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## Labour Law for Care and Wellbeing

Rafael Encinas de Muñagorri

### Abstract

Utopian visions of care work are fairly rare. Even if post-growth theories are giving way to care-oriented societies, we need to get rid of the traditional view that care and domestic work are unproductive and the natural role of women. New welfare economics and feminist studies have stimulated our imaginations to explore new perspectives that promote care work and wellbeing and to examine their possible impacts on welfare and labour law.

**Keywords:** care work, welfare economics, feminist studies, wellbeing, domestic workers.

### I. Introduction

#### A. Global Care as a Utopian Programme

Let us imagine it is 2054, and the members of the United Nations have just adopted the *Globalcare* framework programme. Sceptics and opponents have mocked its name for its evocation of proximity with the global, transnational chains of care workers providing care in Western countries. Yet the same critics had recognized the quality of the participative democratic process before its adoption. *Globalcare* is an ambitious programme, presented by its promoters as a “turning point in civilisation”. During the debate that preceded the adoption of *Globalcare*, its promoters insisted on - and sometimes dramatized - the current emergency facing the world in the context of decades of challenges (e.g., global warming, economic depressions, mass migrations, growing inequalities and poverty, and the intensification of modern slavery). The old capitalist economic system based on productivity had to give way to new alternatives. *Globalcare* was conceived as the best political and social solution, driven by the simple idea that our society has to prioritise care and wellbeing over other considerations.

In 2050, governments produced a report in which the *Globalcare* programme was prepared, with contributions from experts, scientists and ordinary citizens. The report was based on the three guiding principles of Utility, Equity and Liberty. Let's briefly examine these principles in broad terms. Firstly, care work is the most useful and valuable factor for ensuring social continuity, and caregivers must be protected, recognised and accorded appropriate status. Secondly, all citizens have equal rights and obligations as care beneficiaries and care givers. Thirdly, each individual has the freedom to choose whether or not to provide care at different periods in their lives to find a balance between care work and other activities.

General formulations are always a bit vague, and real-life case studies can help clarify them. Of the many case studies cited in the Report, one is that of Camille, a man caring for his dying partner. He is exhausted by the effort of trying to hold down a full-time job while providing appropriate care to his partner. He has been unable to find sufficient support to cope with the situation. His employer feels sorry for him but has done nothing to help with Camille's "personal tragedy". The public health system and his private medical insurance company have only provided minimal support while following their "home healthcare autonomy" protocols. The implementation of *Globalcare* will, by contrast, allow Camille to prioritize his care work over his other activities, meaning he could reduce or even interrupt his paid employment without prejudice or loss of income. He will also be able to request the assistance of professional care workers at home or to use appropriate care services for him and his partner. Other case studies in the Report include those of Nancy, a woman who wants to stay at home to care for her children and her elderly parents instead of working in paid employment, and Anita, who gets paid to do domestic work in other households who then comes home and cares for her own family. The *Globalcare* framework programme suggests models for the reform of national labour and welfare laws governed by public and private institutions. Substantially funded and coordinated at different operational levels, *Globalcare* is a worldwide project that has made an end-of-the-century utopia come true.

## **B. Care, Wellbeing and New Welfare Economics**

However, we are now in 2022, not 2054, and my contribution to this book will examine a puzzling and somewhat obsessive question: why are there so few utopian visions related to care work? It is

hard to give an answer, perhaps because the tasks involved in care work are deeply rooted in our day-to-day lives or the challenge of universal care is too daunting<sup>1</sup>. People have to be cared for as a matter of routine, and even if new technologies (e.g., robots) could sometimes help, the bulk of the work will always have to be done by human beings. Our sense of wellbeing depends on how much care work is available. And it is probably easier to imagine reconstructing a brave new world after an attack by extra-terrestrials than profoundly rethink our daily lives. That said, care work has received plenty of attention from social scientists, leading to many written contributions<sup>2</sup>, especially from feminist thinkers. As a white European male academic law professor in his fifties, and a relative newcomer to this field, I cannot claim any specific expertise, experience or legitimacy. Nevertheless, in this chapter, I will try to bring together the research and contributions of others with my hazardous methodology of eclecticism.

Many definitions and conceptions of care have been given from different disciplines and standpoints. One of the most famous is “everything we do to continue, repair, and maintain ourselves so that we can live in the world as well as possible”<sup>3</sup>. More recently, care work has been defined as “activities and relations involved in meeting the physical, psychological and emotional needs of adult and children, old and young, frail and able-bodied”<sup>4</sup>. This broad definition includes both paid and unpaid care work. It is in line with the “conceptually revolutionary definition of work” adopted in 2013 by the 19<sup>th</sup> International Conference of Labour Statisticians<sup>5</sup>. From a labour law perspective, it could seem curious to include unpaid care work, but the idea of expanding labour law to include unpaid care work is precisely one of the important points at stake<sup>6</sup>.

