. Article 1 states that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms <...>.”⁴⁰⁴ This clause is beneficial for migrant domestic workers rights advocates as it is not differentiating protection for persons according their residence or employment status. Thus ECHR protects legal migrant workers and undocumented migrants on the equal footing.

Within ECHR, only Article 16 contains provisions singling out the migrants who are willing to engage in political activities. Article 16 provides that State can limit their freedom of speech (Art.10), freedom of assembly (Art.11) and can justify discrimination (Art.14) of ‘aliens’. Ryzsard Cholewinski argues that direct reading of article 16 is outdated.⁴⁰⁵ ECtHR has narrowly interpreted article 16 in the light of the PACE

⁴⁰² Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ETS. 50) (the text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010), further ECHR.

⁴⁰³ For example cases *M.S.S v. Belgium and Greece*, Application no. 30696/09 decided on 21 January 2011.

⁴⁰⁴ ECHR, Art. 2.

⁴⁰⁵ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 10.

recommendation on political activities of aliens⁴⁰⁶ and of the Convention on the Participation of Foreigners in the Public life.⁴⁰⁷

Already in the first chapter it was discussed that migrant domestic workers are at higher risk of intersectional discrimination. Therefore article 14 on the prohibition of discrimination is of special importance. Article 14 provides open list of prohibited grounds of discrimination such as: “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”⁴⁰⁸ As for migrant domestic workers the claim could be made not only on the listed grounds of discrimination, but also because of their work within a specific under-regulated sector, also on their migratory status.

Since the adoption of the Protocol 12, discrimination on the grounds provided in the Article 14 can be claimed as a separate human rights violation.⁴⁰⁹ Before this Protocol entered into force,⁴¹⁰ the violation of Article 14 could not be claimed on its own, but only in conjunction with any other substantive article of the ECHR or its protocols. For example in the case *Gaygusuz v. Austria*, the ECtHR ruled on the issue of the social security for non-national.⁴¹¹ Gaygusuz, the applicant, claimed that he was refused “an emergency advance of his pension” only because he was not Austrian citizen.⁴¹² ECtHR found a violation of protection on property (Art. 1 of the Protocol 1) in conjunction with general prohibition of discrimination (Art.14).

⁴⁰⁶ Council of Europe Parliamentary Assembly, Recommendation 799 (1977) of 25 January 1977 on the political rights and the position of aliens, paragraph 10(c).

⁴⁰⁷ Council of Europe, Convention on the Participation of Foreigners in Public Life at the Local Level, 5 February 1992, (ETS No. 144), entry into force 1 May 1997. Exemplary case for the narrow interpretation of the Article 16 provided by Cholewinski is *Piermont v. France* (1995) 20 EHRR.

⁴⁰⁸ ECHR, Article 14.

⁴⁰⁹ Council of Europe, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000.

⁴¹⁰ ECHR Protocol No. 12 entered into force with regards to those countries which have ratified it,.

⁴¹¹ *Gaygusuz v. Austria* 23 EHRR 364 (1996).

⁴¹² *Gaygusuz v. Austria* (1996) 23 EHRR 364.

Both articles 1 and 14 of the ECHR have the potential to expand and advance the rights enshrined in the Convention. The ECtHR also employs interpretative approach and takes into consideration not only European consensus but as well emerging international trends.⁴¹³ Migrant domestic workers' advocates also could use the argument of "the emerging international trend" for advancing the rights. After adoption of ILO domestic workers' convention and subsequent resolutions passed by PACE and EP, it was recognised in the international and intra-governmental level, that migrant domestic workers human and labour rights has to be protected by the state. The protection of such rights requires not only negative obligations (to refrain from making violations), but also positive obligations (to ensure the protection via domestic legislation and policies).

When it comes to positive obligations, the State has a wider 'margin of appreciation'.⁴¹⁴ This 'margin of appreciation' doctrine means that states are free to choose how they will implement their policies. It is important to stress that certain changes in the labour and migration policies and practices are needed in order to protect and ensure migrant domestic workers' labour and human rights. For example state ensures the compliance with labour rights through the supervisions made by labour inspectors. Hence, labour conditions of migrant domestic workers needs to be checked as well. However, ECHR do not contain the article on labour rights, thus it would look like rather the issue of ECtHR counterpart – European Committee on Social Rights.

Notwithstanding, ECHR articles covers some of very important issues for migrant domestic workers, such as prohibition of forced labour and servitude (Art. 4 para.2), right to fair trial (Art. 6), right to privacy (Art. 8), freedom of assembly and association (Art.11), and right to effective remedy (Art. 13) as well right to make an individual complaint to ECtHR

⁴¹³ As for example in the case of *Dugeon v. United Kingdom* EHRR, talked about abolishing sodomy laws, as European Consensus and in the case *Christine Goodwin v. UK* EHRR talked about international trend to recognize the resigned sex in the documents of transsexual persons.

⁴¹⁴ As established in the case *Handyside v. United Kingdom*.

without hindrance (Art. 34) from the authorities. In the instances when the housing, medical aid or other basic services are not provided for the migrant in need for a sole reason of their legal status such negligence can amount to inhuman and degrading treatment (Art. 3) or even cause the threat for life (Art.2).⁴¹⁵ The same is true in the cases when migrants have legal status, but still are denied from the basic social and medical care provided by state.⁴¹⁶

Article 4 is of the major importance regarding migrant domestic workers. The cases on the Article 4 do not only concerns the issues of trafficking in women for sex labour, but also exploitation in the domestic sector.⁴¹⁷ In 2005 ECtHR has made a landmark judgment in the case *Siliadin v. France*.⁴¹⁸ This case concerned domestic servitude. The applicant, Tongolese national, claimed to be trafficked for the domestic servitude as her documents were taken away by the employer. She was forced to work long hours, had never received her wage nor was let on the leave.⁴¹⁹ The Court in this case has clarified a difference between the slavery, servitude and forced labour.⁴²⁰ The ECtHR found that in this case the treatment amounted to servitude, but not slavery.⁴²¹ The slavery is said to amount to commodification of the person, whereas servitude is characterised by “particularly serious form of denial of freedom”.⁴²² This ECtHR decision is important one as it has imposed the positive obligation on the France to criminalize servitude properly. In France there were civil remedies available for the victims

⁴¹⁵ For example in the case concerning treatment of asylum seekers in Greece and Belgium *M.S.S v. Belgium and Greece*, Application no. 30696/09 decided on 21 January 2011.

⁴¹⁶ *D v. United Kingdom* (1997) 24 EHRR 423.

⁴¹⁷ *Rantsev v. Cyprus and Russia* [2010], ECHR No. 25965/04, (7 January 2010)

⁴¹⁸ *Siliadin v. France*, (application no. 73316/01). ECtHR Chamber Judgment delivered on July 26, 2005. 43EHRR16 (2006).

⁴¹⁹ *Siliadin v. France*, 43EHRR16 (2006).

⁴²⁰ Whereas slavery means the commodification of the person; servitude – would mean that person is “commodified” but his/her labour rights are severely exploited and his/her freedom is denied; forced labour – would mean working against ones will, without due or any payment. What is **not** constituting the force labour it was examined in the cases on work during detention, for example *Van Droogenbroeck v. Belgium* (no. 7906/77) judgement of 24 June 1982 in (1982) 4 EHRR 443 and *De Wilde, Ooms and Versyp v. Belgium* [Vagrancy cases] (No 1) (1971) 1 EHRR 373; as well in the cases of military service for example, *W., X., Y. and Z. v. United Kingdom*, (Appl. Nos. 3435-3438/67), (1968) 11 YB 562 EComm HR.

⁴²¹ *Siliadin v. France*, 43EHRR16 (2006), para. 122.

⁴²² *Van Droogenbroeck v. Belgium* EHRR 443 (1982), para. 58.

of servitude but not the criminal procedure.⁴²³ It was the first case under Article 4 imposing positive state obligation.

Siliadin v. France judgement has received various evaluations. For example Virginia Mantouvalou has claimed, that it was “a positive first step towards addressing the problem of the coercion and vulnerability of migrant domestic workers.”⁴²⁴ She further welcomed the ‘integrated approach’ taken by the ECtHR, as they used other UN, ILO and CoE declarations for the clearer guidance on the issue. The more opposite position was expressed by the Holly Cullen, who argued that putting positive obligations for the states under Article 4 in absence of clear definitions was rather a mistake.⁴²⁵ The author argued, that international documents were ‘used as interpretative guides’, even respective State Parties of ECHR have not ratified them.⁴²⁶ The alternative opinion was expressed by Helen Shwenken, who argued, that even migrant domestic workers has received public attention, it rather narrowed their ‘political’ opportunities to the issues of trafficking and modern slavery. Author holds that such kinds of victories are rather dubious.

