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Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context†

This Essay links a particular legal case study with a broader set of questions about the “family” in a global political and economic context. Part I clarifies the analytic links between the household, the market, and globalization. By studying Egypt, the Essay focuses on one part of this global sociolegal continuum and draws out the special significance of transnational background rules and conditions for the “developmental state.” Part II presents the legal framework affecting labor conditions of sub-Saharan African asylum-seekers who are migrant domestic workers in Egypt, and particularly the legal framework that affects their ability to bargain in securing livelihood strategies. Domestic and international law fail to provide adequate assistance and support for these efforts, but they inevitably construct the

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environments for them: “foreground” rules of employment and contract law (but not family law) affect the bargaining environment for migrant domestic workers; “background” rules, most importantly those related to sovereignty and immigration, also crucially influence the bargaining environment. Part III returns to the conceptual landscape, connecting this study with current quandaries in global governance studies and critical understandings of the “economic family.”

INTRODUCTION

Although the domestic worker is part of the “economic family,” supplying necessary labor to the household, the paradigm of family law does not govern the terms and conditions of domestic work. Family law concerns itself primarily with marital and parental relationships; as a consequence, it tends to conceptualize women in households as wives and mothers. For the same reason, issues of waged work and employment arise in family law primarily as they affect marital and parental relationships (e.g., through the valuations relevant to divorce proceedings). The “household” and the “family” are contiguous domains of unwaged work, largely distinct from the waged-labor marketplace.

Domestic workers destabilize such demarcations of the household and the market. Without legally recognized familial ties to the households they work for, domestic workers instead relate to these households as employees or independent contractors. Predominantly women,¹ they provide waged care work supporting households in which they are neither wives nor mothers, for employers who are frequently the household wives and mothers. Market conditions often, though not always, disfavor domestic workers against their employers.²

My goal in this Essay is to link a particular legal case study of domestic workers with a global political and economic context. This Essay examines the legal framework affecting the labor environment for African, and particularly Sudanese, asylum-seekers who work as household help in Cairo, Egypt.³ A “developmental state” such as

1. International Labour Organization [ILO], Int'l Lab. Conf., 99th Session, June 2–18, 2010, *Decent Work for Domestic Workers*, at 6, Report IV(1) (“women invariably make up the overwhelming majority of domestic workers”) [hereinafter 2010 ILO Report].

2. See *infra* Part I.A., I.B., and II.C.

3. See *infra* Part II.A. and II.B. Egypt, an African country that is also often considered to be part of the Middle East, draws asylum seekers from both regions. Though many asylum seekers in Egypt also come from other countries in the Arab world, those from Sudan, the Horn of Africa (Eritrea, Ethiopia, Somalia) and sub-Saharan Africa (most proximately Chad, Uganda, and the Democratic Republic of Congo, but also including nationals of western and southern African countries) are far

Egypt represents an important part of the global sociolegal continuum for labor migration and ultimately for migrant domestic workers. One of the aspirations of this paper is to demonstrate that the phenomenon of irregular migration to a developing country such as Egypt is intimately interconnected with broader effects of modernity and globalization. This focus resists the conventional notion of the modern household as economically residual. The household is an economically significant site, linked to patterns of globalization.⁴

The overwhelming livelihood strategy of these asylum seekers situates them as “irregular” (undocumented) migrant domestic workers. In understanding how law affects these livelihood strategies, this Essay does not look to family law as traditionally defined but rather to the laws which shape the work environment: first, to legal exceptionalism in “foreground” rules of employment and contract affecting domestic workers, and, second, to “background” rules and conditions governing migration and development that link national economies through global dynamics and that contribute to sociolegal environments of “informality” and “irregularity” for domestic workers. These legal rules and institutions governing employment and immigration are not the domain of family law, conventionally understood. Nevertheless, they importantly shape the conditions in which family law relationships arise.

Methodologically, this exposition combines core insights of legal realism—from Hale⁵ to Hohfeld⁶—with tools from governance studies in economics, critical theory and political science that look not only to formal laws stemming from state actors, but also to other potentially regulatory actors and forces: less explicit state practices of implementation and administration, non-state actors (international and non-governmental organizations), ideologies and informal norms, and economic relationships.⁷ Proper analysis of the laws must in-

more visible and much less well assimilated. United Nations High Commissioner for Refugees [UNHCR], 2005 STAT. Y.B. 319 (showing that recognized refugees from the Occupied Palestinian Territories far outnumber recognized refugees from the Sudan or any other African country. More recently, huge waves of Iraqis have fled to Egypt and elsewhere). See UNHCR, RESETTLEMENT OF IRAQI REFUGEES (2007).

4. See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law*, 58 AM. J. COMP. L. 753 (2010), for an exposition on the relationship of this proposition to world-systems theory.

