

Revisiting Social Reproduction: Migrant Care Workers and Their Entitlements in Canada

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In this article, I question the temporary/permanent divide insofar as migrant care workers' legal entitlements are concerned with reference to the Canadian Caregiver Program, which is characterized as one of the best temporary migrant worker programs globally. I problematize the temporary/permanent distinction by critiquing the private market exchange-based relationship on the basis of which the Program is legally formulated. I argue that any caregiver program should see caregivers – irrespective of their national or foreign origin – as fully contributory members of society and thereby entitled to an extensive range of citizenship rights and entitlements. While this proposal is not completely novel, what I offer through this article is a regulatory justification for migrant caregivers' claim to full socio-economic citizenship rights and entitlements. I develop this justification by drawing on – and reconceptualizing – the economic productivity-focused social reproduction perspective. In this article, then, I make two points: first, I propose a theoretical reconceptualization of socially reproductive work and, second, by evaluating migrant care workers' status in Canada, I argue that on the basis of social reciprocity, caregivers cannot be considered temporary insofar as their entitlements are concerned.

1 INTRODUCTION

In this article, I question the temporary/permanent dichotomy insofar as migrant workers' legal entitlements are concerned with reference to the Canadian Caregiver Program, which is contended to be one of the best temporary migrant worker programs globally.¹ I problematize the temporary/permanent worker-based distinction by critiquing the private market exchange-based relationship on the basis of which the Program is legally formulated. I argue that any caregiver program should see caregivers – irrespective of their local or foreign origin – as fully contributory members of society and thereby entitled to a full range of

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¹ For e.g. see Leah Briones, *Empowering Migrant Women: Why Agency and Rights Are Not Enough*, 39 (Routledge 2016); also see Jenna Hennebray, *Falling Through the Cracks? Migrant Workers and the Global Social Protection Floor*, 14(3) *Global Soc. Pol'y* 369, 370, 376, 378 (2014).

citizenship rights and entitlements. While this proposal is not completely novel, what I hope to offer through this article is a regulatory justification for migrant caregivers' claims for full socio-economic citizenship rights and entitlements. I develop this justification by drawing on – and reconceptualizing – the economic productivity-focused social reproduction perspective.

I should note that, although I argue in favour of a full range of socio-economic rights for migrant caregivers on the basis of this justification, migrant-worker receiving states such as Canada may be justified in limiting certain political rights – such as the right to vote – until migrant workers are 'politically integrated' (in the sense of understanding and participating in civic-political discourse) into society. The scope of this limitation, however, should be narrow. As a governance principle, the Canadian state needs to reciprocate, to the fullest extent possible, the substantial social contribution made by migrant care workers by helping them realize their aspirations in their adopted/host country. Although the significance of legally recognized socio-economic rights is undeniable in this respect, what is additionally important is fine-tuning legal entitlements to the lived experiences of migrant workers in the host Canadian society. This approach to legal regulation in the context of migrant workers is important because it is able to problematize the otherwise formal legal equality that exists among all workers – citizens and migrants – insofar as specific categories of working arrangements (such as caregivers, farm workers, high technology workers, taxi drivers, and so forth) are concerned. In this article, then, I make two points: first, I propose a theoretical reconceptualization of socially reproductive work and, second, by evaluating migrant care workers' entitlements in Canada, I argue that on the basis of social reciprocity, caregivers cannot be considered temporary insofar as their entitlements are concerned.

This article is divided into two main parts. In section 2, I reinterpret the idea of social reproduction in valuing domestic (in-home) care work. I offer a regulatory justification of domestic work based on its relationship to society rather than the market. After defining domestic work, I discuss economic productivity and non-economic perspectives in valuing care work in sections 2.1 and 2.2 of section 2. I argue that domestic work – a combination of skills and emotions – should be seen as contributing towards social sustenance and improvements that goes beyond mere economic productivity. In formulating a regulatory logic, the recognition of the wider impact of domestic work mandates that legal regulation be framed with reference to a public relational logic to such work, which is not possible under a private market-centric narrative of social reproduction. In section 3, I assess the concrete regulatory implications of the theoretical concept explored in section 2 by examining the Canadian caregiver program as a case study. In section 3.1 of section 3, I discuss the immigration regime admitting migrant care workers in Canada. In section 3.2, I briefly document the labour rights regime applicable to migrant domestic care workers. In section 3.3, I evaluate

migrant care workers' legal entitlements in Canada and note how their temporariness results in truncated substantive entitlements. In section 3.4, I examine why migrant domestic workers' truncated entitlements sit uneasily with their contributions to Canadian society. I argue that in view of migrant care workers' long term and significant contributions to the sustenance and enrichment of Canadian society, the Canadian state is duty-bound to provide a comprehensive range of entitlements for migrant workers, including a clearly delineated guaranteed path to citizenship. The article ends with a brief conclusion.

2 THEORETICAL FOUNDATION

In this section, I offer a conceptual justification for the regulation of care work – paid or unpaid – performed primarily in private households. In offering a normative justification of care work, my objective is to critique the existing private market exchange-based logic to the regulation of care work and propose a social-relational logic to such regulation. In articulating the regulatory justification, I examine the strengths of two interconnected regulatory ideas: first, the direct private employment relationship logic as manifested through the International Labour Organization's (ILO) Convention on domestic workers, and second, the indirect attribution of market value to care work as suggested by a stream of feminist scholarship. I argue that both of these above-mentioned perspectives fall short of accounting for the extensive societal impact of care workers. Accordingly, the social-relational logic to care work can add to and strengthen the abovementioned regulatory justifications of care work.

In proposing a social-relational theoretical perspective of care work, my empirical focus is on domestic workers performing domestic chores and care work at private households through paid employment, but the theoretical justifications I offer are also relevant for paid care workers engaged in other establishments outside of the household context as well as those working as unpaid care workers. Domestic or 'homecare'² workers are a subset of the much broader range of care workers that includes child care workers, elderly care workers, disabled care workers, teachers, nurses, doctors, therapists, parents, and guardians (including next of kin).³ Care work is gendered and often seen as a natural extension of

² LJB Hayes, *Stories of Care: A Labour of Law*, 1 (Palgrave 2017).

³ Paula England, *Emerging Theories of Care Work*, 31 *Ann. Rev. of Soc.* 381 (2005); Cecilia Benoit & Helga Hallgrimsdottir, *Conceptualizing Care Work* in *Valuing Care Work: Comparative Perspectives* 3, 3–4 (Cecilia Benoit & Helga Hallgrimsdottir eds, University of Toronto Press 2011); Isabel Shutes & Bridget Anderson, *Introduction*, in *Migration and Care Labour: Theory, Policy and Politics* 1, 2–3 (Bridget Anderson & Isabel Shutes eds, Palgrave Macmillan 2014).

women's inherent responsibilities.⁴ While care work could be paid or unpaid, in both of these incarnations it relates to social reproduction on daily and generational bases.⁵ For example, domestic workers help their clients with some of the most intimate and basic conditions of life such as cooking, eating, drinking, maintaining hygiene, taking medicine, using the toilet, cleaning, assisting with outings, shopping, and so forth – all of which are central activities for the sustenance of life and society.⁶

Historically domestic workers have remained excluded from regulatory protections in a majority of countries.⁷ Where the regulation of domestic work has been able to overcome domestic workers' characterizations either as servants or as family members, it has framed domestic work in terms of private market exchange through an 'employment relationship'.⁸ It is this private contract-based regulatory logic that underlies the ILO Convention on Decent Work for Domestic Workers, which characterizes domestic workers as participants in the labour market for domestic work. In the following section 2.1, I analyse the ILO's regulatory logic that recognizes domestic work when performed in a direct employment relationship alongside a critical feminist perspective that sees domestic work as indirect contribution to economic productivity.

2.1 DOMESTIC WORK IN ECONOMIC PRODUCTION

Concerns about the well-being of domestic workers including migrant domestic workers have received international attention through the ILO's 2011 Decent

⁴ Nitya Rao, *Global Agendas, Local Norms: Mobilizing Around Unpaid Care and Domestic Work in Asia*, 49 (3) *Dev. & Change* 735, 737–39 (2018); Siobhan McGrath & James DeFilippis, *Social Reproduction as Unregulated Work*, 23(1) *Work, Empl. & Soc'y* 66, 68 (2009).