From my point of view, *Siliadin v. France* case was in between victory as described by Montevalu and had a real potential for narrowing issues of migrant domestic workers. However, the final impact of this case depends on how it will be used further. For example, positive state’s obligations under Article 4 from the case *Siliadin v. France* were reiterated in the trafficking for sexual exploitation case *Rastnev v. Russia*. This case imposed the positive obligations for respective states: for Cyprus to prevent trafficking in human beings and for Russia - to investigate into the cases of trafficking. However, this case do not relate to migrant domestic workers’ rights.

⁴²³ *Siliadin v. France*, 43EHRR16 (2006), paras, 98-102.

⁴²⁴ Mantouvalou, “Servitude and Forced Labour in the 21st Century,”.395.

⁴²⁵ Cullen, “*Siliadin v France*,” p. 589.

⁴²⁶ Cullen, “*Siliadin v France*,” p.591.

As for 2011, there were 2 cases pending against United Kingdom – *Kawogo v. UK*⁴²⁷ and *C.N. v. the UK*.⁴²⁸ These cases raised issues actual for domestic workers.⁴²⁹ The Applicant in the case *C.N. v. the UK* was claiming that UK has failed to criminalise forced labour and domestic servitude.⁴³⁰ In addition to this, the applicant complained that her treatment “profoundly interfered with her right to respect for her private life” as enshrined in article 8. Therefore, *C.N. v. the UK* case raised the question of the positive obligations under article 4 and under article 8. Similarly in the case *Kawogo v. UK*, applicant has complained about “domestic forced labour in the United Kingdom which the authorities failed to adequately investigate and prosecute as a criminal offence”.⁴³¹ Subsequently, Ms. Kawogo argued that breach was not only under article 4 but also under article 13 (effective remedy).

Article 4 provides the avenue of the migrant ‘victim’, as it was discussed in the previous section. However, raising violations not only as arising under article 4 of ECHR but also as breaches under article 8 and 13 furthers the avenue of migrant ‘domestic workers’ rights. The rights migrant domestic workers shall be advanced, not only via criminalization of domestic servitude. The violations of their rights contain breaches of the right to privacy and right to effective remedy. It is important to claim, that the very essence of aforementioned rights are at stake in the absence of clear regulations of domestic work. These are the rights important for the majority of migrant domestic workers.

Regarding the migrant ‘women’ avenue the case *Opuz v. Turkey* shall be mentioned.⁴³² In this case ECtHR concluded, that women are at greater risk of gender-based violence than men. The court has recognised the domestic violence as a form of discrimination because

⁴²⁷ *Kawogo v United Kingdom* (application no. 56921/09), communicated to the Government in June 2010.

⁴²⁸ *C.N. v the United Kingdom* (application no. 4239/08), communicated to the Government in March 2010.

⁴²⁹ Interesting observation, that CoE factsheet on Forced labour and trafficking as of September 2010, classified abovementioned 3 cases: *Siliadin v. France*; *C.N. v the United Kingdom*; and *Kawogo v United Kingdom* under chapter “Domestic workers”.

⁴³⁰ *C.N. v the United Kingdom* (application no. 4239/08).

⁴³¹ Fourth Section, *Kawogo v the United Kingdom* (application no. 56921/09), lodged on 14 October 2009, Statement of Facts.

⁴³² *Opuz v Turkey* (no. 33401/02) decided on 9 June 2009.

of gender. This avenue may be beneficial for claiming that dependent visa status on their husbands (via family reunification channel) makes them ‘vulnerable’ to gender based violence. Especially in the situations when fear of deportation prevents their access to justice.

Cholewinski compares the influence within several EU countries and draws the conclusion, that it was rather influential in old democracies, such as Germany, France, and the UK.⁴³³ Among the three countries compared in this research it can be claimed, that Germany was most influenced by the ECtHR jurisprudence concerning interpretation of the right to privacy under Article 8.⁴³⁴ Regarding the UK, Cholewinski mentions that “the principles of ECHR case-law under Articles 3 and 8 have found their way into the Instructions of the Immigration and Nationality Directorate (IDIs).”⁴³⁵ Latter he adds that this law is more important for asylum seekers and refugees, than for labour migrants. The greatest influence is seen since 2000, when the UK has incorporated ECHR provisions within its own Human Rights Act.⁴³⁶ (p.41) In French domestic courts it is reiterated that ECtHR jurisprudence was used when deciding cases on the prohibition of torture and privacy cases. Cholewinski speaking about the France further notes, that “progress has also been made in the elimination of discrimination in the field of social security protection as a result of the combination of Article 14 and Article 1 of Protocol No. 1.”⁴³⁷ This was the outcome of the case *Gaygusuz v. Austria*. However, Cholewinski noticed exactly opposite trend in Germany. There domestic courts were reluctant to apply social security protection for migrant workers.⁴³⁸

⁴³³ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 29 – 41.

⁴³⁴ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 29.

⁴³⁵ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 41.

⁴³⁶ The UK’s Human Rights Act 1998 has entered into force on 2 October 2000 in: Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p.41.

⁴³⁷ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 56.

⁴³⁸ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 29.

3.2.3 Role of European Social Committee

The European Social Charter was vastly overlooked by the academics and NGOs working in the field of migrant workers.⁴³⁹ The European Social Charter provides promising avenue for claiming and protecting rights of migrant domestic workers. This avenue is ESC collective complaints mechanism.⁴⁴⁰ In addition to this, European Social Committee also has a Reporting procedure. Reporting procedures were instituted in order to monitor the progress done by the State Parties. Governments within their reports shall include “whether they are only concerned with the situation of nationals or whether they apply equally to the nationals of the other Parties.”⁴⁴¹ ‘Other parties’ refers only to the countries, which has ratified ESCh or Revised ESCh. Whereas all 47 CoE countries have signed this convention and 43 has ratified it,⁴⁴² but only 14 agreed to accept with collective complaint mechanism.⁴⁴³ It is not possible to compare commitments of France, Germany and the UK regarding ESC decisions, as only France ratified ESCh optional protocol.⁴⁴⁴

Regarding the situation of migrant domestic workers it is important to elaborate on the Article 19 of Revised European Social Charter (See the Annex 9, Table 9). It sets “the right of migrant workers and their families to protection and assistance” on the equal terms with

⁴³⁹The one exception I came across is Ryszard Cholewinski, who has been researching on the legal status of irregular migrants and of legal migrant workers: Cholewinski, *The Legal Status of Migrants Admitted for Employment* and Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights*.

⁴⁴⁰ According second protocol, European Social Committee has established a collective complaints mechanism for enforcing European Social Charter according to Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9.XI.1995

⁴⁴¹ FORM for the reports to be submitted in pursuance of the European Social Charter (revised), adopted by the Committee of Ministers on 26 March 2008, Council of Europe, Strasbourg, 31 March 2008, p.3, http://www.coe.int/t/dghl/monitoring/socialcharter/ReportForms/FormRESC2008_en.pdf (accessed: 15 November, 2011).

⁴⁴² With the exceptions of Lichtenstein, Monaco, San Marino and Switzerland.

⁴⁴³ Among these 14 progressive countries ten of them are ‘old EU’ countries (Sweden, Italy, Netherlands, Portugal, France, Belgium, Ireland, Greece, Finland) three of them are new EU countries (Bulgaria, Slovenia, Cyprus), one EEA country (Norway) and only one EU pre-accession country (Croatia). Council of Europe official website, *Member States of the Council of Europe and the European Social Charter: Situation at 20 May 2011*, http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp (accessed: 15 November, 2011).

⁴⁴⁴ Council of Europe official website, *Member States of the Council of Europe and the European Social Charter: Situation at 20 May 2011*, http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp (accessed: 15 November, 2011).

nationals.⁴⁴⁵ Article 18 similarly foresees that migrants from other CoE countries have “the right to engage in any gainful occupation <...> on a footing of equality with the nationals”.⁴⁴⁶ However, these articles contain certain limitations for application for all migrant domestic workers concerned. Important limitations are prerequisites of legal residence status and legal employment. The scope of application is also limited to other State parties, which has been recognised in the aforementioned article.