5. See, e.g., *infra* text and note 20.

6. See, e.g., *infra* text and note 124.

7. In the study of governance we see a convergence of analytical methods from different parts of the academy: economists such as Douglass North have offered institutional analysis which includes both formal rules and informal norms and ideologies, as well as methods of implementation and enforcement (or lack thereof) by the state and the impact of economic and social forces, see, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990). Critical theorists such as Michel Foucault have adopted studies of governmentality which pay close attention both to administrative practices of the state and to forms of knowledge that shape power relations within state and social structures, see, e.g., MICHEL FOUCAULT,

clude their application through formal channels of doctrinal interpretation and implementation within the relevant institution (the state or the international organization in this context), the background social context, and the economic environment. This interdisciplinary method more accurately measures legal and institutional effect.

I. GENERAL CAUSES OF LEGAL INFORMALITY AFFECTING MIGRANT DOMESTIC WORKERS

Informality is legally produced through multiple layers of permission, omission, and prohibition. The informal labor environment for migrant domestic workers is importantly constructed by law in both its explicit content and in its application. In order to lay the groundwork for Part II's close study of the legal framework for asylum-seekers as migrant domestic workers in Egypt, this section sets out three general sources of legal informality for migrant domestic workers that arise at different levels: legal exceptionalism for domestic work; irregularity in migration; and the economics of the developmental state.

A. *Informality from Legal Exceptionalism for Domestic Work*

According to comparative studies of national legal systems, exceptional legal status for domestic workers manifests itself in a range of ways.⁸ Egypt is one of many legal systems that contain outright exclusions of domestic workers from labor codes and other regulations.⁹ This characteristic exclusion from legal regulation¹⁰

SURVEILLIR ET PUNIR (1975). Both approaches influence the analysis here. Additionally, the study of "global governance" by political scientists in international relations has offered the key precept that regulatory effects stem from both state and non-state actors. See, e.g., GOVERNANCE IN A GLOBALIZING WORLD (Joseph S. Nye & John D. Donahue eds., 2000).

8. Extensive comparative analyses of national legal systems have been conducted by the ILO. See, e.g., José M. Ramirez-Machado, *Domestic Work, Conditions of Work and Employment: A Legal Perspective*, ILO Conditions of Work and Employment Series No. 7 (2003) [hereinafter 2003 ILO Report]; 2010 ILO Report, *supra* note 1. Such comparison, needless to say, requires multiple disclaimers, as it is challenged not only by differences in legal contexts but also by the fact that labor protections can arise from multiple formal and institutional sources within any given country.

9. 2003 ILO Report, *supra* note 8, at 7 ("Quite frequently, labour laws refer to domestic workers either to exclude them completely from their scope or to grant them lower levels of protection by being deprived on many of the rights accorded to other categories of workers."). This arrangement characterizes between twenty and twenty-five percent of studied countries. Compare 2003 ILO Report, *supra* note 8, at 9 (finding that nine of sixty-four countries explicitly excluded domestic workers from labor laws), with 2010 ILO Report, *supra* note 1, Appendix (listing about twenty-five percent out of a total of seventy-two countries with explicit exclusions).

10. In a second group of legal systems, domestic workers are not explicitly excluded, but are not explicitly mentioned either, creating questions about the applicability of the general laws. Compare 2003 ILO Report, *supra* note 8, at 8 (finding that seventeen of sixty-four countries "have set no specific regulations on domestic

work in their basic labour legislation”), with 2010 ILO Report, *supra* note 1 (finding about half of seventy-two countries do not specifically address domestic workers). Whereas the 2003 ILO report draws no conclusions about the applicability of labor laws to domestic workers in such cases, the 2010 report reflects efforts by the ILO to take a broad perspective, stating that “this report . . . has, along with the [ILO’s Committee of Experts on the Application of Conventions and Recommendations] the ILO’s Legal Adviser, made the assumption that unless domestic workers are explicitly excluded from the scope of labour legislation they are included.” 2010 ILO Report, *supra* note 1, at 26, para. 88. The third group of legal systems, in which domestic workers are explicitly addressed, establishes separate standards for domestic workers, either in discrete sections of the general labor code or in entirely different regulations. *Compare* 2003 ILO Report, *supra* note 8 (finding thirty-eight of sixty-four countries’ labor laws addressed domestic workers in separate regulations), with 2010 ILO Report, *supra* note 1 (finding about twenty-five percent of countries explicitly addressed domestic workers in separate regulations). Such provisions nevertheless typically create less than complete parity with other types of work. *See, e.g.*, 2010 ILO Report, *supra* note 1, at 49, Figure IV.1 (“As can be seen from figure IV.1, there are significant differences between generally applicable working time standards and those that concern domestic workers. Globally, domestic workers are usually subject to less protective limits than those applied to the general workforce. Half of the countries surveyed permit the domestic labour force to work longer hours than other workers, while just over forty-five percent of countries impose the same limit for all workers; a small percentage have a lower limit or no limit at all for domestic workers.”).