⁵ Benoit & Hallgrimsdottir, *supra* n. 3.

⁶ Hayes, *supra* n. 2; But see Stéphanie Bernstein, *The Regulation of Paid Care Work in the Home in Quebec: From the Hearth to the Global Marketplace in Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* 223, 223–27, 238 (Judy Fudge & Rosemary Owens eds, Hart 2006), critiquing use of the term 'domestic' to signify in-home care workers arguing that the use of domestic somehow hides such workers behind the private domain of home.

⁷ See ILO, *The Employment and Conditions of Domestic Workers in Private Households: An ILO Survey*, 102 (4) *Int'l Lab. Rev.* 391 (1970).

⁸ For example see generally Adelle Blackett, *Making Domestic Work Visible: The Case for Specific Regulation*, Working Paper 2: Labour Law and Labour Relations Programme, International Labour Organization, Geneva 1998, where Blackett discusses some international innovations in regulating domestic work for promoting workers' entitlements; also see Adelle Blackett, *Regulatory Innovation on Decent Work for Domestic Workers in the Light of International Labour Organization Convention No. 189*, 34(2) *Int'l J. Comp. Lab. L. & Indus. Rel.* 141, 143 (2018). But see Bridget Anderson, *Nation Building: Domestic Labour and Immigration Controls in the UK*, in *Migration and Care Labour*, *supra* n. 3, at 31, 36–37, for an explanation of how live-in domestic workers are excluded from certain regulatory protections such as minimum wages in the United Kingdom even when they are employed by a family, because they are (still) considered 'as members of the family'. Also see McGrath & DeFilippis, *supra* n. 4, 68–71, 74–75, for a discussion of several regulatory exclusions of domestic workers in the United States.

Work for Domestic Workers Convention and Recommendation, which entered into force in 2013. The Convention seeks to further a rights-based approach to domestic care workers' well-being.⁹ It advises ILO Member States to legally institutionalize written contracts incorporating (contractually agreed) conditions at work, particularly for migrant domestic workers.¹⁰ Apart from enacting specific provisions for migrant workers such as right to possess their travel and identity documents and freedom to decide whether or not to reside in the employer's residence, the Convention generally calls for equal treatment of domestic workers with that of other categories of workers.¹¹ Additionally, the Convention calls upon Member States to regulate and monitor activities of private recruitment agencies employing migrant domestic workers.¹²

Several scholars have emphasized the positive contribution that the ILO Convention makes.¹³ These scholars rightly note that by bringing the household within the purview of public regulatory framework, the ILO has overcome a substantial barrier to the recognition of domestic work as valuable labour. What was largely hidden from public scrutiny as a private affair in the home is now a matter of public interest.¹⁴ However, the Convention seeks to overcome the vulnerability of paid care workers for the reason that they *significantly contribute to the global economy*.¹⁵ If the underlying logic of the Convention is accepted, the only way of taking legal cognizance of care work lies in their ultimate – but indirect – contributions to market productivity.¹⁶ According to this regulatory logic, then, domestic workers' direct contribution to the household (unless it also contributes to market-mediated economic productivity) remains unworthy of recognition.

Thus, although one of the fundamental contributions of the ILO Convention (and Recommendation) to domestic work is its recognition of the home as a possible worksite, and care work as a valuable work worthy of legal cognizance,

⁹ See Preamble, Domestic Workers Convention, 2011 (No. 189); Adelle Blackett, *The Decent Work for Domestic Workers Convention and Recommendation*, 2011, 106 Am. J. Int'l L. 778, 780, 783–84 (2012).

¹⁰ Arts 7, 8, Domestic Workers Convention, 2011 (No. 189).

¹¹ Arts 10, 14, Domestic Workers Convention, 2011 (No. 189).

¹² Art. 15, Domestic Workers Convention, 2011 (No. 189).

¹³ See Blackett, *supra* n. 9; Adelle Blackett, *Introductory Note to the Decent Work for Domestic Workers Convention*, 53(1) Int'l Legal Materials 250 (2014); Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41(1) Indus. L. J. 67 (2012); Karin Pape, *ILO Convention C189 – A Good Start for the Protection of Domestic Workers: An Insider's View*, 16(2) Progress in Dev. Stud. 189 (2016).

¹⁴ Adelle Blackett, *Introduction: Regulating Decent Work for Domestic Workers*, 23 Canadian J. Women & L. 1, 11–14 (2011).

¹⁵ Preamble, Domestic Workers Convention, 2011 (No. 189).

¹⁶ That is how Adelle Blackett, an influential scholar instrumental in the promulgation of the ILO Convention, begins one of her many scholarly contributions on the subject. See Blackett, *supra* n. 14, 1–5.

the Convention's positive impact is limited by its restricted recognition of only the economic productivity of care work. While the Convention is a laudable initiative in opening the private space of the home to public scrutiny (as I will discuss in the following section), it falls short of changing our juridical perspective of work and succumbs to a narrow market-centric justification of economic productivity when judging the value of domestic care work.

Even though the ILO Convention employs the logic of indirect attribution when determining the market value of domestic work, the actual formulation of workers' substantive entitlements is based on the direct employment relationship model. It is paid domestic work performed through an employment relationship that is regulated through the Convention. The exchange that is subject to regulation here is a private exchange; domestic work *per se* is treated as a service industry in this regulatory perspective. This perspective differs from the indirect attribution of market value to care work that one group of feminist legal scholars advocates for (to be sure, the ILO does refer to this feminist perspective to justify domestic workers' market contribution as mentioned earlier).

In contrast to the ILO's preoccupation with paid employment, the primary concern of several feminist scholars has been unpaid domestic work.¹⁷ In challenging the non-recognition of unpaid domestic work, feminist scholars have largely critiqued the narrow market exchange-focused regulatory logic of worker protections.¹⁸ They challenge labour welfare law's ignorance of social reproduction, which is not necessarily bound to a market space.¹⁹ While articulating social reproduction as a valuable activity, feminist scholars identify three broad aspects of social reproduction: biological reproduction; reproduction of labour power; and social practices of caring, socialization, and fulfilling a broad range of human needs.²⁰ When advocating reformulation of the regulatory logic of worker protection, feminist labour lawyers primarily emphasize

¹⁷ See e.g. Nicole Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011); also see Antonella Picchio, *Introduction*, in *Unpaid Work and the Economy: A Gender Analysis of the Standards of Living* 1, 1 (Antonella Picchio ed., Routledge 2003).

¹⁸ Ania Zbyszewska, *Regulating Work with People and 'Nature' in Mind: What Does a Feminist Perspective Offer?*, 40(1) *Comp. Lab. L. & Pol'y J.* 9 (2018).

¹⁹ Judy Fudge, *Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction*, 22 *Feminist Legal Stud.* 1 (2014); Kendra Strauss, *Unfree Again: Social Reproduction, Flexible Labour Markets and the Resurgence of Gang Labour in the UK*, 45(1) *Antipode* 180 (2013) (these authors offer an overview of the current debates on social reproduction). However, a general absence of a market space does not mean that there is no 'market' for social reproduction. Whenever care and other domestic activities are performed in exchange for wages or payment and an employment relationship or (independent) contractual relationship is established between the service provider and the client, a market for care-and-domestic work, i.e. social reproduction, is established.

²⁰ Isabella Bakker & Stephen Gill, *Global Political Economy and Social Reproduction*, in *Power, Production and Social Reproduction Human In/security in the Global Political Economy* 3, 3–4 (Isabella Bakker & Stephen Gill eds, Palgrave 2003); Kendra Strauss & Katie Meehan, *New Frontiers in Life's Work in Precarious Worlds* 1 (Katie Meehan & Kendra Strauss eds, University of Georgia Press 2015); Eleonore Kofman, *Rethinking Care Through Social Reproduction: Articulating Circuits of Migration*, 19(1) *Soc. Pol.* 142 (2012).

the social reproduction of labour power among these three components of social reproduction. However, it is important to note that although there might be several broad trajectories of social reproduction, biological reproduction, social practices of caring, and socialization cannot be completely divorced from the reproduction of labour power, as I explain later.