Article 19 was not recognised at all by 11 Parties of the ESC.⁴⁴⁷ This article also contains the most reservation in comparison with the rest of the articles of the charter. It also has a large amount of reservations. For example regarding labour conditions there were reservations from 20 countries as for October, 2011.⁴⁴⁸ A slightly better recognised was access to justice on equal footing with nationals – there were 16 countries making reservations on this issue.⁴⁴⁹ This indicates that national governments in general are not willing to grant equal protection for migrant workers.

Appendix, which is said to be an ‘integral part of the Charter’, widens the effect of Articles 18 and 19.⁴⁵⁰ Appendix Article 1, which is defining the scope of application of ESCh, provides as follows:

Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by **Articles 1 to 17 and 20 to 31** include foreigners only in so far as they are **nationals of other Parties lawfully resident or working regularly** within the territory

⁴⁴⁵ Council of Europe, European Social Charter (revised), Strasbourg, 3.V.1996, Article 19.

⁴⁴⁶ European Social Charter (revised), Strasbourg, 3.V.1996, Article 18.

⁴⁴⁷ These 11 countries are: Azerbaijan, Bosnia and Herzegovina, Bulgaria, Hungary, Malta, Ukraine, (as of RevESCh) and Croatia, Denmark, Iceland, Latvia, Macedonia (as of ESCh). According “Accepted provisions” table updated as of October 2011, Department of the European Social Charter, Directorate General of Human rights and legal affairs. <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevOct2011.pdf>, (accessed: 15 November, 2011).

⁴⁴⁸ ESCh (revised), Strasbourg, 3.V.1996, and European Social Charter (1961), Art. 19, para. 4. According “Accepted provisions” table updated as of October 2011, Department of the European Social Charter, Directorate General of Human rights and legal affairs.

⁴⁴⁹ European Social Charter (revised), Strasbourg, 3.V.1996, and European Social Charter (1961), Art. 19, para. 7, According “Accepted provisions” table updated as of October 2011, Department of the European Social Charter, Directorate General of Human rights and legal affairs.

⁴⁵⁰ ESCh (revised), Part VI, Article N.

of the Party concerned, subject to the understanding that these articles are to be **interpreted in the light** of the provisions of **Articles 18 and 19**.⁴⁵¹

According to this article, refugees and asylum seekers, as well as stateless persons also fall under the scope of ESCh.⁴⁵² Thus the Charter in fact includes the migrants, but only on three abovementioned conditions. This gives a possibility for furthering the rights of migrant domestic workers from CoE countries, which have ratified ESCh or Revised ESCh, but who have not undertaken to comply with article 19. What is more, Ryszard Cholewinski noted, that:

Generally speaking, Article 19 has been subject to a liberal interpretation by the Committee of Experts. For example, the Committee observed that Article 19 as a whole should not only ensure equal treatment between national and migrant workers but also requires the adoption of positive measures to assist the latter group.⁴⁵³

This shows, how increasingly migrant workers from State Parties receive better protection. It was interestingly stated by the Governmental Committee, that ESCh provides somewhat of intermediary protection between categories of intra-EU and TNC migrants.⁴⁵⁴

Nevertheless, opportunities to promote the rights for Migrant Domestic Worker are widened by ILO Domestic Workers Convention (as discussed in previous Section on Migrant domestic workers). The latter convention was just adopted in June 2011. As it was discussed in the previous section, PACE has passed resolution and recommendation for 'protection of migrant women within labour market' in April 2011.⁴⁵⁵ The resolution, being an internal policy document for CoE gives an impetus for ESC to refer to this Domestic workers' convention.⁴⁵⁶

⁴⁵¹ Appendix to ESCh, Article 1, para 1.

⁴⁵² Appendix to ESCh, Article 1, para 2 and para 3.

⁴⁵³ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 13.

⁴⁵⁴ "Governmental Committee no longer exercises an interpretative function in the supervisory mechanism, where it was able to produce a separate report to that of the Committee of Experts, and has now adopted its revised role, as stipulated in the 1991 Protocol Amending the Charter, which is to prepare the decisions for the Committee of Ministers and select the situations that should be the subject of recommendations to contracting parties (Article 4). See Governmental Committee, 12th Report (I) (1988-89) (Strasbourg: Council of Europe Press, 1993)", in: Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 13.

⁴⁵⁵ Council of Europe Parliamentary Assembly, Recommendation 1970 (2011); Council of Europe Parliamentary Assembly Resolution 1811 (2011).

⁴⁵⁶ Due to the short time lapse there have not yet been any collective complaints referring to ILO domestic workers convention or PACE resolution, thus it could be the focus for future researches.

Collective Complaint mechanism under Article 19 was creatively used by the Roma rights organizations concerning non-nationals and their right to housing, right to social protection.⁴⁵⁷ This Article has been strengthened in conjunction with article E. Article E provides general non-discrimination clause and provides an open list of prohibited grounds of discrimination.⁴⁵⁸ ESC has stated, that article E provides protection from both – direct and indirect discrimination. In addition, ESC stated, that:

Discrimination may also arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.⁴⁵⁹

In the case *European Roma Rights Centre (ERRC) v. France*, the complaint concerned discrimination of the Roma minority in France living conditions. ERRC argued that Roma people has no „access to housing, inter alia social exclusion, forced eviction, as well as residential segregation, substandard housing conditions and lack of security”.⁴⁶⁰ Regarding Article 19 para. 4 applicant organization complained on behalf “of Romani migrants from other Council of Europe member states” that “France has failed to take measures to address the deplorable living conditions.”⁴⁶¹ ESC found violation of these articles - “31§1 and 2, 16, 30 and 19§4c violation of Arrticle E in conjunction with Articles 31, 16, 30”.⁴⁶² Regarding Article 19§4c French government has tried was objecting that this article is not applicable because most of Roma Travellers are “illegal migrants.”⁴⁶³ However, ESC claimed that among Roma population there are also legal migrant workers who fall under protection of Article 19. Therefore ESC unanimously ruled, that “the findings of a violation of Article 31

⁴⁵⁷ No. 51/2008 European Roma Rights Centre (ERRC) v. France, No. 58/2009 Centre on Housing Rights and Evictions (COHRE) v. Italy.

⁴⁵⁸ ESCh, Article E prohibits discrimination on the grounds of “race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”

⁴⁵⁹ No. 13/2002, *Autism-Europe v. France*, Decision on the merits of 4 November 2003, para. 52.

⁴⁶⁰ No. 51/2008 European Roma Rights Centre (ERRC) v. France, para. 1. (Decision on Admissibility)

⁴⁶¹ No. 51/2008 European Roma Rights Centre (ERRC) v. France, para. 1. (Decision on Admissibility)

⁴⁶² No. 51/2008 European Roma Rights Centre (ERRC) v. France, Conclusion. (Decision on Merits of 19 October 2009).

⁴⁶³ No. 51/2008 *European Roma Rights Centre (ERRC) v. France*, Conclusion. (Decision on Merits), para. (vii).

amount to a finding that there has also been a breach of Article 19§4c.”⁴⁶⁴ Similar decision also has been taken in the case against *ERRC v. Italy*.⁴⁶⁵

More recent case against Italy decided on merits was *Centre on Housing Rights and Evictions (COHRE) v. Italy*.⁴⁶⁶ This case raised a follow up questions for the aforementioned case *ERRC v. Italy* decided in 2004. In *COHRE v. Italy* case, among other violations Article 19 para. 1 (on information), para. 4 (on living and working conditions), para. 8 (on expulsions) were mentioned.⁴⁶⁷ Applicant organization claimed that because of anti-immigrant, racist and xenophobic discourse maintained by the public authorities “Roma and Sinti migrants have been deprived of protection and assistance notably as regards access to housing <...> and expulsions from the territory”.⁴⁶⁸ In this case ESC unanimously concluded, that Italy has violated all the articles complained.⁴⁶⁹ Regarding the access to justice for migrant domestic workers it is important to reiterate ESC assessment on protection against expulsion (Art.19 para. 8):

States must ensure that foreign nationals served with expulsion orders have a right of appeal <...> to a court or other independent body, even in cases where national security, public order or morality are at stake.⁴⁷⁰

ESC extended the scope of application of ESCh to undocumented migrants in the case *Defence for Children international (DCI) v. The Netherlands*.⁴⁷¹ This case has raised the issues unlawfully staying unaccompanied minors and asylum seekers in Netherlands. Applicant organization alleged violations of housing conditions, protection of children and

⁴⁶⁴ No. 51/2008 *European Roma Rights Centre (ERRC) v. France*, Conclusion. (Decision on Merits, para. (vii).