In this chapter, I will focus on both paid and unpaid care work and its assumed contribution to the wellbeing of society. Care work is frequently associated with larger notions, such as reproductive

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1 The Care Collective of Others (eds) *The Care Manifesto: The Politics of Interdependence* (Verso Books 2020)

2 Raffaella Sarti, 'Historians, Social Scientists, Servants, and Domestic Workers: Fifty Years of Research on Domestic and Care Work' (2014) 59 *International Review of Social History* 279

3 Joan Tronto, Berenice Fisher, 'Toward a Feminist Theory of Caring' in Emily Abel, Margaret Nelson (eds) *Circles of Care* (SUNY Press 1990)

4 ILO, *Care Work and Care Jobs for the Future of Decent Work*, (Report ILO 2018) 6

5 *Ibid*, 10

6 Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' (2014) 22 *Feminist Legal Studies* 1

labour or social reproduction<sup>7</sup>. I will pay special attention to care activities in the home, where the boundaries between direct (face-to-face) and indirect care are often blurred in practice. Domestic and care work have been studied together<sup>8</sup>. The best specialist studies of domestic workers use the terminology with nuances, avoiding implicit hierarchies between “noble” activities (direct care work) and “less noble” activities (indirect care work as household work)<sup>9</sup>. In this chapter, I will use “care work” as a general term, giving more precision when necessary.

What branch of economics could be of interest when rethinking the importance of care work in our society? Traditional approaches, which analyse economies through capitalism, markets, and productivity, are not appropriate here. Moreover, they have been accused, particularly by feminist political economists, of neglecting, or even ignoring, the importance of care work. Alternative currents of non-conventional economics have flourished in the last two decades. Post-growth theories are one of the more promising of these currents<sup>10</sup>. Not surprisingly, care work is considered a meaningful activity at the core of prosperity<sup>11</sup>. Its future is envisioned both as paid and unpaid, or, more precisely, as a combination of both: “For a post-growth society strongly characterized by work on and with people, in which formal employment would become less important for all citizens and there would more time for personal initiatives and unpaid care work due to the reduction of working hours, care activities brought together in a hybrid way - a resource system in which formal and informal care work co-operate - could become a distinguishing feature”<sup>12</sup>. Such a prediction would appear fragile without strong institutional support. And in his conclusion, the author recognizes the importance of public infrastructure to make possible the combination of benevolent care with formal social services: “the state may, must and can - oblige all citizens to contribute to the financing of formal and informal work through social security contributions and taxes”<sup>13</sup>.

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7 Judy Fudge, 'Labour as a “Fictive Commodity”': Radically Reconceptualizing Labour Law' in Guy Davidov, Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 130

8 Sarti (n 2)

9 Adelle Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (Cornell University Press 2019) 181 app 1

10 Tim Jackson, *Post-Growth: Life After Capitalism* (Polity Press 2021); Lorenzo Fioramonti, *Wellbeing Economy: Success in a World Without Growth* (Macmillan 2017)

11 Ibid. ch; ch 7

12 Jonas Hagedorn, 'Formal and informal care work' in Irmi Seidl, Angelika Zahrnt, Ray Cunningham (eds) *Post-Growth Work: Employment and Meaningful Activities within Planetary Boundaries* (Routledge 2021)

13 Ibid. 118

Current developments in *new welfare economics* are able to support a fruitful and pragmatic dialogue with the rethinking of labour law from a care work perspective. There are two main reasons for this. The first relates to the definition of welfare economics as “the part of economics that deals with evaluating the state of the world and formulating recommendations for policies that would improve the wellbeing of society as a whole”<sup>14</sup>. Care work is intrinsically linked to the wellbeing of individuals and society in general. This strong connection suggests that welfare economics could accurately design or influence policies promoting a care-orientated society. The second reason is methodological: new welfare economics has assumed its normative dimension as a moral science and criticizes “welfarism”, the tendency - denounced by Amartya Sen - to reduce welfare economics to merely what can be counted and measured for individuals, ignoring other types of information and other considerations, such as justice, freedom, or rights. Welfare economics is “first required to define or decide what social welfare depends on, and which values should be considered as legitimate in this process”<sup>15</sup>. This position is epistemologically coherent and allows us to imagine how welfare economics could support both care-work-orientated policies at the state level and care work attitudes among individuals.

In the framework of this collective book, this chapter aims to explore and assess the implications of the utopian perspective of promoting care and wellbeing for work and labour law. In line with the normative values of new welfare economics, in Part I, I will develop, in line with the normative values of new welfare economics, the three principles mentioned above (Utility, Equity and Liberty). In Part II, I will show why care work is economically useful and can no longer be considered unproductive. In Part III, I will explain the importance of gender equity promoted by feminist theories. Finally, in Part IV, I will examine the frequent dilemma of combining the duty to care with the freedom to choose not to do care work.

## II. Care Work and its Utility

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14 Roger Backhouse, Antoinette Baujard, Tamotsu Nishizawa (eds), *Welfare Theory, Public Action, and Ethical Values: Revisiting the History of Welfare Economics* (University Press 2021)

15 Antoinette Baujard, 'Values in Welfare economics' in Conrad Heilmann, Julian Reiss, (eds) *The Routledge Handbook of the Philosophy of Economics* (Routledge 2021) 23

Even if it seems obvious today that care work is useful to our society, this was not the case in the traditional economic analysis of capitalism. It is necessary to understand why before we go forward.