Feminist political economists and legal scholars argue that socially reproductive activities such as care and domestic work cannot be relegated to the private space out of regulatory oversight.²¹ Their agenda is to dissociate love and emotion (i.e. non-economic motivations) from the performance of socially reproductive activities and situate such work in its economic relevance.²² These scholars advocate valuing socially reproductive activities because of their contributions to economic productivity, thereby constituting a justified claim to care workers' share of their economic contribution. Political economist Antonella Picchio reflects that care and domestic workers' contributions to economic productivity remain unacknowledged because neoclassical market-wages are technically determined by the demand-supply outcome of the market.²³ She advocates for socio-historically determined wages, which could better acknowledge the contribution of social reproduction to economic productivity.²⁴ Picchio notes:

The fact that natural prices, including wages, are not determined by the interplay of supply and demand as systematic price-quantity relationships does not mean that the production of commodities and labour can be separated from the functioning of the market. Nor is there a separation between non-market and market operations. The process of reproduction of the economic system has to be seen as a whole, and the existence of the labour market, as the general form of the labour-subsistence exchange, determines the essential character of the whole process of social reproduction.²⁵

Following the logic of the wholesomeness of the 'economic system', these scholars challenge the regulatory logic fixated on market-based productivity for ignoring unpaid socially valuable (i.e. socially reproductive) work. They note, 'the reproduction of the working population has to be considered a necessary input of the productive process.'²⁶ In addition to its contribution to

²¹ Picchio, *Introduction*, *supra* n. 17, at 5–7; also see Picchio, *A Macroeconomic Approach to an Extended Standard of Living*, in *Unpaid Work and the Economy*, *supra* n. 17, at 11, 11–12, 19–20; Antonella Picchio, *Social Reproduction: The Political Economy of the Labour Market* 1–3, 122 (Cambridge University Press 1992); also see generally Bernstein, *supra* n. 6.

²² See *ibid.*

²³ Picchio, *Social Reproduction*, *supra* n. 21, at 1–5, 20–21, 121.

²⁴ *Ibid.*

²⁵ *Ibid.*, at 20.

²⁶ Picchio, *Introduction*, *supra* n. 17, at 1–2; also see Arlie Russell Hochschild, *Commercialization of Intimate Life: Notes From Home and Work* 2–5, 242–44 (University of California Press 2003); also see Noah D Zatz, *The Impossibility of Work Law*, in *The Idea of Labour Law* 234, 245–47 (Guy Davidov & Brian Langille eds, 2011).

overall standard of living, unpaid work ‘sustain[s] the filtering process of the labour market (young and old, women and men, able and non-able); in this case, the unpaid work done in the home serves to underpin the selection of individuals for the labour market and the personal capacities used.’²⁷ Picchio further explains, ‘[h]ousework is the *production* of labour as a commodity, while waged work is the *exchange* of labour. To be exchanged, labour must be produced; and to be used in the production of other commodities, labour must be produced and exchanged.’²⁸

In advocating for the legal recognition of domestic work, some feminist scholars indirectly attribute market productivity to domestic workers when they justify the value of such work in its ability to produce and sustain economically productive workers in the market.²⁹ ‘[D]ependent caretakers are part of the system of production and they engage in household production, producing workers of the future’, even though they may not be directly paid through market exchanges.³⁰ It must be acknowledged that this productive linkage of care work is indeed a valid justification in advocating a regulation-led entitlement framework for care workers. By showing care workers’ real and substantial contributions to the economic productivity of the market, this perspective indicates the fallacy of narrow legal imagination only with reference to exchange relationships taking place in the market-space. It also establishes how the private home-space is used as a precondition to the existence of the market-led economic productivity, thereby mounting a claim for returns on care workers’ contributions to such productivity.

Despite the valuable insight that this economic productivity perspective offers, does it fully acknowledge the holistic contribution that care workers make to society? Does it really mount a fundamental critique of the narrowly market exchange-focused regulatory logic? While recognizing its inherent strengths, I think the economic productive perspective fails to do either of the above, as I argue in section 2.2. By establishing a causal relationship between domestic care work and market productivity, these scholars end up accepting the market as the only domain for valuing productive work, thereby failing to articulate a much

²⁷ Picchio, *A Macroeconomic Approach*, *supra* n. 21, at 11, 12–19.

²⁸ Picchio, *Social Reproduction*, *supra* n. 21, at 96.

²⁹ See Blackett, *Introduction*, *supra* n. 14, at 1–5, where she notes that domestic work is valuable because it ultimately contributes to market productivity by producing future market-participants; *also see* Judy Fudge, *Labour as a ‘Fictive Commodity’: Radically Reconceptualizing Labour Law*, in *The Idea of Labour Law*, *supra* n. 26, at 120, 134; Bernstein, *supra* n. 6, at 227–28; *also* Judy Fudge & Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms in Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* 3, 14–15 (Judy Fudge & Rosemary Owens eds, Hart 2006); *also* Martha Alter Chen, *Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement, and Regulatory Challenges* 23(1) *Can. J. Women & L.* 167, 168 (2011).

³⁰ Fudge, *The Idea of Labour Law*, *supra* n. 29.

broader non-market justification to value unpaid care work.³¹ However, my critique of the (waged market-focused) social reproduction literature is not to deny the feminist strand of scholarship that adopts a broader relational approach to work beyond its market justification.³²

2.2 DOMESTIC WORK IN ‘SOCIAL REPRODUCTION’

At the other end of the spectrum, Kathy Weeks refuses to grant a special status to economic productivity of work. In fact, in her post-work imaginary, Weeks seeks to problematize the relationship between work and wages – advocating overcoming the reciprocal relationship between valuable work and income in lieu of such work.³³ Feminism’s ‘idealization of waged work’ perpetuates the hegemony of economically productive work in human lives, which in turn compels workers to accept any work in spite of the precarious and exploitative nature of such work.³⁴ However, in questioning feminism’s idealization of waged work, Weeks does not make any distinction between private exchange-based employment and public relational significance of work.³⁵ She is rather interested in doing away with the hegemony of work as a human condition: that is, ‘challeng[ing] the dominant legitimate discourse of work.’³⁶

The solution to the problem of idealizing waged work that Weeks offers is the security of basic income for all irrespective of the work they do. She notes that while the payment of wages for the social reproduction of labour power perspective identifies (and seeks to remedy) the problem with the market wage system, the

³¹ Kathy Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* 118–19, 137 (Duke University Press 2011).

See e.g. Picchio, *Social Reproduction*, *supra* n. 21, at 1–5, 20–21, 121. However, in both of these versions productive work (including social reproduction) is always market-mediated.

³² For e.g. ‘[N]onmarket work is still work. In fact, it is probably the most important work we do’, in Nancy Folbre, *Children as Public Goods*, 84(2) *Am. Econ. Rev.* 86, 89 (1994); also see Busby, *supra* n. 17, at 3, 7–8; Dorothy E. Smith, *The Everyday World as Problematic: A Feminist Sociology* (Northeastern University Press 1987); Dorothy Smith, *Institutional Ethnography: A Sociology for People* (AltaMira Press 2006); Marjorie DeVault, *Mapping Invisible Work: Conceptual Tools for Social Justice Projects*, 29(4) *Sociological F.* 775, 785 (2014); also see generally the different contributions in *People at Work: Life, Power, and Social Inclusion in the New Economy* (Marjorie L. DeVault ed., New York University Press 2008) (these feminist authors articulate an embodied conceptualization of work that emerges from the experiences of workers including non-market domestic and care work, eventually contributing to ‘our humanity’); also see Martha Albertson Fineman, *Contract and Care*, 76 *Chi.-Kent L. Rev.* 1403 (2001) (proposing public responsibility – not market-based incentive structure – for care work).

³³ Weeks, *supra* n. 31, AT 12, 137–43. Although Weeks critiques – albeit in a considerate way – the wage-focused social reproduction literature, she also uses it as a stepping stone towards articulating her post-work imaginary wherein all individuals in a society are assured basic income irrespective of their worker status.

³⁴ Weeks, *supra* n. 33, at 1–13, 137–43.

³⁵ *Ibid.*, at 12–13.