⁴⁶⁵ No. 27/2004 *ERRC v. Italy* (Decision on Merits of 7 December 2005), para. 35 and para. 41.

⁴⁶⁶ No. 58/2009 *Centre on Housing Rights and Evictions (COHRE) v. Italy*, (Decision on Merits of 25 June 2010).

⁴⁶⁷ According No. 58/2009 *Centre on Housing Rights and Evictions (COHRE) v. Italy*, para. 10. Also there was made claim on Art. 19 para. 7 (access to justice), however “the counsel of COHRE decided not to maintain the specific allegation based on Article 19§7”.

⁴⁶⁸ No. 58/2009 *Centre on Housing Rights and Evictions (COHRE) v. Italy*, para. 10

⁴⁶⁹ No. 58/2009 *Centre on Housing Rights and Evictions (COHRE) v. Italy*, para. 162.

⁴⁷⁰ No. 58/2009 *Centre on Housing Rights and Evictions (COHRE) v. Italy*, para. 151.

⁴⁷¹ No. 47/ 2008 *Defence for Children international (DCI) v. The Netherlands*, European Committee of Social Rights, Decision on the Merits of 20 October 2009.

general discrimination of unaccompanied minors. In this case ESC has stressed its interpretive authority over the Charter:

It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality, solidarity and other generally recognised values.<...>It must be interpreted so as to give life and meaning to fundamental social rights.⁴⁷²

In the case (*DCI*) v. *The Netherlands* unaccompanied migrant children were staying “unlawfully” in the country. Nevertheless, ESC has stressed the importance to ensure ‘the best interests of the child’ in this situation. Eventually, ESC found that Netherlands have made violations on the articles referring to reducing homelessness and protection of children who are left without family support.

This due regard to specifically vulnerable situation of migrant children may be invoked by migrant domestic workers’ rights advocates. The latter can claim rights of very ‘vulnerable’ group – migrant domestic workers. Migrant women are overrepresented in the domestic sector. Therefore, this sector is largely under-regulated in the EU countries. This situation makes migrant domestic workers in a particularly vulnerable to their exploitation as workers, as women, as migrants. In all the EU countries except Ireland and Sweden there are no labour inspectors who would have the right to check the private houses. In the majority of cases there are also no trade unions for domestic workers that would help to bring their claims to labour courts not to talk about migrant domestic workers.

The ESCh is able to address the migrant domestic workers’ issues within the frames of ‘labour rights’ in the light of ILO Domestic workers’ convention and PACE resolutions and recommendations. ESCh article 19 contains provisions on labour conditions (19.4), access to justice (19.7) and family reunion (19.6) that are applicable for the domestic work sector as for any other type of ‘work’. It could be argued with the same logic as in previously discussed cases on Roma housing and social protection. Whereas there are some women who have

⁴⁷² No. 14/2003 *FIDH v. France*, European Committee of Social Rights Decision on the Merits of 8 September 2004, para. 27 and para. 29.

irregular status, others stay perfectly legally within EU. What is more, while some of them work ‘in the shadow economy’, others - undertakes such jobs according existing ‘regulations’. Therefore it could be claimed, the lower level of labour protection and supervision granted for this type of work are directed against the interests of migrant domestic workers.

After the country was found to violate the rights recognised in the ESCh, article 9 of the Optional Protocol of ESCh foresees further supervision of implementation by Committee of Ministers. Latter shall adopt the resolution on the basis of ESC report.⁴⁷³ ESC acknowledges that the nature of the social and economic rights usually requires states to fulfil states their positive obligations. The obligations may require additional resources, thus the emphasis is put on the principle of progressive implementation as it was established in the case *Autism Europe v. France case*.⁴⁷⁴

Regarding the changes on the ground, Cholewinski has noted that the actual ESCh impact on Germany is rather limited. Germany has only signed but not ratified the Revised ESCh. It had not accepted collective complaints mechanism also.⁴⁷⁵ Therefore ESC is “considered not directly applicable” in Germany.⁴⁷⁶ The UK is in the same position as Germany, as it has only signed the Revised ESCh, but have not ratified it nor its optional protocol. Cholewinski makes a conclusion that ESCh has been not “significantly” relevant in the UK domestic courts. For example, even in the cases of family reunion advocates have relied on the ESCh provision expanding the age of migrant children up to 21. However in the UK “tribunals have not relied on such provisions directly or referred to them”.⁴⁷⁷ France is the only country among three compared, which has ratified Revised ESCh and has agreed with collective complaints mechanism. Therefore, in France the ESC decisions were rather

⁴⁷³ ESCh, Article 9, para. 1.

⁴⁷⁴ No. 13/2002, *Autism-Europe v. France*, para. 53:

⁴⁷⁵ According official CoE website information
http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp (accessed: 20 November, 2011).

⁴⁷⁶ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 29.

⁴⁷⁷ Cholewinski, *The Legal Status of Migrants Admitted for Employment*, p. 29.

influential, especially concerning family reunion cases. As it was mentioned in the context of the UK, ESC has increased the age applicable for children to join their families in CoE countries up to age of 21. This age was applied by French courts.

The ECJ, the ECtHR and the ESC contain certain limitations as concerns to migrant domestic workers rights (See Annex 10, Table 10). ECHR does not contain the article on labour rights, whereas this is the strongest expressed in ESCh and in the Chapter IV on Solidarity in the EU FRCh. On the other hand the scope of application of ESCh Article 19 provisions is most limited. It covers only migrant workers from other CoE countries, who are working and residing legally, whereas ECHR covers everyone within jurisdiction of the state. The scope of EU Fundamental Rights is said to be the same as of ECHR.⁴⁷⁸ However, EU FRCh provides additional set of rights for EU citizens.⁴⁷⁹ Difference in the scope of application gives different avenues to argue migrant domestic workers rights depending on their legal migration status and on violation. Therefore the potential for advancing the rights of migrant domestic workers lies in combination of these three different mechanisms.

⁴⁷⁸ EU FRCh, Art.52, para.3.

⁴⁷⁹ EU FRCh, Chapter V, Citizens Rights.

CONCLUSIONS

From my point of view, migrant domestic workers' phenomenon has to be analysed from the perspective of feminist legal theory. This theory locates migrant domestic workers within context of social justice and also provides better understanding about the complicated 'genderised' and 'racialised' nature of domestic work.

Domestic work is not only low paid, but also it is hardly considered as a 'formal paid job' at national or EU level. The domestic work from time to time is called 'domestic help' even within the EU official documents.⁴⁸⁰ This is not only a matter of linguistics. The lack of conceptualization of domestic work as 'formal paid work' is translated in to the under-regulation of domestic work. Such under-regulation is a results of low application or absence of usual labour 'safeguards' – minimum wages, inspections, trade unions, collective bargaining, grievance procedures and etc. Subsequently, absence of the usual labour safeguards heightens vulnerabilities of migrant domestic workers.

Migrant domestic work within the EU is marked by two parallel trends: 'feminisation of migration' and increasing demand for domestic workers. The phenomenon of 'feminisation of migration' does not mean merely increased numbers of women within migration. This phenomenon is underpinned by the gender roles in the society in general. Feminist scholars claim that women were always taking part in migration. Migrant women were only 'overlooked' by classic migration scholars, who imagined women as unimportant actors. Feminists claim, that migrant women are not only passive 'followers' of their husbands working abroad, but also active 'bread winners' supporting their families left behind in the countries of origin. However, employment of migrant women is sealed by their gender. Migrant women more are segregated in horizontal and vertical hierarchies of labour, whereas European women are increasingly escaping such hierarchies. Migrant women can find

⁴⁸⁰ For example: European Parliament. Resolution on regulating domestic **help** in the informal sector, 2000/2021(INI);

employment within a specific ‘feminine’ labour sector. Therefore the ‘domestic work’ is known as the main employment for migrant women. I have not elaborated on the role of race, this could be the focus of subsequent research.

Demand for domestic workers is increasing in the EU. Two major factors are contributing for such situation - higher than ever women participation within the EU labour market and ageing EU population. The EU employment policies lay stress on the importance of gender mainstreaming strategies within EU laws and regulations.⁴⁸¹ Increased participation of European women within EU labour market creates a ‘reproductive crisis’.⁴⁸² European women can not or do not want to manage their paid employment with ‘their’ “family duties” - housework and care work. In addition to this, the EU population is rapidly ageing. The majority of EU member states are not prepared to cope with the elders in need of care. Regarding the care of elders, there is a particular demand for ‘in home long term care’. Therefore, I claim that the EU would not manage the ‘reproductive crisis’ and challenges created by ageing without the migrant women performing the domestic work. Migrant domestic workers play an important role for ensuring sustainable functioning of EU society and growth of economy. Notwithstanding, the EU labour migration policies are not providing any legal channels for migrant domestic workers.