### **A. Care Work as Unproductive in an Analysis of Capitalism**

In his famous *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith established a clear dichotomy between “productive” and “unproductive” labour. He compared the labour of a manufacturer producing goods with that of a menial domestic servant caring for his employer. While the manufacturer adds to the value of the raw materials he transforms into goods, “the menial servant, on the contrary, adds to the value of nothing”<sup>16</sup>. Smith did not deny the value of the work done by the menial servant: “The labour of the latter [the menial servant], however, has its value, and deserves its reward as well as that of the former [the manufacturer]”, but this value has less economic importance in a capitalist society. The services that the menial servant performs “perish in the very instant of their performance, and seldom leave any trace of value behind them for which an equal quantity of service could afterwards be produced”. Not being embodied in material goods, this work cannot be stocked, stored, and put into circulation.

Domestic servants are not the only category of “unproductive” workers for Smith. He includes other occupations: civil servants, lawyers, physicians, men of letters of all kinds, and more frivolous occupations such as “buffoons”, musicians and actors. The work done by these individuals has a certain value, but “the work of all of them perishes in the very instant of their production”<sup>17</sup>. For this reason, and even when they receive a wage, these workers are considered “unproductive” in a capitalist society. Besides domestic servants, Smith did not explicitly refer to care workers, but they obviously fall into the same category as all kinds of care work are “unproductive” work. But, as John Stuart Mill observes: “The labour of saving a friend’s life is not productive, unless the friend is a productive labourer”<sup>18</sup>.

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16 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (first published 1776, Penguin 1999), Book II, ch III

17 Ibid

18 Nicolas Bueno ‘From Productive Work to Capability-Enhancing Work: Implications for Labour Law and Policy’ (2022) 23 *Journal of Human Development and Capabilities* 354-356

Karl Marx refined Smith's distinction<sup>19</sup> in two ways. Firstly, he insists on the importance of the distinction *from a capitalist economic standpoint*. Work could be productive and useful *in general* without being considered so from a capitalist point of view. For example, consider peasants producing goods for themselves or selling such goods as self-employed artisans. Their labour is productive and useful in general, but not to the capitalist system, or as Marx states several times: "Only labour *which is directly transformed into capital is productive*"<sup>20</sup> or, more explicitly: "From the capitalist standpoint only that labour is productive which creates a surplus-value; and in fact not a surplus-value for itself, but for the owner of conditions of production"<sup>21</sup>. A simple purchase of labour services with money is not enough to make it productive labour because it needs to create a surplus value for the capitalist system.

Secondly, Marx states that "the designation of labour as *productive labour* has absolutely nothing to do with the determinate content of that labour, its special utility, or the particular use-value in which it manifests itself. *The same* kind of labour may be *productive* or *unproductive*"<sup>22</sup>. In particular, it has nothing to do with producing or transforming material things. Marx compares the example of an actor or a clown employed by a capitalist entrepreneur to whom he returns more labour than he receives in the form of wages ("productive" labour) with that of a jobbing tailor who comes to the capitalist's house to repair his trousers for him ("unproductive" labour). Marx always vigorously denounced the tendency - attributed to Smith and his disciples - of only taking "productive" work, embodied in materiality, into account.

Care work as a form of reproductive labour fits more easily into Marx's analysis than Smith's. Care work is productive and useful work from a general standpoint that is not merely capitalist, and therefore is legitimate in a non-capitalist society. This is why the Soviet economist S.G. Strumiling included housework as "productive" labour in his 1926 writing<sup>23</sup>. For him, "all social forms of labour

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19 Ian Gough, 'Marx's Theory of Productive and Unproductive Labour', (December 1972) 1/76 *New Left Review* 47

20 Karl Marx, *Theories of Surplus Value*, (1862 Lawrence & Wishart 1969) 393  
<<https://archive.org/details/marxtsvpart1/page/392/mode/2up?view=theater>> accessed 6 January 2023

21 *Ibid*, 153

22 *Ibid*, 401

23 Alena Heitlinger, *Women and State Socialism*, (Palgrave Macmillan 1979) 25



that promote the welfare of the whole society are seen as productive”<sup>24</sup>. However, the Soviet Union government in the 1930s, for whom more traditionally “productive work” was assimilated with labour embodied in material goods, did not uphold this position. This is one of many examples of the gap between the Marxist legacy and Marx’s original doctrine.

Marx added a thoughtful statement when he observed that, even in the capitalist system, a job could be considered both “productive” and “unproductive”, depending on the super-value it generates. Reproductive labour is not an exception. While most of it still performed outside the realm of a capitalist market economy, another part of it has been progressively organised as a market<sup>25</sup>. At least in Western Europe, a market sector for care and wellbeing services has emerged, partly encouraged by government policies; employers have designed capitalist strategies to offer services adapted to consumers. Our wellbeing is their “product”, and this sector of the economy is based almost entirely on a workforce of employees.

At this point, it is important to recall that the distinction between “productive” and “unproductive” labour is an outcome of capitalist economics. Care work is “unproductive” in the traditional economic sense because it is not a commodity with an exchange value. But it could also be “productive” if it is commoditized as a paid-for service provided by capitalist entrepreneurs.

## **B. Care Work as Crucial for any Economic System**

Even though it is considered “unproductive” and/or “unpaid”, nobody would deny that care work is necessary, even indispensable, for capitalist economies. The idea that capitalism could not sustain itself without care work is a commonly held view. Reproductive labour is essential for maintaining the strength of the workforce and, in the long term, for producing new generations of workers to perpetuate the productive workforce.