³⁶ *Ibid.*, at 13.

basic income perspective seeks ‘to break the link between work and income’³⁷ to indicate the arbitrariness between paid and unpaid work. Although Weeks is correct in noting the problems of associating social reproduction with waged work, her basic income proposal denies the significance of work for workers and society altogether. In her proposal, work becomes completely irrelevant for accessing entitlements for individuals.³⁸

The advocacy of basic income for all, while admirable, cannot be formulated in relation to work. Ensuring basic income for all could be an important social policy objective so that people are not dependent on substandard and precarious employment for securing minimum living standards. However, the justification for such basic income ought to lie somewhere else than in people’s contributions through their work. It is true that the significant majority of people contribute to society through their work, but everyone – such as individuals suffering from serious mental and physical disability, children, and a significant proportion of the old age population – do not work (i.e. some might work, but not all). Although every individual must be considered a valuable member of society and hence, worthy of social reciprocity (i.e. in terms of basic income), the basis of the reciprocity cannot be their contribution through their work. Insofar as social reciprocity is concerned, there are reasons to distinguish between people contributing through their work and others who do not. People who contribute through their work make a direct intervention in the lives of others (i.e. society), thereby often generating justified claims additional to income. Social contribution through work gives rise to a claim to social resources that is *sui generis* and unlike other bases of claims.

In any case, while Weeks may not be interested in singling out the market-productive logic of care work for her critical evaluation, others have noted the inconsistency in this indirect association of care work with that of the market, especially when feminists seek to challenge the very hegemony of market-based economic productivity as justification for regulation. The problem with attributing economic productivity to care work is that asserting market-justification of these activities ‘simply begs the question whether what matters for regulatory purposes is a shared status as “work” or a divergent relationship to markets.’³⁹ Although these feminist scholars began by critiquing the market productivist basis of regulation, they end up succumbing to the same market-based logic by extending the demand/supply relationship beyond immediate economic exchanges of the market, thereby elucidating a broader expanse of market exchanges.

³⁷ *Ibid.*, at 143.

³⁸ *Ibid.*, at 12, 137–43.

³⁹ Zatz, *supra* n. 26, at 246.

As I note, in spite of the commendation it has received, the ILO Convention on domestic workers is even narrower than the indirect economic productivist perspective. The Convention only recognizes domestic work that is performed through a private employment relationship. It seeks to regulate only the *waged labour market* for domestic work. It may be true that this labour market exists primarily because it frees up others (e.g. employers of domestic workers) to participate in economic exchanges of the market (although there are often situations where this assumption is not true, such as in the case of households of elderly individuals, persons requiring medical care, or children), but in itself, this domestic labour market functions on the same narrow market productivist principle that feminists problematize.

Care work including domestic work should not be framed only in terms of direct (the ILO position) or indirect (the feminist economic productivist perspective discussed above) market demand-supply logic. Markets are spaces for private exchanges. It is an important space for the exchange of goods and services that are measurable in monetary terms, that is, where a reasonably appropriate exchange value could be ascertained. It is true that a range of tasks performed by domestic workers could be expressed in monetary terms (i.e. in equivalent monetary value). However, a significant part of domestic work consists of non-measurable and market non-exchangeable values. These values include love, trust, devotion, care (hence 'care' work), benevolence, sacrifice, joy, empathy, pity, and so forth. While these sentiments have social significance and interpersonal appeal, by their very nature they are not market-exchangeable commodities. The regulatory justification of care work on the basis of its market contribution discounts the centrality of these values for care work. As I argue below, a more appropriate – and expansive – regulatory logic could be devised by recognizing the contribution of domestic and care work to *society* not limited to the market.

A market-focused economic productivity-centred approach to acknowledging domestic work is ill-equipped to account for the emotional components of care work, which is central to the *work commitments* – and hence, overall work experiences – of domestic workers. Additionally, the indirect attribution of market logic to domestic work is disrespectful to domestic workers in the sense that in order for their work to be considered valuable, their work needs to be dependent on the economic productivity of other workers' (eventual market participants) who would have received care services from such workers.

When feminist legal scholars adapt social reproduction literature to indicate the inadequacies of the regulation of work (or labour law), they point out that segregating the home as a private domain (and thereby, attributing domestic interactions solely to love and emotion) hides economic exchanges of the domestic sphere. This critical reflection has successfully problematized the false division

between economically productive market-employment and emotion-driven domestic work. However, linking social reproduction to market-exchanges, without further specifying the total impact of socially reproductive work, ends up conceding substantial justificatory grounds for valuing domestic and care work to markets. This manner of justifying wages for domestic work (or more broadly, care work) goes against the stated objectives of a strand of feminist activism that seeks to dissociate wages for house work from any market-based justification: '[We should be unconcerned with our contribution to market productivity.] For our aim is to [...] price ourselves out of the market, for housework and factory work and office work to be "uneconomic."⁴⁰ If 'extricat[ing] a portion of their lives from capital's logics and purposes' was an aspiration of the feminist movement for returns on housework,⁴¹ that aspiration is only undermined by linking housework to that of economic productivity of the market.

Indeed, care work including domestic work should be valued on an alternative basis – with reference to the social contribution and beyond-the-market exchange logic. It is only when domestic work is so valued that the actual contour of such work can be properly grasped. However, such a valuation cannot be premised on the notion that since everyone is presumed to contribute to society, social contribution through work is an irrelevant consideration for universal basic income – the way in which Weeks imagines a post-work society. Although it might be true that every individual in society does *something*, it is an overstatement to assert that every individual makes positive social contributions for the sustenance and evolution of society.

A public account of care work in contrast to a private market relationship-based valuation of such work is helpful in more appropriately capturing the value of care work. Care work, which is properly seen as *social reproduction*, cannot primarily be about self-interested or private economic exchange. While for unpaid domestic work, the primary motive is perhaps diametrically opposite to that of self-interested private exchange, even in the context of paid domestic work workers regularly perform activities that go far beyond contractually agreed duties and are characterized by emotions including love, trust, and empathy. By their very nature, the latter cannot be the subject of a contractual exchange even though those are essential for the performance of care work. In fact, it is these non-marketable traits of care work that define the quality of a care worker rather than the general skillsets of cooking, shopping, changing, doing dishes, and so on.

⁴⁰ Nicole Cox & Silvia Federici, *Counter-Planning from the Kitchen: Wages for Housework, A Perspective on Capital and the Left* 14 (New York Wages for Housework Committee, 1976).

⁴¹ Weeks, *supra* n. 31, at 136.

Relatedly, care work is not primarily a private exchange because it is in society's, that is, the public's interest to see that children, the elderly, persons requiring medical care, and all other citizens (i.e. recipients of care) have comprehensively enriched life experiences. By 'comprehensive enrichment of life experiences' I mean not only the satisfaction of the material needs of individuals in a society but also the fulfilment of emotional conditions for their well-being. The diverse resources and circumstances necessary for such comprehensive enrichment are generated inter alia through care work performed at home.⁴² Accordingly, although care workers may be indirectly market-productive, centralizing the economic productivity logic somewhat marginalizes their (foremost) contribution beyond the market and into the broader realm of society.⁴³ Of course, feminists do recognize contributions of social reproduction beyond the market, indicating the three broad aspects of social reproduction mentioned earlier. Yet, while this recognition posits a diversified account of social reproduction when considered in isolation, when any of the three components are linked to market exchange, the 'production of labour' subsumes social reproduction's other aspects.

The production of labour refers to the production of workers for the future (or present), where a worker is one who possesses certain skillsets for undertaking designated tasks and employs those skillsets primarily for securing a livelihood. Although always linked to the overall personality of a worker, these work-specific skillsets have generally (historically) been separated from other aspects of a worker's life. For example, work skills have been separated from aspects of personality pertaining to socialization, friendship, and cultural sensitivity. The latter aspects of individuals' personality are traditionally seen as part of their social qualities, not significantly relevant to their identity as workers. However, these social qualities are increasingly seen as defining characteristics of workers – not only care workers but also other categories of workers.

If the juridical basis for recognizing social reproduction remains the production of market-exchangeable labour, it is then the market that possesses the legitimate authority to determine the quality (i.e. characteristics) of such labour. The market increasingly demands humanistic, social, cultural, linguistic, and emotional qualities from workers beyond their mere skillsets as workers.⁴⁴ Thus, love,

⁴² See for e.g. Isabel Dyck, *Migrant Mothers, Home and Emotional Capital – Hidden Citizenship Practices*, 41 (1) *Ethnic & Racial Stud.* 98 (2018), on how migrant mothers perform a range of everyday care work for the Canadian state in producing 'new [Canadian] citizens.'