The EU Agenda 2020 praises for ‘needs based’ assessment within migration policies and for the circular migration among highly and low-skilled migrants. At EU level legal channels are created for seasonal, self-employed and highly skilled migrants. None of these policies are applicable for migrant domestic workers. Therefore, migrant domestic workers access the EU via various other legal and illegal channels. Different ways of entrance determine migrants’ legal status in the EU. This creates a ‘diversification’ of legal statuses in

⁴⁸¹ For example The Equal Pay directive (75/117/EEC) and Equal treatment directive of men and women within employment 2002/73/EC.

⁴⁸² This phenomenon of ‘reproductive crisis’ means that women refuse to play their ascribed gender role as mothers and carers. Not only women do not work within the household, but also they choose to have fewer children and to give birth later.

the EU among the population of migrant domestic workers: starting from legally staying and balancing on the edge of the legality (in case of ‘tourists’ going forth and back) ending up with undocumented migrants, rejected asylum seekers, and victims of trafficking.

What is more, the EU migration and labour policies increasingly differentiate among highly skilled and low skilled migrants. The former are encouraged to migrate in order to fill in the gaps of the EU labour market, while the latter are discouraged by the limited quotas and narrow channels for legal entry. To sum up, EU labour migration policies are using rather ‘skills based’ than ‘needs based’ approach. Therefore I argue, that current EU migration policies are not responding the grand EU strategies, such as Agenda 2020.

Only recently, after ILO has launched Domestic Workers’ Convention migrant domestic workers’ issues were addressed at EU level.⁴⁸³ EP has passed resolution and European Economic and Social Committee (EESC) proposed recommendations for member states. There were some attempts at the EU level to present domestic work as a ‘new type of long term employment’. However, these attempts were framed as measures to combat the level of unemployment among European women within the EU.

Overall, the regulation of domestic work is left for the competence of the Member States. National governments usually leave demand for migrant domestic work for ‘self-regulation’ within informal economy. In addition to this ‘domestic work’ is not regarded as a ‘formal job’. For example, in all three countries examined – Germany, France and the UK, there are no labour inspections foreseen to inspect the workplaces, whereas this safeguard is essential for other formal jobs. However, in all of these three countries, there is a possibility created for employers to declare the domestic work. In France there is a service employment cheques system since 1994. Similar service cheques system exists in Germany since 1997, however much fewer German families than French families are using it in the reality. In the

⁴⁸³ ILO has launched “Decent Work for Domestic Workers” agenda in 2010 June, 99th Session of International Labour Conference.

UK situation is dealt via national tax system. Regarding the migrant domestic workers, only the UK provides special migrant domestic worker's visas. However, this type of visa used to be attached to a particular employer. This clause was later reversed, but there is still no possibility to change the sector. Such conditions, compounded with the absence of labour inspections, heighten the migrant domestic worker's dependency upon one employer's goodwill. Therefore, migrant domestic workers do not report their labour right and human rights abuses because of the fear to be deported.

From my point of view, combating 'illegal' immigration and undeclared work are two issues having negative impact on migrant domestic workers rights. The EU is heavily investing in policies and budgets for the protection of its external borders from 'unwanted' migrants. These policies also target migrant domestic workers because of their perceived low skills' level. Migrant domestic workers are equated with the victims of trafficking or illegal work or criminal networks within EU policies combating 'illegal' immigration. The EU fight against undeclared work is directed at persons employing undocumented migrants. It is supposed to be a preventative measure. However, when undocumented migrants are found to be working "for personal services", the penalties are lower for such employers. Moreover, the employees usually get deported from the EU, if they do not make criminal charges against the employers. Being a 'victim' is the only ground for undocumented migrants to receive a short residence permit and to get some protection of their rights within EU. Therefore I argue that regarding migrant domestic workers, 'victim centred' approach is prevalent, but 'human rights based' approach is missing in the EU migration and labour policies.

There are several avenues for claiming the rights of migrant domestic workers within the European human rights system. I argue, that within this system the rights' claims can be framed in a way to empower migrant domestic workers or in a way to further 'victimise' them. I came up with a conclusion that framing claims of migrant domestic workers as the

‘victims of trafficking’ for domestic servitude do not add or empower these women, but rather require to demonstrate their powerlessness. These victims’ protection is conditional upon the cooperation in the criminal investigation and on their perceived ‘usefulness’ within such cooperation. ‘Victims of trafficking’ in the best case scenario can receive the renewable short-term residence permit on humanitarian grounds.

Second way of framing rights is to show migrant domestic workers’ vulnerabilities as of ‘women’ within the ‘anti-domestic violence’ legislation. This legislation also portrays women as prototype victims. On the other hand, the rationale of the fight against domestic violence has a potential as it reaches the private households and intimate relationships. This legislation has achieved the recognition of ‘home’ as a place of women abuse. Regarding migrant domestic workers this rationale shall be advanced in order to recognise ‘home’ as a place of women workers’ abuse.

Third way is framing claims of ‘migrant workers’ rights’. Migrant workers’ rights have faced significant controversies internationally.⁴⁸⁴ Such controversies are also noticeable within the European Human Rights system, even regarding legally residing and working migrants from other CoE countries.⁴⁸⁵ Notwithstanding this situation, I concluded, that claiming migrant workers rights at the regional level can produce ‘empowering’ results for migrant domestic workers in order to regularize ‘domestic work’ as any other formal ‘work’. From my point of view, framing migrant domestic workers’ claims as a ‘particular’ sector claims would be the most beneficial in order to to ensure their rights on the ‘ground’.

Once the right claims are framed, legal enforcement mechanisms are needed to ensure and advance them. Three major actors within the European Human Rights system are the European Court of Justice, the European Court of Human Rights and the European

⁴⁸⁴ The UN Migrants workers convention is the least ratified among the 9 core Human Rights conventions. None of the EU member states has ever ratified it.

⁴⁸⁵ For example ESCh Article 19 for the protection of migrant workers rights has been ratified with the largest number of reservations.

Committee of Social Rights. The ECJ has a widest range of instruments at its disposal, including the legally binding EU Fundamental Rights Charter, whereas the ECtHR is limited to European Convention on Human Rights and its protocols and the ESC is limited to European Social Charter and its Revised version. Combination of all these three mechanisms is able to protect the rights of migrant domestic workers and to advance them. For example, the ECJ has exclusive competence over EU migration legislation and the rights of migrants within EU. The ECtHR is developing its jurisprudence on Article 4. ECtHR has established positive obligation for state parties of ECHR to criminalise domestic servitude. Regarding migrant domestic workers' empowerment, there are more potential in the claims on the right to privacy (Art. 8), on the right to effective remedy (Art. 13) and on the prohibition of discrimination under Article 14. In addition to this, there were successful attempts to claim discrimination in social security benefits according to Article 1 of the ECHR Protocol No.1 in conjunction with Article 14 within the ECtHR. The ESC is the least used by migrant workers' advocacy organizations. The ESCh Article 19 is limited to legal migrant workers from other CoE countries. However, the Committee is interpreting this provision in a liberal manner. Therefore, a positive overspill effect has the potential to advance the rights of all migrant domestic workers in general.

All in all, I claim that abovementioned legal developments could contribute to the social and political recognition and legal protection of migrant domestic workers, whose labour's value is currently overlooked, if not denied, in EU economies. Therefore, I argue, that regarding the protection of migrant domestic workers rights', there is a need for the 'paradigm shift' - from 'victims' to 'workers'.

ANNEX

Annex 1, Table 1

Global women stock migration in per cent since 1960

Year	Percent of women
1960	47 %
1970	?
1980	48%
2000	49%
2010	49%

Source: Created by Lina Vosyliūtė, according following sources Nicola Piper, ed., *New Perspectives on Gender and Migration: Empowerment, Rights, and Entitlements*, p. 4 and UN Department on Economic and Social Affairs (UNDESA), Trends in International Migrant Stock: The 2008 Revision, retrieved from http://www.un.org/esa/population/migration/UN_MigStock_2008.pdf, of 2010-04-12, in: Frank And Spehar, *Women's Labour Migration In The Context Of Globalisation*, p. 15.