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24 Ibid

25 Clémence Ledoux, Karen Shire, Franca van Hooren, *The Dynamics of Welfare Markets: Private Pensions and Domestic-Care Services in Europe* (Palgrave Macmillan 2021)

The value of reproductive labour can also be assessed from another perspective. An anthropological study based on empirical research has demonstrated that “contrary to many characterizations of reproductive labor, reproductive and productive labor add value to one another and, in the process, serve as sources of happiness, dignity, and social legitimacy to women and men working in jobs that many consider onerous, dirty, smelly, undignified, and poorly remunerated”<sup>26</sup>. Yet, even if clearly articulated, the value of productive and reproductive activities is not equally important for individuals. Reproductive labour is a source of happiness and satisfaction when performed in informal settings, such as family homes, but is less valued when performed for others in the formal economy.

This dichotomy highlights what is considered “useful” and for whom. “Utility” has no meaning in itself, disconnected from the points of view of individuals, entrepreneurs, or governments. What is “useful” for some could be considered useless, futile, or even harmful for others. The utilitarian concept inherited from Bentham, which continues to influence many economic analyses, is too narrow to grasp the complexity of the wellbeing of individuals taken as such or collectively. New welfare economics has criticized the flaw of considering only individual preferences to evaluate social wellbeing. The weakness of utilitarianism is its focus on individual preferences. The challenge of new welfare economics is based on axioms derived from theories of justice, such as that proposed by Amartya Sen, that give analytical tools to objectively compare one situation to another to decide which is better for society. What could be seen as more productive *or* just in the economy? This question points towards different values and political choices. That is why feminist thinkers about care work, for example, have pointed out the lack of equity between men and women.

### **III. Care Work and Gender Equity**

Who are the carers contributing to the wellbeing of others? Intuitively, we think of a nurse looking after patients or a mother caring for her children, partner, or elderly relatives rather than a soldier fighting to defend his compatriots against their enemies. Of course, this representation is traditional, but it corresponds to a long-established reality: the people performing care work are predominantly women. The productive and reproductive labour dichotomy was not conceptually institutionalized in

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26 David Griffith, Kerry Preibisch, Ricardo Contreras, 'The Value of Reproductive Labor' (2018) 120 *American Anthropologist* 224

feudal societies and only became more pronounced during the transition to industrial capitalism<sup>27</sup>. In a gendered complementarity, men and women have been cast respectively as paid professional workers (male breadwinners) and unpaid non-professional housekeepers (female caregivers). But, as has been widely demonstrated, this division is unfair and creates barriers to transforming modern societies.

Women suffer from gender inequalities *both* in their professional lives and their family lives (by taking care of others). The professional and familial spheres are separate in our current institutions, but they interact in our daily lives. And it is barely possible to be fully engaged in one sphere without detrimental consequences for the other. The best professional careers are not fully compatible with family obligations (and vice-versa). How can we solve what could be called “the unpaid care/work conflict”<sup>28</sup>? Is it possible to reconcile unpaid care work with paid work? Among feminist scholars, this question has received different answers depending on welfare traditions: some national policies are more gender-orientated than others<sup>29</sup>. Yet this problem is also theoretical and grounded in a plurality of feminist approaches: some stress the specificity of women (*differentialist*), while others insist on equality with men (*universalist*).

The challenge is deeply cultural: “in many cultures, being female is associated with care for others”<sup>30</sup>. And this representation of women’s “natural altruism” explains why economists have considered care work a free-of-charge contribution, separate from the market economy. Even economic theories of justice focus more, in their examples, on resources, opportunities, and allocations than on burdens. However, the burden of taking care of others is inescapable. How can men and women share care responsibilities? This major issue is not new and has many dimensions: “social norms that closely link being female to care of others have significant economic consequences that contribute to gender

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27 Joanne Conaghan, ‘Gender and the Labour of Law’ in Hugh Collins, Gillian Lester, Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law* (OUP 2018)

28 Nicole Busby, *A Right to Care? Unpaid Care Work in European Employment Law*, (OUP 2011) Ch 1

29 Jane Lewis, ‘Gender and the Development of Welfare Regimes’ (1992) 2 no. 3 *Journal of European Social Policy* 159

30 M.V Lee Badgett, Nancy Folbre, ‘Assigning Care: Gender Norms and Economic Outcomes’, (1999) 38(3) *International Labour Review* 311

inequality within both the household and the labour market"<sup>31</sup>. It also has political and legal dimensions that feminists and legal scholars have examined.