⁴³ In a market-focused valuation of care work, markets often undervalue, and therefore, underpay, care workers for their contribution. See generally Paula England, Michelle Budig & Nancy Folbre, *Wages of Virtue: The Relative Pay of Care Work*, 49(4) *Soc. Prob.* 455 (2002).

⁴⁴ See e.g. British Council et al., *Culture at Work: The Value of Intercultural Skills in the Workplace*, <https://www.britishcouncil.org/sites/default/files/culture-at-work-report-v2.pdf> (visited: 28 May 2018); also see Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling*, in *The Production*

empathy, altruism, patience, and trustworthiness are also qualities that the market often demands of a good worker. When these qualities underlying sociality and human bonds⁴⁵ go on to define a modern worker, social reproductive dimensions of ‘biological reproduction’ and ‘social practices of caring, socialization, and fulfilling a broad range of human needs’ become part of the market-productive narrative. Thus, by subjecting social reproduction to the market-productivist logic, feminist scholars abdicate the justificatory space to the market on an issue that truly is a matter of social concern.

The public account (i.e. the social perspective), instead, would entail that care work be seen as a component of the public relationship between the worker and society. Care workers discharge a public obligation of social well-being and sustenance, thereby promoting conditions for comprehensively enriched life experiences of each individual member of society. In this public exchange (or interaction) between care workers and society it is incumbent on the state (i.e. various instrumentalities of the state) and non-state civil society to take cognizance of care workers’ social contribution and thereby reciprocate in furthering domestic workers’ well-being. The regulation of care work, then, should be conceptualized with reference to this worker-society relationship instead of the private employer-employee relationship.

Centralizing this social relationship as the foundation of legal regulation of work does not, however, dismiss private market exchanges; it only recognizes the limitations of the market in taking account of efforts not resulting in – or unable to be attributed to – economic production. While markets are *per se* significant for efficient private exchanges, markets should also be seen as components of society because of their capacity to promote human interactions and generate wealth for society.⁴⁶ While the market sometimes may be able to compensate workers including domestic workers for their technical skills (that is, if there are no other market imperfections, which itself is a contentious issue that I do not explore in this article), it is unable to take into account the emotional components of labour rendered by such workers. It is this vacuum that society needs to fill through legal regulation when care work is performed through private exchange.

In this section, I articulated a public account-based justification for regulating domestic work. The essence of this conceptual justification is that the market as a space for private interaction and exchange triggered by the economic-productivist

of Reality: Essays and Readings on Social Interaction 320 (5th ed., Jodi O’Brien ed., Sage, 2011); also Jonathan Payne, *Emotional Labour and Skill: A Reappraisal*, 16(3) *Gender, Work & Org.* 348 (2009); also Antonio Argandoña, *Beyond Contracts: Love in Firms*, 99 *J. Bus. Ethics* 77–85 (2011).

⁴⁵ See generally e.g. Isabella Bakker & Stephen Gill (eds), *Power, Production and Social Reproduction* (Palgrave Macmillan 2003); Kate Bezanson & Meg Luxton (eds), *Social Reproduction: Feminist Political Economy Challenges Neoliberalism* (McGill-Queens University Press 2006).

⁴⁶ Amartya Sen, *Development as Freedom* 116–24 (Alfred A. Knopf 1999).

logic provides a narrow reference point wherein the overall contribution of domestic workers could never be adequately assessed and compensated. Further, although the market might exist for public purposes, its internal logic is based on private interest-focused exchange and, thereby, inadequate at analysing public interests. Accordingly, the orthodox account of substantive legal entitlements secured through labour laws falls short in the context of domestic workers.

However, while it is one thing to advocate a social contribution-based account of reciprocal legal entitlements, it is a different challenge to consider what such a foundational imagination might mean for domestic worker's substantive rights in specific social contexts. In the following part (section 3), by way of exploration I undertake a case study of temporary migrant domestic workers' entitlements in Canada. My objective in doing so is to assess what the above theoretical perspective may mandate in more concrete terms. Thus, I evaluate migrant domestic workers' entitlements under the Temporary Foreign Worker Program and critique migrant workers' substantive entitlements on the basis of the standard espoused in section 2.

3 PRACTICAL IMPLICATIONS

In this section, I evaluate the legal entitlements of migrant domestic workers in Canada on the basis of two legal regimes that determine their entry and well-being in their host country: the immigration regime and the labour rights regime. The Canadian Caregiver Program (CP) is arguably one of the best temporary migrant worker programs insofar as it promotes the integration of migrant workers into Canadian society.⁴⁷ Accordingly, the Canadian CP should offer an opportunity for evaluating how (arguably) the best of legal temporariness of workers fares against a normative ideal of care work as social contribution. By indicating migrant domestic workers' contributions to Canadian society, I contend that their entitlements should be similar to those of Canadian workers including a guaranteed right to permanent residency and in this sense, the temporary/permanent distinction should be abandoned in favour of a more equitable entitlement regime.

3.1 CAREGIVING AS TEMPORARY WORK FOR MIGRANT WORKERS: THE IMMIGRATION REGIME

According to the Canadian in-home and healthcare facility-based CP, which is a low-wage component of the Temporary Foreign Worker Program (TFWP), employers can hire migrant workers 'to provide care, *in a private residence*, to

⁴⁷ Briones, *supra* n. 1; Hennebry, *supra* n. 1.

children, seniors or persons with certified medical needs, *when Canadians and permanent residents are not available*.⁴⁸ Under the CP, migrant caregivers work full-time in private households (i.e. their workplace), although (now) they have the option of either living in or living out of the employer's household.⁴⁹ The work that migrant caregivers are to engage in includes *caring and nursing* for children under the age of eighteen, elderly persons, people with disabilities, and chronic and terminally-ill patients.

The above-listed features of the CP and more broadly, the provisions of the TFWP were introduced in 2014 and were intended as improvements to earlier versions of the program that claimed to overcome the increasing use of temporary migrant workers by employers and the 'systemic exploitation of low-wage migrant workers'.⁵⁰ Although the changes introduced by the TFWP left the inconsistent treatment of different categories of migrant workers unaltered,⁵¹ my main concern for the purpose of this article is the narrative it generated for in-home caregivers. At the outset, it is worth noting that the guiding principle of the TFWP is framed in terms of its threat to Canadian workers rather than migrant workers' contributions to Canada.⁵² Second, several of the changes introduced in the TFWP with a view to curbing the normalization of migrant

⁴⁸ Government of Canada, *Hire a Temporary Worker as an In-Home Caregiver – Overview*, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver.html> (site visited 20 Apr. 2018) [emphasis mine].

The Canadian Constitution Act, 1867 enumerates shared federal and provincial power over immigration. The federal Immigration and Refugee Protection Act, 2001 and Regulations under the Act regulate foreign workers' immigration in Canada. Foreign workers' migration in Canada could be broadly categorized under two heads: high-skilled and low-skilled migrant workers. While high-skilled foreign workers have several opportunities to migrate to Canada, low-skilled workers, including caregivers could access four temporary work programs in order to migrate to Canada under the aegis of the Canadian Temporary Foreign Worker Program (TFWP): the caregiver program, the seasonal agricultural worker program, the National Occupational Classification (NOC) 'C' & 'D' (low-skilled workers) pilot project, and the agricultural stream of the NOC 'C' & 'D' pilot project. Temporary foreign workers' employment would be subject to a Labour Market Impact Assessment, which would have to approve such temporary employment prior to migrant workers' hiring by Canadian employers. See Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity*, Metcalf Foundation 19–26 (Sept. 2012).

⁴⁹ See Ministerial Instructions Establishing the Caring for Children Class under s. 14.1 of the Immigration and Refugee Protection Act (s. C. 2001), <http://www.gazette.gc.ca/rp-pr/p1/2014/2014-11-29/html/notice-avis-eng.html#na3> (site visited 31 July 2018); also see Ministerial Instructions Establishing the Caring for People with High Medical Needs Class under s. 14.1 of the Immigration and Refugee Protection Act (s. C. 2001), <http://www.gazette.gc.ca/rp-pr/p1/2014/2014-11-29/html/notice-avis-eng.html#na2> (site visited 31 July 2018).