Annex 2, Table 2

World 1990-2010 Sex: Female

Indicator	1990	2000	2010
Estimated number of international migrants at mid-year	76 392 876	88 261 070	104 798 742
Total population at mid-year by age and sex (thousands)	2 625 413	3 033 048	3 425 794
International migrants as a percentage of the population	2.9	2.9	3.1
Female migrants as a percentage of all international migrants	49.1	49.4	49.0

Source: United Nations, Department of Economic and Social Affairs, Population Division (2011). *Trends in International Migrant Stock: Migrants by Age and Sex* (United Nations database, POP/DB/MIG/Stock/Rev.2011).

Annex 3, Table 3

Europe 1990-2010 Sex: Female

Indicator	1990	2000	2010
Estimated number of international migrants at mid-year	26 048 608	30 431 045	36 537 451
Total population at mid-year by age and sex (thousands)	374 209	376 950	379 950
International migrants as a percentage of the population	7.0	8.1	9.6
Female migrants as a percentage of all international migrants	52.7	52.8	52.3

Source: United Nations, Department of Economic and Social Affairs, Population Division (2011). *Trends in International Migrant Stock: Migrants by Age and Sex* (United Nations database, POP/DB/MIG/Stock/Rev.2011).

Annex 4, Table 4

France, Germany, UK

Trends in International Migrant Stock: Female Migrants by Age in 2010 and data commentary

Age	France	Germany	UK
0-4	50.4	45.0	49.7
5-9	50.9	44.9	49.7
10-14	51.3	44.9	49.7
15-19	51.7	46.1	51.3
20-24	52.3	47.8	53.5
25-29	53.0	48.1	54.4
30-34	52.9	47.1	53.4
35-39	51.0	45.9	52.8
40-44	48.3	45.4	52.9
45-49	46.2	46.7	53.8
50-54	46.0	47.4	54.5
55-59	47.2	46.2	54.0
60-64	52.6	46.3	54.7
65+	58.5	47.0	55.6
All ages	51.3	46.7	53.5

In Germany and UK, the lowest numbers of women migrants are among minors – 0-14, the stark increase approximately by 2% in the category 15-19 can be explained by the women coming for studies or work. In Germany and France the highest percentage of women among the working age population – 20-34. In the UK this category is also numerous, however, there is a trend that women are more presented among the older generation – 50 – 65+. This may be connected with a family reunification policies in 1970-s, when these women were 20-35 years old. The same trend – the stark increase among older generation (65+) is seen in France.

Source: United Nations, Department of Economic and Social Affairs, Population Division (2011). Trends in International Migrant Stock: Female Migrants by Age (United Nations database, POP/DB/MIG/Stock/Rev.2011). Data commentary made by Lina Vosyliūtė.

Annex 5, Table 5

Demand for Feminised Labour according to sectors

<i>Manufacturing industry</i>	<i>Service Industry</i>	<i>Agriculture</i>
It is noticed that more women are needed for the “ assembly line work in labour intensive export oriented production ” as well for “ cost-effective, subcontracted, piece-rate, flexi production. ” ⁴⁸⁶	Regarding services women are particularly demanded to work as “ nurses, teachers, secretaries , to a lesser extent as doctors, managers, IT professionals , and finally at the lower end as restaurant and hotel workers, domestic workers. ” ⁴⁸⁷ These “lower end jobs” also includes sex workers .	Migrant women are prevalent in especially export-oriented agriculture , should be indicated as a separate category for “traditional women jobs”, such as fruits picking, cow milking, animals’ feeding , etc.

Source: Created by Lina Vosyliūtė, according to UNIFEM information “Gendered Basis for Women’s Migration for Work”, found in Empowering Women Migrant Workers in Asia: A Briefing Kit, 2004.

Annex 6, Table 6

‘Au pair’ – a lesson to be learned for EU policies

‘Au pair’ is a very narrow, but legal channel for migrant domestic workers within Western European countries, but it is not part of EU policies. So far, Au Pair agreement was the only attempt in inter-governmental level (CoE) to facilitate migration of domestic workers and to respond for the needs of European families.⁴⁸⁸ This Agreement was launched by Council of Europe. It was aimed only at “young persons, especially girls”, willing to learn language, improve professional skills and to experience life in the Western Europe.⁴⁸⁹ It was foreseen, that ‘au pairs’ are entitled to live with family, to receive some pocket money and food, but in exchange they have to take care of children and household. This agreement was criticized, because “au pair status is not conceptualized as a work status”.⁴⁹⁰

The study implemented in 2006 has revealed that even participants of ‘Au Pair’ programme are formally protected, but practically they have faced many violations. It included poor working and living conditions and even cases of sexual abuses and harassment.⁴⁹¹

Main drawback of this agreement was, that domestic work, was not treated as a real work. It is still perceived as a “love labour”, which is so intimate and happening under home privacy. Simply, it can not be ‘grasped’ as a formal labour within minds of Europeans.⁴⁹² Subsequently, no labour rights can be applied. However, other way is possible. It can be illustrated by

⁴⁸⁶ UNIFEM, “Gendered Basis for Women’s Migration for Work”, in *Empowering Women Migrant Workers in Asia: A Briefing Kit*, 2004.(accessed:...)

⁴⁸⁷ UNIFEM, “Gendered Basis for Women’s Migration for Work”, in *Empowering Women Migrant Workers in Asia: A Briefing Kit*, 2004.(accessed:...)

⁴⁸⁸ European Agreement on "au pair" Placement, Strasbourg, 24.XI.1969 (<http://conventions.coe.int/treaty/en/treaties/html/068.htm>, accessed : 2011-03-20).

⁴⁸⁹ European Agreement on "au pair" Placement, Strasbourg, 24.XI.1969, Preamble.

⁴⁹⁰ Hrzenjak, *Invisible Work*, 45.

⁴⁹¹ Anderson B., Ruhs, M., Rogaly, B., Spencer, S. “Fair Enough? Central and East European Migrants in Low-Wage Employment in the UK”, Joseph Rowntree Foundation, 2006, p. 24 in Hrzenjak, *Invisible Work*, p. 45.

⁴⁹² Hrzenjak, *Invisible Work*, 59-61.

examples of South Africa and USA. In case of South Africa, domestic work is being regularised and workers are entitled to full labour rights and social security.⁴⁹³ However South African example do not address migrants, thus *New York Domestic Workers Bill of Rights* can be set an example for covering migrant domestic workers with rights and entitlements.⁴⁹⁴

Next step to be taken by EU is to change migration policies in order to facilitate migrant domestic labour from CEE and third countries. It follows from A Policy Plan on Legal Migration:

“to design temporary migration schemes that could help maximise benefits for *all interested parties*, i.e. responding to labour needs in Member States while contributing, through eventual return, to the development of countries of origin and offering skills and other gains to participating migrants.”⁴⁹⁵

Nevertheless, at the moment there is no real and viable access for migrant domestic workers to EU countries, which is increasingly demanding for such labour. Thus, current EU policies only “encourage and structurally enable the grey area in the *domestic help*, and provide black market with the labour force”.⁴⁹⁶ What is even more worrying, that migrant women are subjected to the abuses and depend on the mercy of their “patron”.

Source: Analysis made by Lina Vosyliūtė.

Annex 7, Table 7

Comparison of EU and CoE measures for protection of victims of human trafficking

	EU Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17)	CoE Convention on Action against Trafficking in Human Beings (CETS. 197)
<i>Victim's reflection period</i>	It included the clause on “victim's reflection.” It entitles victims of trafficking for “a reflection period of 30 days to take the decision to cooperate with the competent authorities.” ⁴⁹⁷ It is indicated, that ‘victims’ shall not be deported during reflection period and “while awaiting the decision of the	Similarly to EU Directive on victims of trafficking are entitled for reflection and recovery period. ⁵⁰² However, CoE convention is more generous as it awards “ at least 30 days , when there are reasonable grounds to believe that the person concerned is a victim.” The duration

⁴⁹³ In South Africa, there is a *The Domestic Workers' Act* sets out minimum wages for domestics and specifies working conditions such as hours of work, overtime pay, salary increases, deductions, annual and sick leave. (<http://www.mywage.co.za/main/decent-work/domesticworkersrights>, accessed: 2011-03-20).

⁴⁹⁴ In USA, there are some recent positive developments *New York Domestic Workers Bill of Rights*, The Bill was signed by Governor Patterson on August 31, 2010, and went into effect on November. (<http://www.domesticworkersunited.org/campaigns.php>, accessed: 2011-03-20)

⁴⁹⁵ Communication from the Commission COM(2005) 669 final, Brussels, under 1.1. The political context, p. 11.