### **A. Feminist Movements Demanding Equity and Pay for Care**

The first wave of the feminist movement was particularly active in France and has been called "maternal feminism" by historians<sup>32</sup>. Feminist women claimed pay for stay-at-home mothers, initially just for poor mothers and then for all mothers. They campaigned for a kind of citizenship and welfare state that recognizes their contributions to society as mothers. The International Congress for the Rights of Women held in 1892 was the first explicitly feminist call for "social protection for all mothers". Hubertine Auclert proposed state maternity benefits, funded by a new tax on fathers to reward women for their "indispensable services to the state". Käthe Schirmacher, in France and then in Germany, criticised economists for ignoring the work done by women. She argued that domestic work performed by women was "real work" and "work creating value", adding, "there is no work more productive than that done by mothers". Therefore, this work deserved pay. Why should women have to do house and care work for free, when they knew that other domestic workers got paid to do it? Moreover, Schirmacher argued that housework performed in the home by women is the "*sine qua non* condition" of the paid work performed outside the home by men and that "employers and men's work is dependent on women". Society should recognize domestic work's political and economic value by paying for it. In the same period, other feminists made similar arguments, for example, Léonie Rouzade on the "social function" of maternity; Marguerite Durand on the necessity of remunerating housework and establishing a social insurance maternity fund; and Nelly Roussel on a "fair wage for the noble maternal work", threatening a "womb strike" to get it. Similar ideas and propositions bloomed in other Western countries at the beginning of the twentieth century. It is important to remember these claims, not only because they are at the origin of the feminist movement but also because they could be forgotten or undermined by what later became the dominant idea identified with social progress for women: gaining access to the labour market on an equal footing with men.

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31 Ibid. 323

32 Gisela Bock, Pat Thane (eds), *Maternity and Gender Policies: Women and the Rise of the European Welfare States, 1880s-1950s* (Routledge 1991); Gisela Bock, 'Pauvreté féminine, droits des mères et Etats-Providence' in Georges Duby, Michelle Perrot (eds) *Histoire des Femmes en Occident* (Tempus 2002)

A century after the beginning of the feminist movement, it is clear that women have gained emancipation by working outside the home in the same way as men. Yet, care and reproductive work must still be done, whether it be by paid domestic workers, by other members of the household, by the working women themselves, or shared with their male partners. The idea of sharing this work became a permanent source of frustration and tension, particularly in the seventies, in the context of rapid changes in values and family structures in Western countries.

Strategic questions have been raised in controversial ways, such as: "How can we attack the unequal sharing of unpaid domestic work?"<sup>33</sup> a paper in which the sociologist and feminist Christine Delphy analyses the exploitation of unpaid domestic work performed by women for the benefit of men. She generally takes a critical approach to the patriarchal mode of production based on the exploitation of the female workforce. Her objective is abolitionist: nobody should work for others for free. Domestic work does not so much benefit capitalism as it benefits men as a dominant group. She denounces welfare-state regimes that support such inequalities between women and men and suggests ways to eradicate or at least reduce this injustice in our society. Her main proposal is to withdraw the fiscal and social advantages men could have by exploiting their female domestic partners. She argues that it should become normal for men to pay wages to their female partners who stay at home and also that society should give such women all the rights and social protections associated with paid work (e.g., sick pay, paid holidays and retirement pension). That would mean that the women who work at home and contribute to the wellbeing of others would become paid domestic workers protected by labour law and social security law.

Nancy Fraser, the famous feminist thinker, tackled the problem in an article<sup>34</sup> reproduced as a book chapter<sup>35</sup> with the evocative title: "After the Family Wage. A Post-industrial Thought Experiment". It is probably one of the most well-known attempts to assess utopian conceptions of gender equity in social welfare. One of its crucial elements is care work and how it could ideally be assigned to

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33 Christine Delphy, 'Par où attaquer le « partage inégal » du « travail ménager » ?' (2003) 22 n°3 *Nouvelles Questions Féministes* 47; Christine Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (Verso, 2016)

34 Nancy Fraser, 'After The Family Wage: Gender Equity and the Welfare State' (1994) 22 no. 4 *Political Theory* 591

35 Ngairé Naffine (ed) *Gender and Justice* (Routledge 2002)

institutions such as the family, the market, civil society or the state. Fraser contrasts and compares two models of social welfare for gender equity: the “Universal Breadwinner” model and the “Caregiver Parity” model. In the Universal Breadwinner model, “the bulk of such work would be shifted from the family to the market and the state, where it would be performed by employees for pay. Who, then, are these employees likely to be? In many countries today, including the United States, paid institutional care work is poorly remunerated, feminized, and largely racialized and/or performed by immigrants”<sup>36</sup>. Giving weight to the Universal Breadwinner model for all women would require us to “upgrade the status and pay attached to care work employment, making it, too, into primary-labor-force work”<sup>37</sup>. In the Caregiver Parity model, which is more in line with European social democratic policies, the aim is to “promote gender equity principally by supporting informal care work. The point is to enable women with significant domestic responsibilities to support themselves and their families either through care work alone or through care work plus part-time employment”<sup>38</sup>. With the support of public funds, “care work would be counted on a par with years of employment” with the rights and protections associated with employment, such as unemployment benefits and pensions. For Fraser, both models are utopian, but neither is utopian enough. Therefore, she proposes a third model, the Universal Caregiver model, “to *induce men to become more like most women are now*, namely, people who do primary care work”<sup>39</sup>. In this model, “all jobs would be designed for workers who are caregivers too. (...) Some informal care work would be publicly supported and integrated on a par with paid work in a single social-insurance system. Some would be performed in households by relatives and friends, but such households would not necessarily be heterosexual nuclear families. Other supported care work would be located outside households altogether – in civil society”<sup>40</sup>. This reference to civil society and self-managed care work activities “would overcome the ‘workerism’ of Universal Breadwinner and the domestic privatism of Caregiver Parity”<sup>41</sup>. The aim is to discourage free-riders: “men of all classes who shirk care work and domestic labor, as well as corporations who free-ride on the labor of working people, both underpaid and unpaid”.