Successful mobilization by labor, human rights, and other social movements have brought about some new initiatives to include or expand provisions on domestic work. *See* 2010 ILO Report, *supra* note 1, at 23–24 (describing initiatives in Spain, Uruguay, South Africa, and India). “Despite this, and despite its nominal inclusion in legislation, paid domestic work remains virtually invisible as a form of employment in many countries.” 2010 ILO Report, *supra* note 1, at 12, para. 44. In the United States, for example, both federal and state labor laws reflect the exceptional, and often excluded, status of domestic workers. Federal labor statutes amended a previous exclusion for some domestic workers from minimum wage and maximum hours restrictions in 1974, but still exclude “companions” for the sick or elderly. 29 U.S.C. § 213(a)(15) (2006). Federal statutory protections for the right to organize explicitly exclude all domestic workers. National Labor Relations Act, 29 U.S.C. § 152(3) (2006). Occupational health and safety standards do not exclude domestic workers at the statutory level, but that exclusion was nevertheless adopted at the administrative agency level “as a matter of policy.” 29 C.F.R. § 1975.6 (2006). Federal antidiscrimination provisions, though they contain no explicit exclusion of domestic workers, operate to exclude them in practice since they apply only to workplaces of fifteen or more employees. 42 U.S.C. § 2000e(b) (2006). State laws in the United States are, of course, more various, but reflect similar patchworks of exclusion and differential treatment. As one example, in the state of New York, the minimum wage and hours laws apply to all workers (though not explicitly mentioning domestic workers). New York Minimum Wage Act, N.Y. Lab. Law §§ 650–665 (Consol. 2010). Most other New York state labor laws either explicitly exclude domestic work, New York State Labor Relations Act, N.Y. Lab. Law § 701(3)(a) (Consol. 2010), fail to explicitly include it among a list of other specified occupations, N.Y. Lab. Law § 161 (Consol. 2010) (establishing one day of rest for a series of employees of owners of “dwellings” and other residences, but making no reference in the series to domestic workers), or include it but provide a lesser level of regulation. As in federal law, New York state labor law excludes live-in domestic workers from standard overtime rules, though unlike federal law New York does guarantee a lower level of overtime for them. N.Y. COMP. CODES R. & REGS. tit.12, § 142-2.2 (2010). Legislation has recently been proposed to amend this exceptionalism, and in the process has touched on central questions relating to the propriety of and justifications for it. *See, e.g.*, Mona Simpson, *Pay Your Nanny on the Books*, N.Y. TIMES (July 2, 2010), at A21 (describing the bill, passed by the New York state legislature and pending signature and approval by New York’s governor, which would bring domestic workers into line with standard protections on overtime, sick leave, and vacation). In conclusion, though the U.S. system of federalism creates a

contributes to an economic environment of pronounced informality, in which market transactions are not actively monitored or regulated by the government and without clearly defined contracts or protections.¹¹

The movement of the domestic worker out of the realm of the household represents one aspect of the broader move from “status to contract,”¹² against a backdrop in which industrialization shifted the bulk of production from “traditional” household-centered agrarianism to “modern” production occurring in firms.¹³ Yet that legal transformation has been far from complete.

A number of policy justifications exist for the lack of domestic work regulation. They include challenges to administrability posed by the small scale of domestic work and the “specificity”¹⁴ of domestic work conditions. The personal or intimate nature of the relationship between domestic workers and the families for which they work also heavily informs resistance to regulation.¹⁵ As the saying goes, domestic workers are “just like one of the family,”¹⁶ triggering conceptual resistance to formal legal intervention in the family private sphere. Next to such ostensibly more neutral reasons, however, lie conscious or unconscious legacies of slavery and servitude.¹⁷

B. Informality from Irregular Migration

Domestic work is also increasingly characterized by the “prevalence of migrant work.”¹⁸

more convoluted regulatory structure, in essential aspects it mirrors the pattern of legal exceptionalism discussed in the text.

11. For extensive discussion of the concept of economic informality, see *generally* LINKING THE FORMAL AND INFORMAL ECONOMY: CONCEPTS AND POLICIES (Basudeb Guha-Khasnobis et al. eds., 2006).

12. HARRY SUMNER MAINE, ANCIENT LAW 100 (1861) (“we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract”); see also DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT ch. 4 (1975). In eighteenth century legal treatises, the household included not only marital (husband-wife) and parental (parent-child) relations, but also those of “master and servant.” See JANET HALLEY, FAMILY LAW IN AMERICA: A GENEALOGY 4 (2009). In the nineteenth century, the household servant became a paid wage laborer and that legal relationship became defined by contract.

13. See HALLEY, *supra* note 12.

14. 2003 ILO Report, *supra* note 8, at 8; 2010 ILO Report, *supra* note 1, at 24. See *infra* Part II.B.4.(discussing ILO justifications for not including domestic work in international labor standards).

15. See Mundlak & Shamir, *supra* note *.

16. See BRIDGET ANDERSON, DOING THE DIRTY WORK: THE GLOBAL POLITICS OF DOMESTIC LABOUR ch. 9 (2000).

17. See *id.*, at 126; DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS (2008); see also *infra* Part III.B.

18. 2010 ILO Report, *supra* note 1, at 21 (“One of the most striking changes in domestic work in the past 30 years has been the growing prevalence of migrant work.”).