⁵⁰ See generally Fay Faraday, *Canada's Choice: Decent Work or Entrenched Exploitation for Canada's Migrant Workers?*, Metcalf Foundation, 6 (June 2016). But for a different view, see Jill Hanley, Lindsay Larios & Jah-Hon Koo, *Does Canada 'Care' About Migrant Caregivers?: Implications Under the Reformed Caregiver Program*, 49(2) *Can. Ethn. Stud.* 121 (2017).

⁵¹ Faraday, *supra* n.50, at 7.

⁵² *Ibid.*, at 8.

workers in specific services do not apply to in-home care workers due to their exemption from these regulations.⁵³

Although formally the CP leads to the possibility of Permanent Residency in Canada on successful completion of the Program, several conditions need to be met by workers for their Permanent Resident application to be successful. Permanent residency is no longer guaranteed upon completion of a minimum two years of caregiving.⁵⁴ Apart from formal language skills assessment and formal educational requirements, the number of permanent residency grants per year is legally restricted. Additionally, even upon attaining Permanent Resident status, family reunification is not always guaranteed because of age- and education-based restrictions on bringing in family members even if they are the migrant worker's children. In spite of the legally secured possibility of family reunification, what is often impractical for migrant workers is garnering enough income and socio-economic resources to actually bring family members to live with them (unless some family members also earn at the same time).

Successful completion of the CP would mean that a caregiver would have worked with the same employer for at least two years (before applying for Permanent Residency). Even though the government mediates the CP, since a migrant worker would have to work on a compulsory basis in the same employer's household for an extended period, an employer holds immense power over migrant in-home caregivers. Since the demand for and control of the CP lies with the employer, it is largely an employer-focused relationship. There is thus an immense power imbalance in the private employment relationship between an employer and a migrant 'in-home' employee.

Moreover, irrespective of formal legal safeguards, it is often impractical to monitor and investigate adherence to or violation of workers' rights in an employer's household unless an employee institutes a complaint. However, as noted by several scholars, migrant workers often hesitate to complain against their employers fearing retaliatory action by employers.⁵⁵ Additionally, any dispute with an employer might delay their

⁵³ *Ibid.*, at 30–33.

⁵⁴ Just before this article went to press, the federal government announced two new five-year caregiver immigration pilot initiatives, guaranteeing a direct pathway to permanent residency once caregivers have two years of work experience. Additionally, caregivers will be able to change jobs and bring their families with them. See *Launching 2 new 5-year caregiver immigration pilot programs*, News Release, Immigration, Refugees and Citizenship Canada, Government of Canada, 23 Feb. 2019, <https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/02/caregivers-will-now-have-access-to-new-pathways-to-permanent-residence.html> (site visited 12 Apr. 2019).

⁵⁵ See e.g. Alexandra Rodgers, *Envisioning Justice for Migrant Workers: A Legal Needs Assessment*, *Migrant Workers Centre* 35–36 (Mar. 2018), <http://bcpovertyreduction.ca/wp-content/uploads/2018/03/MWC-Envisioning-Justice-for-Migrant-Workers-Report.pdf> (site visited 10 Jan. 2019); also see Judy Fudge & Joo-Cheong Tham, *Dishing Up Migrant Workers for the Canadian Food Services Sector: Labor Law and the Demand for Migrant Workers*, 39 *Comp.Lab. L. & Pol'y J.* 1, 16 (2017).

eligibility to apply for Permanent Residency. Therefore, because of the nature of the working arrangement, the private employment relationship is structurally biased against the possible autonomy and agency of migrant care workers.

In-home care service is an area of work where both the temporary worker status and the racialized profile of the worker is normalized.⁵⁶ The very premise of the CP is that since Canadians are not interested in performing low-waged employment characterized by limited worker-rights in a difficult-to-monitor employer's home, the Canadian state needs to fill the vacuum by attracting low-skilled disadvantaged workers through a globalized market exchange. While the CP is often politically projected as a model of temporary migrant worker arrangement, feminist scholars have convincingly articulated problems with this portrayal.⁵⁷

Through the CP, socially necessary work – work that sustains and improves human lives, families, and social well-being – that is not directly economically productive through a market-based private exchange relationship is nonetheless relegated to the private concerns of citizens engaging such activities. While the Canadian state might recognize the significance (i.e. contribution) of such socially necessary work, their concern for these workers as evidenced in the legislative framework is secondary to their emphasis on promoting market-based private economic exchanges based on the needs of the citizenry. Accordingly, laws safeguarding the interests of care workers are devised on the same logic that is employed in regulating employees in an industry-based employment relationship. Non-market forms of work remain unacknowledged in private exchange-focused legal regulation. In the following section, I discuss the labour rights regime on migrant domestic workers.

3.2 ENTITLEMENTS OF MIGRANT IN-HOME CARE WORKERS: LABOUR RIGHTS

In this section, I assess the legal entitlements of migrant caregivers in Canada with a view to ascertaining the substantive nature of their temporariness in the host country. Migrant caregivers in Canada are only able to access a constrained set of legal entitlements, although formal legal guarantees based on specific trades remain *prima facie* nondiscriminatory.⁵⁸ The federal Ministry of Employment

⁵⁶ Faraday, *supra* n. 50, at 7.

⁵⁷ See Briones, *supra* n. 1, at 24–26, 42–43; also see generally Hennebry, *supra* n. 1.

⁵⁸ Bethany Hastie, *The Inaccessibility of Justice for Migrant Workers: A Capabilities-Based Perspective*, 34 Windsor Yearbook of Access to Justice 20 (2017). While differential rights and exclusions from standard employment protections do exist for specific jobs, the existence of formal legal rights and protection for migrant workers is not an issue. For example, differential regulations exist for agricultural workers and domestic workers, with regard to wages, hours or work, and so on, but these exceptions are determined by occupation and not citizenship. While it has been documented that

and Social Development Canada (ESDC), which manages the CP, underlines the minimum standards for the employment of migrant care workers.⁵⁹

Migrant care workers can have rights to minimum wages, overtime pay, maximum working hours, daily breaks, weekly leave, statutory leave, and notice of termination, depending on what is provided under their respective (provincial) employment statutes. The ESDC further specifies that while employers cannot require care workers to live in the employer's residence, if the employer and the migrant employee mutually agree, the employee may live in the employer's house – in which case the accommodation will have to meet certain specified standards and must be provided free of cost. Additionally, on arrival in Canada, when the migrant worker is not covered by provincial health insurance, they are entitled to private health insurance paid for by the employer. Migrant workers are also entitled to workplace safety insurance provided by the employer.

Although the ESDC has no power to intervene in a private employment contract between an employer and a migrant worker, the employment contract needs to adhere to the legal rights provided under the respective provincial employment statutes. Thus, migrant care workers' legal rights are formally secured through the employment contract. An example might be instructive here. Once migrant workers are in the province of British Columbia, they are regulated through the British Columbia Employment Standards Act, 1996. Generally speaking, substantive employment standards in British Columbia are set at quite a low level compared to other Canadian provinces.⁶⁰ The province trails behind other provinces on substantive entitlements pertaining to statutory holidays, paid vacation, notice for termination, and absence of protection for unjust dismissal.⁶¹ Additionally, the self-initiated complaint procedure, involving mandatory negotiation by disputing employees with employers, substantially limits workers' capacity to realize their statutory rights.⁶²

The Employment Standards Act, 1996 states that the statutory safeguards of the Act are applicable to all employees unless statutorily excluded.⁶³ Any domestic

many workers face barriers accessing justice, the author argues that the erosion of rights is especially acute for workers with temporary or insecure residency status.

⁵⁹ See *Hire a temporary worker as an in-home caregiver – Wages, working conditions and occupations*, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver/working-conditions.html> (site visited 20 Aug. 2018).

⁶⁰ Fudge & Tham, *supra* n. 55, at 12.

⁶¹ *Ibid.*

⁶² *Ibid.*, at 13. In British Columbia, domestic (care) workers could fit the definitions of 'domestic' under s. 1 of the BC Employment Standards Act [RSBC 1996, c 113] or 'residential care worker' under s. 1 of the BC Employment Standards Regulations [B.C. Reg. 396/95], depending on their specific live-in or live-out situation and the nature of their tasks. While domestics are excluded from having to self-initiate negotiation with their employers, residential care workers are not so excluded. However, the complaint procedure remains self-initiated for both of these categories of workers.