⁴⁹⁶ Hrzenjak, *Invisible Work*, 60.

⁴⁹⁷ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002, Art. 8. para. 1.

	<p>authority responsible for the investigation or prosecution.”⁴⁹⁸ During this period ‘victims’ also are entitled to assistance and care.⁴⁹⁹ This provision includes not only social and medical care, but also “free legal aid and translation and interpreting services”, which are crucial for accessing the justice.⁵⁰⁰ six months “if the conditions <...> continue to be satisfied.”⁵⁰¹</p>	<p>for the recovery is preferably is longer. In addition to this, more people falls under the scope of this convention as the criterion prior to identification is the one of “reasonableness.” What is more, CoE anti-trafficking convention explicitly stresses that “assistance to a victim is not made conditional on his or her willingness to act as a witness.”⁵⁰³ Assistance is aimed at “physical, psychological and social recovery.”⁵⁰⁴ The minimum list includes:</p> <ul style="list-style-type: none"> a) standards of living capable of ensuring their subsistence <...> b) access to emergency medical treatment; c) translation and interpretation services, when appropriate; d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand; e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against
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⁵⁰² Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, 13.

⁴⁹⁸ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002, Art. 8. para. 2.

⁴⁹⁹ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002, Art. 9.

⁵⁰⁰ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002, Art. 9, para. 2.

⁵⁰¹ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002 Art.10, para. 3.

⁵⁰³ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art. 12 para. 6.

⁵⁰⁴ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art. 12 para. 1.

		offenders; f)access to education for children.
<i>Short-term residence permit</i>	<p>Despite facilitation of ‘access to justice’, this proposal is differentiating among ‘good’ victims, who cooperate and ‘bad’ victims who do not. The first ones may be issued a short residence permit, while the latter would be deported after reflection period, as other categories of ‘unwanted’ migrants in EU (as discussed in Chapter 2 Section 2). This proposal contains ‘tricky’ clauses as there are certain conditions for issuance of a residence permit:</p> <p style="padding-left: 40px;">The authority responsible for the investigation or prosecution shall decide on the following matters <...>:</p> <p style="padding-left: 40px;">(a) whether the presence of the victim is <i>useful</i>;</p> <p style="padding-left: 40px;">(b) whether the victim has shown a <i>clear intention to cooperate</i> <...>;</p> <p style="padding-left: 40px;">(c) whether the victim <i>has severed all relations</i> with those suspected of acts <...>. ⁵⁰⁵</p> <p>Thus, even when victim agrees to cooperate (after reflection period), she/he must to ‘qualify’ for a residence permit and meet abovementioned criteria. The criterion of ‘usefulness’ practically leaves the hands of deciding authority open. They can still send the victims back even they have decided to cooperate. ‘Clear intention’ must be expressed in the form of ‘lodging of a complaint’ or bringing ‘initial material.’ ⁵⁰⁶ If the victim ‘qualifies’ for being a ‘good victim’ it is not much promised for her/him. In the best case a ‘victim’ with family members</p>	<p>CoE convention is also more generous for the victims regarding the residence permit. It is recognised that such permits can be necessitated not only by cooperation in criminal procedures but also by the personal situation of the victim. ⁵⁰⁸</p> <p>Convention also “encourages Parties to have regard to the applicant’s having been a victim of trafficking in human beings” when he/she applies for other type of residence permit. ⁵⁰⁹</p>

⁵⁰⁵ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002 Art.10, para. 1.

⁵⁰⁶ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002 Art.10, para. 1.

	may be granted with the “residence permit on humanitarian grounds.” ⁵⁰⁷ In the usual case a ‘victim’ is issued with renewable short-term residence permit for	
<i>Other provisions</i>	<p>CoE Convention includes on provisions not reflected in EU Directive. For example, it foresees ‘compensation and legal redress’ for victims, also elaborates on repatriation and return of victims.⁵¹⁰ The importance of ‘safety and dignity’ is stressed before, during and after returns take place.⁵¹¹ Also there is a preference for “voluntary” returns, however it is not forbidden for countries to deport ‘victims’ of trafficking.⁵¹² It is discussed the issue of the proper repatriation programmes, which “aim at avoiding re-victimisation.”⁵¹³ What is more, it contains ‘non-punishment provision’ “for their [victims’] involvement in unlawful activities, to the extent that they have been compelled to do so.”⁵¹⁴ The two last provisions may be more the case with sex workers, than domestic workers, but “non-punishment” may be also beneficial in the countries where ‘undeclared work’ is on the responsibility of the worker. One relevant provision regarding domestic workers using the services of recruitment agencies is that corporate liability is foreseen for legal persons. It goes as follows:</p> <p style="padding-left: 40px;">a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.⁵¹⁵</p> <p>Therefore it can be argued, that irresponsible recruitment of domestic workers for the employers, without any further checks or safeguards can amount for abetting domestic servitude or forced labour. Especially as these agencies are benefiting financially from the employer or/and employee.</p>	

Source: Analysis made by Lina Vosyliūtė.

⁵⁰⁸ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art.14, para. 1, goes as follows:

“Each Party shall issue a renewable residence permit to victims, in one **or** other of the two following situations **or in both**:

a) the competent authority considers that their stay is **necessary** owing to **their personal situation**;

b) the competent authority considers that their stay is **necessary** for the purpose of their **co-operation** with the competent authorities **in investigation or criminal proceedings**.”

⁵⁰⁹ Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings, adopted by the Committee of Ministers on 3 May 2005, para. 189.

⁵⁰⁷ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002 Art.10, para. 4.

⁵¹⁰ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art. 15, Art. 16.

⁵¹¹ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art. 16.

⁵¹² Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art. 16, para. 2.

⁵¹³ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art. 16, para. 5.

⁵¹⁴ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art. 26.

⁵¹⁵ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) adopted by the Committee of Ministers on 3 May 2005, Art. 22, para.2.

Annex 8, Table 8

Comparison of EU and CoE measures for protection of victims of gender-based violence

Council of Europe	EU
<p>Council of Europe Convention on preventing and combating violence against women and domestic violence article 59 elaborates on ‘Residence status’. This article provides four important provisions for women in migrant situation: ‘residence status dependence on spouse’; ‘suspension of expulsion proceedings’; issuance of ‘a renewable residence permit to victims’; regaining residence status after dissolution of ‘forced marriage’.⁵¹⁶ Migrant domestic workers, who came to the country via family reunification policies, will find it vital to maintain their independent legal status for example “after dissolution of the marriage or the relationship.”⁵¹⁷ For example in Germany there is 2 years probation is foreseen by law for spouses coming under family reunification channel.⁵¹⁸ In the UK the situation is better as domestic violence rule can be invoked.⁵¹⁹ It provides ‘indefinite leave to remain’ for victims of domestic violence. This rule was established in the case <i>AI (Pakistan) v SSHD</i>, in order remedy the situation of formal dependency among spouses.⁵²⁰ As it was discussed in the second Chapter, EU family reunification policy lacks gender sensitivity as it enables formal dependency, usually of women. According this policy, spouse who is non-EU national receives his/her independent residence permit only after lapse of 5 years.⁵²¹ Similar provision is enshrined in the second paragraph of Council of Europe Convention on</p>	<p>At EU level, the issue of a separate residence permit after experiencing domestic violence was firstly addressed in the Proposal for a directive „on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.”⁵²⁵ It has foreseen that right to retain residence permit should be granted, when “the marriage was dissolved because of particularly difficult circumstances <...> in particular, situations of domestic violence.”⁵²⁶ This provision was reiterated within the Directive, which went into effect in 2004.⁵²⁷ This provision may be relevant for advocacy of the migrant domestic workers’ rights who came to EU according family reunification channel. EU ‘anti-trafficking’ legislation provides short-term permit for only six month, with the conditional possibility to renew it.⁵²⁸ Also, it does not provide the necessity to stay for the victims own situation, but only for her/his ‘perceived’ value for the investigation. However, it is not clear what threshold will be foreseen in new EU directive against gender-based violence.⁵²⁹ Moreover, EP called Member States to support financially NGOs working with</p>

⁵¹⁶ Council of Europe Convention on preventing and combating violence against women and domestic violence, (CETS No. 210), 12 April, 2011, Article 59.

⁵¹⁷ Council of Europe Convention on preventing and combating violence against women and domestic violence, (CETS No. 210), 12 April, 2011, Article 59, para.1.

⁵¹⁸ Eleonore Kofman, “Gendered Migrations, Livelihoods and Entitlements in European Welfare Regimes”, in *New Perspectives on Gender and Migration: Empowerment, Rights, and Entitlements*, ed., Nicola Piper.