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36 Ibid, 52

37 Ibid, 52

38 Ibid, 55

39 Ibid, 60

40 Ibid, 61

41 Ibid, 62

Such feminist ideas must be taken seriously and have made stimulating contributions to rethinking the social status of caregivers who contribute to the wellbeing of others. Feminist utopias have strong implications for the meaning of “work” in our societies and the definition of who should be identified as workers.

## **B. Feminist Legal Thinkers' Proposed Enlarged Scope of Labour Law**

Feminist legal thinkers have suggested enlarging the scope of labour law to include home-based care and domestic work<sup>42</sup>. The main problem with this proposal has been, and still is, how to account for the so-called *invisible* work, performed mostly by women, in homes. This ongoing challenge can be considered at different levels, and it deserves a general overview, from a historical and cultural perspective<sup>43</sup>.

As Judy Fudge notes: “traditional accounts of work and labour law have ignored all the unpaid domestic work, overwhelmingly performed by women”<sup>44</sup>. Joanne Conaghan observes similarly that: “feminist exhortations to expand the reach of labour law to encompass unpaid domestic labour are generally met with polite bewilderment”<sup>45</sup>. They both advocate change to this situation by reconceptualizing labour law in a broader sense. Scholarly feminists want to “extend the boundaries of the field beyond paid work to unpaid care and domestic labour” and to “revitalize our thinking about law for a post-industrial and globalized world”<sup>46</sup>. These ambitious changes would not only recognize unpaid, non-professional care and domestic tasks as work but would, more precisely, make such work covered by labour law. There are two main objectives for such a change.

First, it aims to reach *equality between women and men in society*. The traditional gendered division of labour (male breadwinner and female caregiver) is unequal and must be changed<sup>47</sup>. The structural

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42 Fudge, 'Labour as a “Fictive Commodity”' (n 7); Fudge, 'Feminist Reflections on the Scope of Labour Law' (n 6); Conaghan (n 27).

43 Raffaella Sarti, Anna Bellavitis, Manuela Martini, *What Is Work?: Gender at the Crossroads of Home, Family, and Business from the Early Modern Era to the Present* (Berghahn Books 2018)

44 Fudge, 'Labour as a “Fictive Commodity”' (n 7)

45 Conaghan (n 27) 271

46 Fudge, 'Feminist Reflections on the Scope of Labour Law' (n 6) 2

47 Fudge, 'Labour as a “Fictive Commodity”' (n 7) 131

and legal separation of labour and family domains perpetuates that division. "In societies that value paid employment as the primary path to 'citizenship', treating unpaid care work, predominantly performed by women, as a matter of family law, and not labour law, reinforces the idea that such work is not only a woman's natural role, but also that in the social hierarchy it is of lower value than paid employment"<sup>48</sup>. To avoid this tendency, the proposal is to consider all kinds of work under the same labour law umbrella. That would confer the same symbolic status on care and domestic work as on other work. "There is no *a priori* conceptual reason why such work should fall outside the boundaries of labour law"<sup>49</sup>.

The second objective is for labour law to cover *unpaid and paid work*. Proposing that "unpaid care work be located within the personal scope of labour law is designed to provide a critical perspective on the process of legal characterization and the concept of legal jurisdiction"<sup>50</sup>. This ambition goes beyond feminism: "it is a recurrent misapprehension of labour-law scholars to assume that the feminist focus on unpaid work is animated solely by egalitarian or justice-seeking aspirations. In fact, the feminist foregrounding of empirical work is equally driven by concerns to value the utility of the analytical and conceptual frames through which labour is commonly apprehended"<sup>51</sup>.

Yet, the idea of enlarging the scope of labour law has to confront serious obstacles. It threatens the identity of labour law in its usual conception. That is why those who propose it devote time to studying the ideas of potential allies. For example, Judy Fudge examines Mark Freeland and Nicola Kontouris's conception of "personal work relations" and their efforts to move on from traditional labour law categories based on formal paid contracts to include categories of workers such as volunteers and trainees. However, Fudge reproaches them for not being fully coherent with their criteria: care and domestic work for the benefit of the household is not on their list, even if "care work performed by a member of a household for a dependent is both relational and personal"<sup>52</sup>. Fudge considers that Freeland and Kontouris retain a conventional understanding of labour law.

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48 Ibid, 136

49 Ibid, 132

50 Fudge, 'Feminist Reflections on the Scope of Labour Law' (n 6) 3

51 Conaghan (n 27) 272

52 Fudge, 'Feminist Reflections on the Scope of Labour Law' (n 6) 16



Is there any conceptual opening for unpaid care work to become covered by labour law? Pessimistic opinions about “work law” as a large domain of regulations encompassing many forms of market and non-market work have been expressed<sup>53</sup>. Domestic housework and care work within families provides the “principal example” of non-market work, which differs from employment, as it obviously lacks an “employer” and a clear “exchange dimension”<sup>54</sup>. Women working in their homes have no contract, salary, or professional activity, even as independent workers. But these elements of the classical definition of labour law are also flexible and are precisely what is at stake. Currently, or at least in Europe, the general trend is to expand the scope of labour law in two main directions: one to broaden the definition of employee and the other to extend the protection of labour law to non-employees<sup>55</sup>. Each of these has been legally explored for caregivers contributing to the wellbeing of others<sup>56</sup>.