Though most migrants are authorized to enter their countries of destination, migrants also enter without proper documentary status. In traditional conceptions—and under current legal frameworks—undocumented migrants have been divided into distinct categories. “Forced” migration refers to those who arrive in a foreign country without proper documentation because they have been compelled by political persecution, and who now seek asylum. If successful, these asylum seekers will be recognized as refugees and will be resettled. By contrast, labor migration refers to those who leave home for “merely” economic reasons. In application, however, it is hard to keep these categories distinct. Migration experts are increasingly challenging this dichotomy as it applies to undocumented migrants. These experts argue instead for a single term of “irregular” migration, which would group both categories together or at least place them on a continuum with each other.¹⁹

Forced and labor migration have interconnected causes in the country of origin. Rather than distinct phenomena, political persecution and economic desperation may be co-effects of the same problematic environment in which political and economic instability and inequality feed into each other. Though rooted in legal tradition, the view that economic circumstances are not coercive is a particular and limited one.²⁰

The interconnection between “forced” and “economic” migration also characterizes the experiences of migrants in the host country. The relative ease of access to asylum procedures stems from the conception of undocumented migration as a crime,²¹ which may therefore be more easily excused than justified. Refugee status, though difficult to obtain, may be easier to claim than regular work authorization.²² In addition, once in the new country, both political

19. Philippe Fargues, *Work, Refuge, Transit: An Emerging Pattern of Irregular Immigration South and East of the Mediterranean*, CARIM Analytic and Synthetic Notes 2009/02, Irregular Migration Series, Background Paper (“[T]hese . . . categories are not as distinct as one might think in terms of migration motives.”). Fargues adds the third category of “transit” migrants, or those seeking to migrate elsewhere either through the refugee resettlement process or for work. This category is quite important in Egypt, as will be discussed below, but not necessary for the introductory discussion in this section.

20. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

21. See Fargues, *supra* note 19.

22. International Organization for Migration [IOM], *World Migration Report 2008: Managing Labour Mobility in the Evolving Global Economy* 206 (2008) [hereinafter 2008 IOM Report] (describing the “so-called ‘nexus’ between asylum and migration: the propensity of significant numbers of irregular migrants to make use of asylum procedures not because of a genuine need for protection, but to gain entry to new countries and access to their labor markets. This pattern is particularly evident when asylum systems are perceived as the primary or only official mechanism sanctioning the entry and stay of foreigners in the absence of an alternative means of access to the labor market.”); Guy Mundlak, *Irregular Migration in Israel—A Legal Perspective*, at 1, CARIM Analytic and Synthetic Notes 2008/59, Irregular Migration

asylum seekers and migrant workers find themselves faced with the same challenges and survival options.²³ Their experiences and livelihood strategies at that point can become indistinguishable.

The difficulty in access for economic or labor migration contributes to “the development of informal labor markets,”²⁴ since “the informal economy is the natural point of insertion into the labor force for migrants who cannot find regular employment because of their lack of appropriate documentation.”²⁵ Informality and irregularity tend to occur in low-skilled and less profitable sectors.²⁶ For a variety of reasons, migrants, and particularly migrant women, often end up in domestic work. Domestic work lacks licensing and membership requirements that form barriers to entry in other, more highly remunerative occupations that are therefore harder for foreign nationals to join. As one of the least well-paid and least secure types of jobs, it is also the most susceptible to newly arrived and poor workers.

Thus, economic informality both attracts, and is increased by, the presence of irregular migrants. Domestic work, as a major part of the informal economy, thus becomes a major draw for migrant women with “irregular” status seeking livelihoods.²⁷

C. *Informality in the Developmental State*

Though the most visible debates about immigration seem to focus on influxes from South to North, in fact most migrants “move from one developing country to another rather than from a developing country to a developed one.”²⁸ If unchecked immigration is viewed as a challenge to sovereignty or statehood, the challenge seems more acute precisely in the postcolonial global South in which sovereignty is comparatively recent and sometimes still contested.

Geographical proximity is of course one reason for the disproportionate migration between developing countries. These countries tend to be easier points of entry for other reasons as well, either intentionally for reasons of political solidarity or due to a lack of administrative and policing border control capacity. Both reasons ap-

Series, Legal Module, at 2 (“Some [migrants] attempt the asylum avenue given the tight control over labor migration.”).

23. Fargues, *supra* note 19, at 1 (these groups “tend to merge into one category in the local reality . . . where [they] have no legal access to labor, welfare and protection, and, at best, subsist.”).

24. 2008 IOM Report, *supra* note 22, at 43–44.

25. *Id.* at 207.

26. *Id.* at 206.

27. *Id.* at 82 (“Female labor migration is characterized in particular by its concentration in a very limited number of female-dominated (essentially lower-skilled) occupations associated with traditional gender role, such as domestic”); *id.* at Text Box 3.2.