⁵¹⁹ After Germany and France has ratified CoE convention on ‘preventing and combating violence against women and domestic violence’ (CETS No. 210), similar provision is applicable in these countries.

⁵²⁰ Court of Appeal judgment in *AI (Pakistan) v SSHD* [2007] EWCA Civ 386, decided according paragraph 289A of the UK Immigration Rules, found in in Immigration Law Practitioners Association info sheet “Domestic Violence Judgement”, 2007. (Accessed: <http://www.ilpa.org.uk/data/resources/4588/07.06.1046.pdf>), 2011-11-10).

⁵²¹ Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, 2001/0111 (COD), Brussels, 23.5.2001

<p>preventing and combating violence against women and domestic violence. It obliges state parties to “ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse.”⁵²² This clause links with the first clause on the residence permit after dissolution of marriage. Third clause brings the right to stay for the victims of violence in two cases: if a residence permit is “necessary owing to their [victims’] personal situation”⁵²³ and if such permit is “necessary for the purpose of their co-operation <...> in investigation or criminal proceedings.”⁵²⁴ This provision is identical for the one found in CoE ant-trafficking convention. The residence permit issued in such situation is also not permanent, but ‘renewable’. This convention does not elaborate on how much time ‘victims’ should be given.</p>	<p>victims of gender based violence, and especially those, who enable them to “break the silence.”⁵³⁰ EP in the new policy approach has included the creation of “European Charter setting out a minimum level of assistance services to be offered to victims of violence against women.”⁵³¹ Such minimum would cover the provisions on:</p> <p>the right to legal aid; the creation of shelters to meet victims’ needs for protection and temporary accommodation; urgent psychological aid services to be provided free of charge by specialists on a decentralised and accessible basis; and financial aid arrangements aimed at promoting victims’ independence and facilitating their return to normal life and the world of work;⁵³²</p>
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Source: Analysis made by Lina Vosyliūtė.

⁵²⁵ Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, 2001/0111 (COD), Brussels, 23.5.2001, Art. 13, para 2, cl. a).

⁵²⁶ Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, 2001/0111 (COD), Brussels, 23.5.2001

⁵²⁷ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 30.4.2004, Official Journal of the European Union L 158/ 77.

⁵²⁸ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities (2002/C 126 E/17) COM(2002) 71 final, OJ C 126 E/393, 28.5.2002 Art.10, para. 3.

⁵²⁹ EP Committee on Women's Rights and Gender Equality press release “MEPs call for a directive to combat violence against women”, 15-03-2011, (<http://www.europarl.europa.eu/en/pressroom/content/20110314IPR15468/html/MEPs-call-for-a-directive-to-combat-violence-against-women>, accessed: 2011-11-10).

⁵²² Court of Appeal judgment in *AI (Pakistan) v SSHD* [2007] EWCA Civ 386, decided according paragraph 289A of the UK Immigration Rules, found in Immigration Law Practitioners Association info sheet “Domestic Violence Judgement”, 2007. (Accessed: <http://www.ilpa.org.uk/data/resources/4588/07.06.1046.pdf>), 2011-11-10).

⁵²³ Council of Europe Convention on preventing and combating violence against women and domestic violence, (CETS No. 210), 12 April, 2011, Article 59, para.3 a.

⁵²⁴ Council of Europe Convention on preventing and combating violence against women and domestic violence, (CETS No. 210), 12 April, 2011, Article 59, para.3 b.

⁵³⁰ European Parliament, (2010/2209(INI)). para. 23.

⁵³¹ European Parliament, (2010/2209(INI)).para. 2.

⁵³² European Parliament, (2010/2209(INI)). para. 2.

Annex 9, Table 9

Article 19 of European Social Charter Revised

European Social Charter Revisited (excerpt)

Article 19 – The right of migrant workers and their families to protection and assistance

With a view to ensuring the effective exercise of **the right of migrant workers** and their families to **protection and assistance** in the territory of any other Party, the Parties undertake:

- 1.to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, **against misleading propaganda** relating to emigration and immigration;
- 2.to adopt **appropriate measures** within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, **appropriate services** for health, medical attention and good hygienic conditions during the journey;
- 3.to **promote co-operation**, as appropriate, **between social services**, public and private, in emigration and immigration countries;
- 4.to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, **treatment not less favourable than that of their own nationals** in respect of the following matters:
 - a. **remuneration** and other **employment and working conditions**;
 - b. membership of **trade unions** and enjoyment of the benefits of **collective bargaining**;
 - c. **accommodation**;
- 5.to secure for such workers lawfully within their territories **treatment not less favourable than that of their own nationals** with regard to **employment taxes, dues or contributions** payable in respect of employed persons;
- 6.to facilitate as far as possible the **reunion of the family** of a foreign worker permitted to establish himself in the territory;
- 7.to secure for such workers lawfully within their territories **treatment not less favourable than that of their own nationals** in respect of **legal proceedings relating to matters referred to in this article**;
- 8.to secure that such workers lawfully residing within their territories are **not expelled** unless they endanger national security or offend against public interest or morality;
- 9.to permit, within legal limits, the **transfer of such parts of the earnings and savings** of such workers as they may desire;
10. to **extend the protection and assistance** provided for in this article to **self-employed migrants** insofar as such measures apply;
11. to promote and facilitate the **teaching of the national language** of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families;
12. to promote and facilitate, as far as practicable, the **teaching of the migrant worker's mother tongue** to the children of the migrant worker.

Source: European Social Charter Revisited, Article 19. Emphasis added.

Annex 10, Table 10

Comparison of the ECJ, ECtHR and ESC: accessibility, time efficiency and impact

<i>Criteria</i>	Comparison of the ECJ, ECtHR and ESC
<i>Accessibility</i>	Regarding accessibility of those mechanisms, European Court of Human Rights has an individual complaints mechanism, whereas European Committee of Social Rights provides a possibility for collective complaints. Individual complaints for ECtHR can be filled rather easily by the victim or in exceptional circumstances – related persons. Collective complaints mechanism allows any of the registered unions or non-governmental organizations accredited by the CoE to make such complaints on behalf of the groups of persons. As for remedies in the individual case, the better avenue is ECtHR, however if there are constantly violates rights of certain group of people – issue is easier to be addressed via ESC collective complaints mechanism. In addition to this, in latter case organizations willing to make strategic litigation do not have to look for a person, willing to make a law suit. Thus, collective complaints mechanism is ‘safer’ for individuals, as they are not obliged to make claims on their behalf and put themselves into the role of ‘victim’, whereas in ECtHR anonymous complaints would be regarded as inadmissible. ⁵³³ On the other hand ECtHR has a safeguard – intermediary injunctions, thus can stop the expulsion orders, till the case is pending in court. ECtHR requires applicants to exhaust reasonable domestic remedies. ⁵³⁴ ESC limits the possible applicants – in order to make a collective complaint organization is required to have a ‘particular competence’ in the field. if it is national trade or employers unions, they have to be active within jurisdiction of the country they are complaining against. ⁵³⁵ Accessibility to the European Court of Justice is the most difficult. ECJ has a peculiar preliminary reference procedure. This procedure can only be used by national courts, when they do find the matter arising under EU law.
<i>Time efficiency</i>	As for the time efficiency, it is notably the ECtHR to be the longest avenue. The court has a backlog of cases. However it is ‘speeding’ the important cases according their relevance and urgency. Nevertheless, it can take up to 5 years to get the decision on merits. The better situation is with regards to ESC and ECJ. The duration from filing complaint to decision on the merits takes not longer than 1 year in ESC. ECJ also is delivering its reference rulings in a comparatively short period.
<i>Impact</i>	The influence can be understood as a political or moral and legal. As concerns legal outcomes, ECJ decisions are in the best position. ECJ gives interpretation of the States legally binding EU legislation, thus it can not be ignored not only in the respective country but in the Union as a whole. Implementation of ECtHR and ESC decisions is supervised by the same institutions - Committee of Ministers. However regarding political repercussions, ECtHR is much more influential – its decisions are being quoted by lawyers and academia. ESC decisions rarely do face the same level of attention from the public. However it is also up to organizations who apply to make the use of the decisions – is to make them well known.

Source: Analysis made by Lina Vosyliūtė.

⁵³³ ECHR, Art. 35 para. 2.

⁵³⁴ ECHR, Art. 35 para.1

⁵³⁵ ESCh, Optional Protocol, Art. 3 and Art.1, para c.

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