What should the boundaries of labour law, as an academic domain and as a set of conceptually forged and constructed categories and institutions, be? Who should be considered a worker and why? These questions are not new, but interest in them has been renewed by the ongoing dynamic of paid and unpaid care work. The scope of labour law is pragmatically and epistemically flexible. Another perspective is needed; “A new imagining would require us to go beyond analogizing household and familial relationships to employment and would put a greater emphasis on public provision and social responsibilities”. For that reason, Fudge supports basic-income strategies over wages-for-housework policies<sup>57</sup>. Her opinion is fully coherent. Enlarging the scope of labour law to include unpaid domestic workers and carers seems possible. It would bring us back to the original, broad concept of labour law as proposed by its founders, such as Sinzheimer, who encapsulates social welfare within it<sup>58</sup>.

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53 Noah Zatz, ‘The Impossibility of Work Law’ in Guy Davidov, Brian Langille (eds), *The Idea of Labour Law* (OUP 2011)

54 Ibid. 235

55 Adalberto Perulli, ‘The Legal and Jurisprudential Evolution of the Notion of Employee’, (2020) 11 2 *European Labour Law Journal* 117

56 See for example the French Law of 28 December of 2015 concerning the adaptation of ageing society and the status of “*proche aidant*”, (close helper/carer of a dependant elder in the household). Under certain conditions, he could become the employee of the dependant person. Even without this qualification, a system of respite leave has been implemented to allow caregivers to rest to avoid the risk of exhaustion caused by taking care of a dependant person.

57 Fudge, ‘Labour as a “Fictive Commodity”’ (n 7) 136 n. 96.

58 Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014) 15. The founders of the discipline had such a broad conception in mind yet restricted it to dependent labour.

Perhaps more radically, labour law could nowadays be conceived as an addition to a new welfare paradigm, and not the other way around.

Bringing together the forces of the feminist movement and critical thinking is welcome. There is a long road ahead for solving the gender equity problem in care work. In a utopian future, it would not be necessary to distinguish care work and reproductive labour from productive labour because they would be shared by men and women and considered equal in value and dignity. An integrated welfare and labour law system could better achieve this aim than separate systems.

#### IV. Care Work as Freely Chosen

Giving care to others is time-consuming and could be considered real work. However, in societies dominated by traditional conceptions of employment, it is difficult to imagine a framework that would include unpaid and paid work under the same umbrella. This situation creates a sort of paradox: care work is only considered work when it is paid. This institutionalized prevalence is not justified. A new, utopian perspective considers care work as real work, whether paid or unpaid.

That said, it is important to consider fundamental questions: is care work an obligation? How is it related to the right to work or the freedom not to work? Declarations of human rights have stressed the right to work as both a positive and a negative obligation<sup>59</sup>. Positively, the right to work has been considered the right to access a (paid) job and, in a broader perspective, the right to a free choice of employment and the right to develop at work. Negatively, it refers to the prohibition of forced or compulsory labour. This sheds light on a consequence that is not always socially recognised: prohibiting forced or compulsory labour implies, logically, the freedom *not* to work<sup>60</sup>. Moreover, in a human economy, this end is desirable: freedom from work could be considered a new motivating force that promotes human potential and creativity<sup>61</sup>.

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59 See in this book Chapter 11 by Alexander De Becker and Flore Claus.

60 Rafael Encinas de Muñagorri, 'Existe-t-il une liberté de ne pas travailler?' (2020) *Droit social* 416

61 Nicolas Bueno, 'From the Right to Work to Freedom from Work. Introduction to the Human Economy' (2017) 33 *n°4 International Journal of Comparative Law and Industrial Relations* 463

Amartya Sen's theory of justice has also stressed the positive meaning of liberty rather than the negative one. The capability approach has been examined widely, even in the field of labour law<sup>62</sup>. But care work is not only a question of individual choice: it is also a burden, a moral and social responsibility that is unavoidable at the collective level. Care work is required for a society to survive and for the wellbeing of its members. Therefore, institutions have to promote care work, both paid and unpaid.

Applying the freedom to choose not to work to care work leads to an uncomfortable conclusion: everyone has the option between whether or not to take care of others. Although this is coherent in an individualistic concept of freedom, it is understandable that it is economically and socially better for society to encourage individuals to care for others.

This problem is not abstract and can become prominent when individuals are workers for an employer, on top of being carers for their relatives. Many Western countries have adopted policies that reconcile paid employment and unpaid care<sup>63</sup>. "Rather than resulting from a new political awareness of the needs of workers-carers, such recent additions to the law and policy mix are part of the slow, incremental movement towards targeted state support for the management of unpaid care and paid employment within a social welfare framework"<sup>64</sup>. Welfare is the appropriate framework for rethinking the status of carers who contribute to the wellbeing of others because of its ability to grasp the professional and non-professional aspects of our lives simultaneously. But how is it possible to reconcile unpaid care work with paid employment?