28. *Id.* at 32. See *infra* Part III.A. for further reflections on migration.

ply to Egypt: the Egyptian constitution welcomes political asylum-seekers, and until recently Egypt's southern borders remained relatively porous.²⁹

Economic informality also exerts a particular pull in "the developmental state."³⁰ The International Labor Organization reports that in developing countries generally between one-half and three-quarters of non-agricultural jobs are informal. Moreover, though once viewed as a vestige of "traditional" economic production that would subside with economic modernization, it is now apparent that economic informality is "actually expanding" in developing countries.³¹ Thus, the issue of economic informality has become the issue of economic "*informalization*," denoting a process that is dynamically increasing in significance.³²

This process of economic informalization reflects a number of factors in developing countries: the deregulatory trend in the global economy generally in the past quarter-century;³³ the adoption of neoliberal economic policies under debt arrangements, established by international financial institutions;³⁴ and the decay of bureaucratic infrastructure. As a consequence, in many developing countries that once sought to maintain state-managed industrialization, employment in the formal and public sectors (often highly correlative) has now greatly declined.³⁵

29. See *infra* note 40 for a detailed discussion of factors contributing to migration from sub-Saharan Africa to Egypt.

30. For a discussion of "the developmental state," see David M. Trubek, Developmental States and the Legal Order: Towards a New Political Economy of Development and Law, Remarks at the Conference on Social Science in the Age of Globalization National Institute for Advanced Study on Social Science, Fudan University, Shanghai (Dec. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349163. There is an emerging body of scholarship on law and development. See, e.g., THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).

31. Martha Alter Chen, *Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment*, in LINKING THE FORMAL AND INFORMAL ECONOMY, *supra* note 11, at 75, 81.

32. James Heintz & Robert Pollin, *Informalization, Economic Growth and the Challenge of Creating Viable Labor Standards in Developing Countries 1* (Political Economy Research Institute [PERI], Working Paper No. 60, 2003) ("Over recent decades, conditions for working people in developing countries have undergone a major transformation. This has been the substantial rise in the proportion of people engaged in what is termed 'informal' employment, generating a broad trend toward 'informalization' of labor market conditions in developing countries. Current estimates suggest that informal employment comprises about one-half to three-quarters of non-agricultural employment in developing countries. Moreover, and perhaps even more significantly, these proportions appear to be rising even when economic growth is proceeding in developing countries, contrary to what a previous generation of researchers and policymakers had anticipated.").

33. Keith Hart, *Bureaucratic Form and the Informal Economy*, in LINKING THE FORMAL AND INFORMAL ECONOMY, *supra* note 11, at 21, 23, 27.

34. *Id.* at 26.

35. Dzodzi Tsikata, *Towards a Gender Equitable Decent Work Regime for Informal Employment in Ghana: Some Preliminary Considerations*, CAN. LAB. & EMP. L.

At a policy level, informalization is viewed approvingly in some sectors as a necessary adjustment to overly rigid and statist economic strategies.³⁶ In the area of labor law, the deregulatory argument is phrased in terms of the need for labor flexibilization.³⁷ Amongst critics of deregulation, however, the growth of “flexibilization” as a strategy for labor law reform has raised widespread concerns about its contribution to “precarious work”: “The decline of the standard employment relationship and the increase in precarious work—work that is insecure, badly remunerated, unprotected, and largely beyond the control of employees—is one of the most worrying problems of the new economy.”³⁸ Flexibilization is of concern everywhere, but in the developmental context it has the distinctive feature of having been part of a coherent reform agenda proposed by the international financial institutions.³⁹

Of what significance is economic informalization and labor market flexibilization to the issue of domestic work, for which such characteristics are neither new nor exceptional? These dynamics form an important component of the background conditions within which domestic labor markets work. They shape not only bargaining

(forthcoming); Marilyn Carr & Martha Alter Chen, *Globalization and the Informal Economy: How Global Trade and Investment Impact on the Working Poor* 2 (Women in Informal Employment Globalizing & Organizing [WIEGO], Working Paper No. 1, 2002) (“the informal economy [has] continued to expand and grow”).

36. Martha Alter Chen provides a comprehensive analysis of the literature:

Over the years, the debates on the informal economy crystallized into three dominant schools of thought: dualism, structuralism and legalism. The dualists argue that informal . . . activities have few (if any) linkages to the formal economy . . . and that informal workers comprise the less-advantaged sector of the informal market. Unlike the dualists, structuralists see the informal and formal economies as intrinsically linked . . . capitalist firms . . . are seen to reduce their . . . labor costs, by promoting informal production . . . both informal enterprises and informal wage workers are subordinated to the interests of capitalist development . . . The legalists focus on the relationship between informal entrepreneurs/enterprises and the formal regulatory environment, not formal firms.

Chen, *supra* note 31, at 84; see also Carr & Chen, *supra* note 35, at 6 (“what distinguishes each of these schools is their underlying model of power or power relationships. The dualists subscribe to the notion that there are few (if any) power relationships between . . . the informal and formal economies. The structuralists subscribe to the notion that the formal economy exerts a dominant power relationship over the informal economy in its own interests. The legalists subscribe to the notion that informal entrepreneurs exercise their own power.”).