⁶³ S. 3, BC Employment Standards Act [RSBC 1996, c 113].

worker, defined as an employee who works ‘at an employer’s private residence to provide cooking, cleaning, child care or other prescribed services [...] and resides at the employer’s private residence,’ is covered by the employment statute provisions.⁶⁴ However, the Employment Standards Regulations create specific provisions for domestic (residential) care workers, meaning any worker who ‘is employed to supervise or care for anyone in a group home or family type residential dwelling’ and ‘is required by the employer to reside on the premises during periods of employment’.⁶⁵ The Regulations exclude domestic care workers – or in-home care workers – from the scope of Part 4 of the BC Employment Standards Act, which enumerates maximum hours of work and overtime payments for employees.⁶⁶ The Regulations instead mandate a minimum eight consecutive hours rest period if such workers are to be on the premises of the employer for a twenty-four-hour period.⁶⁷ If the rest period is interrupted with additional work, the worker is entitled to additional pay.

Thus, although the statute does not distinguish between migrant and domestic workers (defined either as domestic or residential care worker) with regard to statutory entitlements within the specific category of domestic work, it creates differential standards for the residential care worker category as compared to other regular employees. Some scholars suggest that this very statutory standard devising differential entitlements for domestic workers (along with unemployment insurance and social assistance regimes) goes on to create the migrant domestic worker market by making domestic work unattractive for Canadian workers.⁶⁸

In any case, apart from enumerating minimum statutory entitlements, a formal employment contract is important for migrant care workers because an employer cannot compel a migrant worker to undertake any work that is not part of the worker’s contractual job description. This contractual obligation is helpful, at least at a formal level, for migrant care workers insofar as they are safeguarded from carrying out a number of miscellaneous activities in the employer’s home at the employer’s whim. Although written contractual employment may be more transparent, it does not *per se* eliminate the marginalization of migrant workers since their permission to work in Canada is tied to a specific employer. Be that as it may, in addition to common law contractual safeguards and minimum statutory protections of employees, the human rights codes (for example the British Columbia Human Rights Code) legally prohibits an employer from discriminating against

⁶⁴ S. 1, 14, BC Employment Standards Act [RSBC 1996, c 113].

⁶⁵ S. 1(1), Part 1, BC Employment Standards Regulations [B.C. Reg. 396/95].

⁶⁶ S. 34, BC Employment Standards Regulations [B.C. Reg. 396/95].

⁶⁷ S. 22, BC Employment Standards Regulations [B.C. Reg. 396/95].

⁶⁸ See generally Fudge & Tham, *supra* n. 55, at 5–7, 15–16.

migrant workers on certain prohibited grounds.⁶⁹ Having briefly noted the general nature of migrant domestic workers' rights in Canada, in the following section I evaluate the actual scope of their substantive entitlements.

3.3 EVALUATING MIGRANT DOMESTIC WORKERS' ENTITLEMENTS IN CANADA

From the previous section it is clear that at a formal regulatory level migrant care workers (including domestic care workers) are entitled to similar or equivalent legal protection to that of Canadian workers employed on the same job, although many of the job characteristics dissuade Canadians from undertaking domestic work. However, in spite of these legal safeguards, migrant workers' experiences are shaped by their migration and resultant legal temporariness.⁷⁰ When migrant workers interact with the employment law regime in Canada, the outcome often leaves migrant workers with truncated rights and entitlements.⁷¹ Their vulnerabilities and marginalization result partly from the operation of the legal regime that is insensitive to their unique experience as temporary foreign workers working in the employer's home.⁷² Here, formal legal equality between Canadian and migrant workers is the very source of marginalization of migrant workers.

Temporariness of migrant care workers (and resultant insecurity) is shaped by two simultaneously operating legal regimes – that of immigration and that of work-related legal entitlements. As I discuss in section 3.1, since it is the

⁶⁹ For example, an employer is prohibited from discrimination on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and criminal conviction not related to employment consideration, under the British Columbia Human Rights Code [RSBC 1996]; additionally, migrant workers are protected under health and safety legislation. See Hastie, *supra* n. 58, at 22.

⁷⁰ See generally Marcel Paret & Shannon Gleeson, *Precarity and Agency Through a Migration Lens*, 20(3–4) *Citizenship Stud.* 277 (2016).

⁷¹ See Sarah Marsden, *Assessing the Regulation of Temporary Foreign Workers in Canada*, 49 *Osgoode Hall L. J.* 39 (2011); also see Andrea M. Noack, Leah F. Vosko & John Grundy, *Measuring Employment Standards Violations, Evasion and Erosion – Using a Telephone Survey*, 70(1) *Indus. Rel.* 86 (2015); also Mary Gellatly et al., 'Modernising' Employment Standards? *Administrative Efficiency and the Production of the Illegitimate Claimant in Ontario, Canada*, 22(2) *Econ. & Lab. Rel. Rev.* 81 (2011); also Kerry Preibisch & Jenna Hennebry, *Temporary Migration, Chronic Effects: The Health of International Migrant Workers in Canada*, 183(9) *Can. Med. Ass'n Jn* 1033 (2011); also Janet McLaughlin, Jenna Hennebry & Ted Haines, *Paper Versus Practice: Occupational Health and Safety Protections and Realities for Temporary Foreign Agricultural Workers in Ontario*, 16(2) *Perspective interdisciplinaires sur le travail et la santé* 1 (2014); also Jenna Hennebry, Janet McLaughlin & Kerry Preibisch, *Out of the Loop: (In)access to Health Care for Migrant Workers in Canada*, 17 *Int'l Migration & Integration* 521 (2016) (the final two studies are on migrant farmworkers' health and safety condition).

⁷² See Hastie, *supra* n. 58, at 23, 30–37; also see Iain Campbell & Robin Price, *Precarious Work and Precarious Workers: Towards an Improved Conceptualization*, 27(3) *Econ. & Lab. Rel. Rev.* 314, 316–18 (2016); also see Judy Fudge, *Self-employment, Women, and Precarious Work: The Scope of Labour Protection in Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* 201, 211 (Judy Fudge & Rosemary Owens eds, Hart 2006); also see Luin Goldring, Carolina Berinstein & Judith K. Bernhardt, *Institutionalizing Precarious Migratory Status in Canada*, 13(3) *Citizenship Stud.* 239, 252–55 (2009).

immigration regime that determines legal migration of foreign workers, the labour and social rights of these workers are always subject to the attributed legal temporariness of the immigration regime. From the outset, this legal temporariness means that the labour and social rights regime ends up having discriminating effect on migrant workers. Once migrant workers are in Canada, migrant care (and other) workers' entitlement-focused legal institutional framework could be seen as a combination of these five legal regimes: (1) employment contracts; (2) provincial employment standards; (3) restrictions on recruitment agencies; (4) unionization for some groups of temporary foreign workers; and (5) increased monitoring mechanisms.⁷³

An example of the discriminatory treatment of migrant workers that permeates all five of the abovementioned entitlement-focused regimes is the institutional structure for addressing workers' grievances – from labour boards to the Supreme Court of Canada. The juridical dispute resolution mechanism in Canada is premised on the idea of workplace justice unconstrained by serious temporal limitations on the realization of rights and entitlements of workers. However, the legal temporariness of workers, wherein migrant workers' status is time-bound, sits uneasily with this idea of the dispensation of justice. Additionally, the self-initiated (in contrast to pro-active investigation) complaint-based mechanism to report violation of employment rights (in British Columbia), especially when the nature of the employment relationship is bonded constitutes a serious hurdle in realizing the formal legal rights and entitlements of migrant caregivers.⁷⁴

Legal scholars have observed that migrant workers generally suffer from social exclusion, illegally low wages, poor working conditions, sub-standard living accommodations, sexual and racialized discrimination, exploitation, and withholding of passports, largely because of the circumstances created by reason of their temporary migrant status.⁷⁵ For example, Sarah Marsden notes that temporary workers in Canada could be distinguished from permanent residents on the following grounds: (1) they lack the right to remain permanently in Canada; (2) they have limited access to social and economic benefits; (3) they lack direct democratic representation; and (4) they have limited labour mobility because their status relies on specific employer-centred relationships.⁷⁶ Reviewing three decades of the Canadian Supreme Court's engagement with non-citizens' Charter Rights claims, Catherine Dauvergne notes that although the Supreme Court's

⁷³ Judy Fudge & Fiona MacPhail, *The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor*, 31 Comp. Lab. L. & Pol'y J. 101 (2009).