Supiot's report deserves special attention here. One of its main proposals is to go *beyond employment* and accommodate a greater diversity of work. The report proposed the delineation of a *professional status* that encompasses all the forms of work that individuals could perform in their lifetimes, from

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62 Brian Langille, *The Capability Approach to Labour Law* (OUP 2019); Bueno (n 18) introduces the dichotomy between capability-enhancing and capability-reducing work; care work, paid or unpaid, being part of the former 362-365.

63 Example from the European Union: Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers.

64 Busby (n 28) 1

initial training to retirement, including employed or self-employed work in the market, work to acquire or improve knowledge, work for the benefit of others in the public sphere, voluntary work, and “even work performed in the domestic sphere”<sup>65</sup>. Basically, each individual should be able to use their freedom to choose between different kinds of work activities, considered socially valuable at different stages of their lives. This proposal implies creating a new welfare system in which domestic and care work could be integrated into other work activities. Yet, although this would be an improvement, unpaid care work will remain at the margin, eclipsed by paid employment. More ideally, the status of caregivers who contribute to the wellbeing of others would be detached from the classical representation of work as paid employment.

It would be a paradigm shift to transfer this problem away from employment (or even *beyond* employment) to the realm of social welfare. Pascale Vielle has taken such direction, and she raises interesting questions: what kind of needs do individuals freed from benefits related to care activities have? What types of actions and solidarity are required to satisfy such needs? Various techniques, including integrating paid employment with unpaid care work, have been used in some state social security systems to protect individuals who care for others in their households (e.g., children, elderly relatives, and partners). Vielle’s comparative study reviewed the different legal criteria that give access to state benefits, but neither those derived from paid employment nor their extension to care work seemed appropriate<sup>66</sup>. Therefore, social security systems should account for a new risk of conflict for individual paid employees with obligations to care for others. Yet Vielle’s proposed system is still based on the idea that individuals have paid jobs alongside their unpaid care work, it does not claim to include all the individuals who are not in paid employment and is limited to fixed time periods, for example, when children are in full-time education. The typical individual in the proposed system works both outside and inside the home. Nevertheless, it opens the door to reconsidering the status of unpaid carers who contribute to the wellbeing of others, for example, in “parental activities”<sup>67</sup>.

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65 Alain Supiot, *Au-delà de l'emploi: les voies d'une vraie réforme du droit du travail* (2nd edn Flammarion 2016) XXVII

66 Pascale Vielle, *La sécurité sociale et le coût indirect des responsabilités familiales: une approche de genre* (Bruylant 2001) 126-129

67 Ibid. 408

To go further would abolish the advantage of paid work for an employer over unpaid care work for the wellbeing of others. Because a utopian society is not necessarily based on the obligation to care for others, it should make it possible, when desired or required, to find care workers instead of having to provide the care oneself. But who would these workers be, and who would set their conditions of work?

Domestic workers are here a specific example. Despite there being large obstacles to overcome (e.g., risk of modern slavery, exploitation of immigrants in global care chains, difficulty of effective collective action, and additional public-health precautions required during pandemics), a realignment of the status of domestic and care workers seems to be taking place at the moment. The most normative improvement at the international level was the adoption of ILO Convention 189 in 2011. All domestic workers - representing approximately 8% of all working women - should be treated the same as paid employees, even if, in reality, many of them are currently undeclared or unofficial. Moreover, ensuring the decent treatment of care workers is essential<sup>68</sup>.

Ideally, “nobody should be reduced to an inferior status because they fulfil obligations to care for others”<sup>69</sup>, so improving the status of individuals who contribute to the wellbeing of others is a desirable objective. Yet, the status of paid care workers is currently low, and not only in Western societies. Market forces control the care work sector almost everywhere and have created a dynamic that has commodified care work, as illustrated by the emergence of big, for-profit firms that have structured and formalized the market for care work or by the generalization of poor working conditions and terms of employment in the care work sector. More generally, there is “a theoretical continuation of the care economy between unpaid care and care that has been marketized”<sup>70</sup>.

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68 ILO, *Securing Decent Work for Nursing Personnel and Domestic Workers: Key Actors in the Care Economy* (Reports of the CEACR, ILC 110th Session ILO 2022)

69 Fudge, 'Labour as a "Fictive Commodity"' (n 7) 135, quoting Elizabeth Anderson's idea of equality.

70 Adelle Blackett, 'Emancipation in the Idea of Labour Law' in Guy Davidov, Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 429–30

Accepted manuscript forthcoming as Rafael Encinas de Muñagorri, 'Labour Law for Care and Wellbeing' in Nicolas Bueno, Beryl ter Haar and Nuna Zekić (eds), *Labour Law Utopias: Post-Growth and Post-Productive Work Approaches* (Oxford University Press 2024).

But the emancipation of paid and unpaid care workers is still an objective that could one day be envisioned in a utopian *Globalcare* framework programme. Of utility to any economic system, care work is particularly desirable in a post-growth society that aims to sustain and develop wellbeing among its members. Care work should no longer be assigned solely to women or abandoned to the goodwill of benevolent individuals. It should be distributed equally to men and women by the policies supporting social welfare and labour law systems.

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