37. Dzodzi Tsikata criticizes this literature, arguing that, in terms of labor issues, there has not been a focus on development or sustainability, or livelihood security. See Tsikata, *supra* note 35, at 5 (“Dominated by the international financial institutions . . . and economists, policy discussions have stressed the importance of flexibility of labor markets for economic growth.”); see also Anne Trebilcock, *Using Development Approaches to Address the Challenge of the Informal Economy for Labor Law*, in *BOUNDARIES AND FRONTIERS OF LABOR LAW* 63 (Guy Davidov & Brian Langille eds., 2006).

38. Rittich, *supra* note *, at 31.

39. *Id.* at 35.

amongst particular contracting parties but also the possible directions of change in a broader context. Against a backdrop of increasing informality, the likelihood of domestic workers to be able to demand better terms and conditions, either individually or collectively, is greatly challenged. Moreover, the decline of formal, public sector opportunities in developing countries is affected by these trends. With economic informality more prevalent, livelihood alternatives may decrease.

II. SPECIFIC CAUSES OF LEGAL INFORMALITY AFFECTING AFRICAN ASYLUM SEEKERS AS MIGRANT DOMESTIC WORKERS IN EGYPT

Egypt is a major destination for asylum-seekers.⁴⁰ In the migration lexicon, Egypt is a country of *transit*, meaning this destination is

40. The significant population of African asylum-seekers in Egypt can be attributed to a variety of interlocking factors. First, waves of intense political and military conquest and upheaval, as well as economic desperation, have expelled African asylum seekers from their countries of origin. Donald P. Chimanikire, *African Migration: Causes, Consequences and Future Prospects and Policy Options* (paper presented to the U.N. Univ. Conf., "Poverty, International Migration, and Asylum," Helsinki, Finland, Sept. 27–28, 2002). In addition to these "push" factors, are diverse "pull" factors attracting African asylum seekers to Egypt. Most African migrants enter Egypt from its southern border with Sudan. Munzoul A.M. Assal, *Refugees from and to Sudan* (paper prepared for the Migration and Refugee Movements in the Middle East and North Africa, The Forced Migration and Refugee Studies Program, American University in Cairo, Egypt, Oct. 23–25, 2007). Until recently, see *infra* text accompanying notes 96–99, the Egypt-Sudan border has not been heavily policed, certainly in comparison to the borders of proximate wealthier nations, i.e., Israel and Mediterranean Europe. Second, there are relative economic and political advantages of migration to Egypt. With its capital city Cairo as the largest on the African continent, Egypt at least promises economic and survival opportunities. As a territory that is relatively free of outright physical conflict—despite or because of its authoritarianism—Egypt offers a degree of stability and physical security. Cairo's history of relative cosmopolitanism must also factor in, as a city with ancient traditions of political, mercantile and cultural flux, and hybridity. Third, Egypt's legal culture has also been relatively hospitable. Following World War II, Egypt pursued aspirations of postcolonial leadership in the international community and the Third World. Accordingly, the Egyptian constitution grants political asylum to all who have defended "their people, human rights or justice." CONST. OF THE ARAB REP. OF EGYPT art. 53 ("The right to political asylum shall be guaranteed . . . for every foreigner persecuted for defending the peoples' interests, human rights, peace or justice.").

This general posture of openness is particularly enhanced in the case of the Sudanese, since, as the Egyptian government recently put it, "the Sudanese in Egypt have always enjoyed a special status." U.N. Comm. on the Prot. of the Rights of All Migrant Workers and Members of their Families, *Written Replies by the Government of Egypt Concerning the List of Issues Received by the Committee on Migrant Workers Relating to the Consideration of the Initial Public Report by Egypt*, ¶ 6, U.N. Doc. CMW/C/EGY/Q/1/Add.1 (Feb. 6, 2007) [hereinafter Migrant Workers' Committee]. This charitably phrased description glosses over the colonial relationship of Egypt (as a proxy for Britain) over Sudan and the prejudices of many Egyptians against the Sudanese. Nevertheless, it does reflect geographical, historical, cultural, and linguistic ties that have resulted in various treaties granting mutual rights of, *inter alia*, entry and work, though the most recent of these treaties has not been fully implemented. YASMINE AHMED & REBECCA DIBB, PANDEMIC PREPAREDNESS AMONG SUDANESE MIGRANTS IN

nominally only temporary for most asylum seekers, though in reality asylum-seekers are in Egypt indefinitely, as they await the refugee status determination process.⁴¹ Asylum seekers gather in Egypt to seek recognition under international refugee law and subsequently resettlement to wealthier countries in the global North and the Middle East.⁴² The fact that many migrants in Egypt are attempting to resettle elsewhere adds to the context of precariousness. Despite the many forces of attraction bringing asylum seekers to Egypt, they face serious challenges to their everyday survival. Domestic work forms a significant source of livelihood for them. As a consequence, asylum seekers are also migrant workers, demonstrating the difficulty in distinguishing “political” from “economic” migrants.⁴³ Without documentation in either category, they are also irregular migrants.