⁷⁴ *Ibid.*; Marsden, *supra* n. 71.

⁷⁵ Sabaa A Khan, *From Labour to Love to Decent Work: Protecting the Human Rights of Migrant Caregivers in Canada*, 24(1) Can. J. L. & Soc'y 23 (2009); Marsden, *supra* n. 71; Hastie, *supra* n. 58.

⁷⁶ Marsden, *supra* n. 71; also see Alison Taylor & Jason Foster, *Migrant Workers and the Problem of Social Cohesion in Canada*, 16 Int'l Migration & Integration 153 (2015).

early decisions were supportive of non-citizen claims, the jurisprudence evolved to become less sympathetic to Charter claims of non-citizens.⁷⁷ Although Dauvergne's concern was not primarily migrant workers, her reflection is useful in situating temporary foreign workers in the context of the Canadian Charter of Rights and Freedoms.

Thus, legal temporariness results in a diminished set of rights and entitlements for migrant workers in Canada. Often this constrained set of rights is entrenched in formal jurisprudence as in the situation of Charter Rights; at other times the realization of formal entitlements is onerous as in the case of statutory rights. Although temporariness is a legal status for migrant care workers, when such status results in truncated rights and entitlements, can such substantive temporariness be supported by the critical moral evaluation articulated in section 2? In the following paragraphs, I answer this question in the negative. I argue that legal temporariness may be permissible as part of a politico-legal agenda to some extent, but when such a policy results in a lesser set of socio-economic entitlements for migrant care workers (compared to Canadian citizens), it cannot be supported on a critical evaluation. Legal temporariness, if any, is to be dissociated from an entitlement framework promoting migrant workers' well-being.

3.4 MIGRANT CARE WORKERS' CONTRIBUTION TO CANADIAN SOCIETY & LEGAL TEMPORARINESS

Migrant domestic workers, and care workers more generally, share more than a mere contractual relationship with their employers. To be sure, although they are not members of the employer's family, their relationship to their employers' family (and the people they care for) are often characterised by non-marketable sentiments mentioned in section 2. Co-opting this very real and substantial emotional contribution into a market exchange formula will be reductive; on the other hand, ignoring this *unique* contribution in favour of a post-work scenario-based universal basic income will conflate care work with *any other activity* whether socially useful or not. In the context of migrant domestic workers, both of these perspectives would mask the real and substantial contribution that migrant workers make to their host society. Actual contributions of migrant domestic workers could be recognized by means of an expansive public account of care work as a reciprocal

⁷⁷ Catherine Dauvergne, *How the Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence*, 58(3) McGill L.J. 663 (2013); see particularly *Ontario (Attorney General) v. Fraser*, 2011 SCC 20. But see Daiva K. Stasiulis & Abigail B. Bakan, *Negotiating Citizenship: Migrant Women in Canada and the Global System* 140–56 (Palgrave 2003), for an analysis of how Canadian courts have sometimes upheld procedural rights of migrant domestic workers, even if the extension of Charter rights is limited.

relationship between workers and society, as I elaborate in section 2. In this manner of (re-)conceptualizing the regulation of domestic work, migrant domestic workers' legal entitlements should primarily be a state responsibility (in contrast to employers' private obligations), although non-state actors may also contribute towards fulfilling such legitimate entitlements.

Domestic work by temporary migrant workers in Canada is performed through private market exchanges (i.e. one that the ILO envisages), albeit facilitated by the state. The Canadian state proactively creates and nurtures this domestic care market for temporary foreign workers. Although the care work market could be expected to compensate such workers' marketable skills using a demand-supply logic, as I argued earlier, it is unable to take cognizance of non-economic contributions of migrant care workers. It is thus the Canadian state's responsibility to reciprocate the migrant domestic workers' contributions to Canadian society. If the normative aim of such reciprocation is the promotion of multidimensional improvements in the lives of migrant workers, it remains incumbent on the state – at a minimum – to remove conditions of insecurity created by the legal temporariness of migrant workers' lives in Canada. This agenda would entail simultaneous modifications to the immigration regime and the employment-related legal entitlement regime.

In more concrete terms, what this removal of insecurity from the lives of migrant domestic workers would mean is that there must be a clear path to citizenship for such workers. Migrant domestic workers' permanent residency should not be a matter of chance or political uncertainty (i.e. mere possibility), as it is at present – it should be a matter of entitlement reciprocal on their substantial contribution to Canadian society (i.e. guaranteed permanent residency should follow their migration for domestic care work).⁷⁸ Family reunification for migrant domestic workers should also become easier and faster, with much fewer formal legal hurdles. In addition to securing a future in the host country, the legal framework should safeguard equitable substantive entitlements for migrant domestic workers on par with Canadian workers, keeping in mind the *sui generis* problems regarding the realization of legal entitlements by migrant workers. However, even though migrant domestic workers should be treated at par with Canadian citizens for a comprehensive range of legal entitlements, there could, perhaps, be certain privileges that could be withheld from migrant workers for a certain period of time. For example, privileges such as voting and direct political participation in the Canadian political process could be afforded gradually to migrant

⁷⁸ See *supra* n. 54, for recent federal government pilot initiatives promoting these agendas. However, the pilot schemes are temporary and experimental, and they stop short of securing the full socio-economic citizenship of migrant care workers.

care workers facilitating their integration into Canadian society, rather than immediately upon their arrival.

However, withholding certain privileges should not hinder migrant workers' effective participation and voice in shaping the nature of their workplace and entitlements, including their access to the Charter right to association.⁷⁹ Voice and interaction with a range of civil society organizations should be immediately facilitated for migrant domestic workers upon their arrival. This democratic participation is a necessary addition to socio-economic entitlements to overcoming migrant workers' marginalization in their host society and furthering multidimensional improvements in their lives. The integration of effective democratic participation of workers in policy-making would mean that legal entitlements would often have to be devised in a decentralized manner catering to the heterogeneous lived experiences of migrant care workers in Canada.⁸⁰ A solely employer-focused private entitlement framework is inadequate in ensuring workplace democracy and social integration while also securing substantive legal entitlements. Although the social relational concept of work and consequent legal imagination is not a completely novel insight,⁸¹ what remains challenging in this perspective is the balance between private market-entitlements and public regulation-based entitlements for migrant domestic workers. Given the varied individual contexts (and histories) of migrant domestic workers, this balance cannot be struck *a priori*; it has to be devised through meaningful participation by such workers.

4 CONCLUSION

Without limiting my analysis only to the specific context of migrant workers, in section 2 of the article, I chart a conceptual justification for regulating domestic work that centralizes the role of state (rather than a private employer) in guaranteeing appropriate conditions for well-being and security of domestic workers. I argue that the breadth and significance of domestic work cannot be captured only with reference to private self-interested economic exchange. An alternative legal imagination of domestic work ought to be a social relational idea of work rather than a market-based concept. Such a legal imagination needs to recognize domestic (and generally care) work not because they are socially reproductive for waged

⁷⁹ See Canadian Charter of Rights and Freedoms, s. 2(d), Part 1 of the Constitution Act, 1982, being Sch. B of the Canada Act, 1982 (UK), c 11.

⁸⁰ See for e.g. Hayes, *supra* n. 2, at 68–71, for her emphasis on the role of heterogeneous experiences of paid care workers for legal policymaking in the UK context.

⁸¹ For e.g. see Alain Supiot et al., *Beyond Employment – Changes in Work and the Future of Labour Law in Europe* (2001); Hayes, *supra* n. 2.

market purposes, but because they are socially contributory in sustaining and furthering our common humanity and civilization.

In accordance with the proposed legal imagination, in section 3, I offer two general policy agendas in the context of migrant domestic workers in Canada. First, that in view of their contributions to Canadian society foreign migrant workers performing domestic work in Canada should not be considered temporary insofar as their entitlements are concerned. And second, that the migrant domestic workers' entitlement regime should be decentralized, and substantively determined on the basis of their heterogeneous lived experiences in Canada. Once these two general proposals survive critical scrutiny, the next stage of the discussion should focus on how these general claims are to be realized in actual contexts.