A. *Foreground Rules: Labor and Employment Law in Egypt*

Notwithstanding the regional and local particularities of Egyptian family law—an essential exposition of which can be found in Lama Abu-Odeh’s *Modernizing Muslim Family Law*⁴⁴—Egypt resembles the universalized model described elsewhere in this volume: it identifies much of what we understand as family law as a separate domain which does not include waged work.⁴⁵ The informal and un-

GREATER CAIRO 14 (Center for Migration and Refugee Studies, American University in Cairo, 2008) (“[T]he 1976 Wadi El-Nil (Nile Valley) [agreement] granted [mutual rights] . . . to enter and exit . . . without visa requirements and unrestricted access to education, employment, health-care and ownership of property This agreement was revoked in 1995 after an assassination attempt on Hosni Mubarak blamed Sudanese Islamist extremists in Ethiopia. The sudden change in the law caused a number of Sudanese migrants, previously residing lawfully in Egypt, to find themselves . . . in an irregular situation. . . . However, in 2004, Egypt signed the *Four Freedoms Agreement* . . . [which] promised a partial return to the Wadi-El Nil Agreement”). For criticisms of Egypt’s lack of implementation of the Four Freedoms Agreement, see *infra* Part II.B.3. . The result of all of these factors is that the Sudanese are the largest group of foreign nationals living in Egypt, though the lack of data leaves a very wide estimated range of between two and five million. Migrant Workers’ Committee, *supra*.

41. See *infra* text accompanying note 67.

42. Mundlak, *supra* note 22, at 6 (noting that irregular migrants that Israel deems “[i]ndividuals from enemy countries generally enter [by] crossing the border with Egypt.”).

43. Assal, *supra* note 40, at 6 (it is “difficult to procure neat boundaries between voluntary and forced migration. Whereas conventional wisdom in migration studies looks at refugees and migrants as having different motives for leaving a homeland (migrants for economic reasons, refugees for political reasons), recent studies show that a mixture of factors produces both categories.”).

44. Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT’L L. 1043 (2004).

45. See Halley & Rittich, *supra* note 4; Duncan Kennedy, *Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811 (2010).

regulated labor environment for domestic workers is constructed by law, most importantly through regulatory exclusion.⁴⁶

Household labor, in the Middle East and North Africa, as elsewhere, provides a major source of livelihood for migrant workers.⁴⁷ Egypt stands in contrast to other countries in the region, however, in its relatively low level of formally employed migrant domestic workers. Whereas in other states in the region, migrant workers are predominantly South Asians who have procured formal entry through the *kafala* system,⁴⁸ in Egypt (where the majority of domestic workers are Egyptian) migrant domestic workers are predominantly “irregular” migrants from the Sudan and the horn of Africa.⁴⁹ Due to the country’s relative poverty, large population, and unemployment, such formal contracting for migrant household help is negligible. This contrast is reflected also in the national origins of the domestic migrant worker population to be found in Egypt, which are predominantly sub-Saharan African as opposed to the South Asians who supply the households of the Levant and the Gulf.

The origin of much of the migrant domestic worker population as asylum-seekers and other irregular migrants, rather than in a formal contracting system, alters the dynamics between employer and employee. Though employees can be vulnerable in both circumstances, widespread abuses arising in the *kafala* context—restrictions on freedom of movement and withholding of identity and travel documents—do not tend to pertain to the Egyptian context where many migrant workers are unlikely to have valid travel documents in the first place. Rather, the vulnerability of migrant domestic workers comes from the factors that contribute to their irregularity—the lack of formal opportunities to enter the country, and the exclusion of domestic work from labor law.

46. See Ray Jureidini, *Irregular Workers in Egypt: Migrant and Refugee Domestic Workers*, 11 INT’L J. MULTICULTURAL SOC’YS 75–82 (2009).

47. The Middle East and North Africa have the “highest share of migrant populations in the world, if regular and irregular migration is included as well as refugees and asylum seekers.” Jureidini, *supra* note 46, at 77. Migrants have historically constituted an important source of labor for the oil-producing Gulf states, Libya, Jordan and, increasingly in recent years, Israel. Philippe Fargues, *Introduction* to EUR. UNIV. INST., ROBERT SCHUMAN CTR. FOR ADVANCED STUD., MEDITERRANEAN MIGRATION 2006-2007 REPORT (Philippe Fargues ed., 2007); ILO REGIONAL OFFICE FOR ARAB STATES, GENDER AND MIGRATION IN ARAB STATES: THE CASE OF DOMESTIC WORKERS 11 (Simel Esim & Monica Smith eds., 2004); see Mundlak, *supra* note 22. The migrant population is greatly increased beyond “regular” migrants by substantial movements of refugees: “the Middle East is the world’s largest source and host of refugees, constituting around 42 per cent of the total world refugee population.” Jureidini, *supra* note 46, at 77.

48. Elsewhere in the region, particularly the oil-producing Gulf states, Libya, and Jordan, the “*kafala*” system predominates whereby migrant workers enter into contracts prior to their entry into the country to work as household help. ILO REGIONAL OFFICE FOR ARAB STATES, *supra* note 47, at 44.

49. Jureidini, *supra* note 46, at 78.

Egyptian labor law (of which the most recent iteration is the Labour Law of 2003), provides: "Domestic work is an exception to labor law."⁵⁰ Reflecting the exceptionalism discussed in Part I above, the law is perhaps especially notable for also explicitly incorporating the justification for exceptionalism that draws on the context of intimacy in the household, as the law goes on to state: "This is because of the strong relations that grow between the servant and the employer which enables the former to know many secrets and personal issues of the employer."⁵¹

In addition to establishing this exception from the labor law code, the statute also explicitly overrides the general employment-security default rules in Egypt by stating that otherwise applicable "restrictions on terminating the work contract do not apply to the employer in this case."⁵²

Unlike other states in the region, in Egypt no specific legislation has been adopted to promote or facilitate the process of hiring and entry for migrant domestic workers—a fact which stems from the vast differences in underlying economic conditions between Egypt, a poor, labor-rich, densely populated country, and other countries in the region that are wealthier and suffer from shortages of national labor supply.

To the contrary, over time and particularly with the economic decline of the 1980s and early 1990s, the government has adopted a strict stance discouraging regular migration for domestic workers.⁵³ The Ministry of Labour and Immigration issued a decree in 1984 "specifically prohibiting foreign maids from entering Egypt."⁵⁴ In 1987 the Ministry of Internal Affairs "launched a campaign to arrest those without proper work visas."⁵⁵

In 2003, migrant domestic workers were included in a broader tightening of Egyptian work visa rules requiring that foreign workers obtain a work permit before entering the country. In 2006, foreign domestic workers were specifically the focus of a further tightening of controls on entry, in a decree prohibiting the request of work permits

50. Labor Law, Law no. 12 of 2003, art. 4(G); Jureidini, *supra* note 46, at 79.

51. *Id.*

52. *Id.*

53. The strict stance constitutes a change in enforcement rather than underlying law. The legislation itself has been in place since Nasser's regime, under which Law No. 91 was passed prohibiting the issuance of work permits to foreigners for positions that Egyptians could be hired to fill. In practice, the Ministry of Internal Affairs was lenient in enforcing this law, and many foreigners, among them migrant domestic workers, were allowed entry notwithstanding the general prohibition. Others intending to work entered on tourist visas, a practice that remains common in Egypt today.

54. Jureidini, *supra* note 46, at 80.

55. *Id.*

for foreign nationals to perform household labor (“house manager or a similar position such as nanny, cook, maid”).⁵⁶

The context of these restrictions appears to have been a straightforward series of efforts to shore up employment opportunities for Egyptian nationals.⁵⁷ Apparently to enable Egypt to remain compliant with its obligations under international refugee law, an exception to this strict prohibition allows a work permit to be obtained through special petition in cases of “humanitarian and social” necessity.⁵⁸ As the next section indicates, however, in practice this permission has not materialized, so that obtaining formal work permits remains practically impossible regardless of refugee or asylum-seeker status.

B. Background Rules: Migration and the Right to Work in Egypt for Asylum-Seekers

If foreground rules on labor and employment codes and regulations in Egypt provide virtually no protection for domestic workers; their relative bargaining power is affected by background rules relating to their status in the country. With the right to work legally in the country, migrant domestic workers would occupy a stronger position since they need not fear and cannot be threatened with arrest and deportation.

Egypt has entered into a significant number of treaties that do, by virtue of their subject matter, potentially apply to migrant domestic workers. That these treaties have been ratified, and that they are directly enforceable, makes them an important part of the legal framework. However, as the close readings below reveal, that framework often ends up mirroring, in form or in effect, the regulatory exclusion in the Egyptian labor code. As such, it reinforces the dynamic of informality that pervasively defines these workers’ experiences.

56. *Id.* at 82.

57. At the same time, the Egyptian government was acceding to greater trade liberalization on traditional goods through the World Trade Organization. The coincidence of these work restrictions with WTO accession may either have been evidence of the lack of coherence in domestic economic regulation, or evidence of a strategy to provide some economic security in a context where foreign import competition might otherwise be undermining employment opportunities.

58. *Id.* at 82:

In 2006 the Egyptian Government placed strict control on the formal entry of foreign domestic workers. Decision (700), article (11) states: It is prohibited to request a work permit for foreigners for the occupations of house manager or a similar position such as nanny, cook, maid, etc. of any nationality. It can only be obtained in writing from the central administration of labour from the ministry and in cases where humanitarian and social circumstances necessitates and after consulting with the minister.

According to Egyptian law, therefore, once a treaty is ratified and published, no additional step of implementing legislation is required for it to take domestic legal effect.