DIGNITY OF WORK AND FREEDOM AT WORK: ETHICAL REFLECTIONS ON THE ARTICLE 4 JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

CLEMENS SEDMAK*

INTRODUCTION

Siddarth Kara recounts the story of Enrique.[1] Enrique left his parents and younger sister at the age of nineteen to travel to the United States. A middleman ("enganchador") offered to arrange work for a fee; Enrique's parents offered their land on loan for the fee. The enganchador took the Mexican men to Nogales where they were met by another middleman (a "coyote"). He asked for a high fee to cross the border with him. The men had to work for a cartel to be allowed to cross the border; after five months they crossed the border and were driven to an avocado farm in California. In the beginning, Enrique objected to the hard work and the wage theft, but he was threatened with deportation and with the possibility to take his parents' land. The hygienic conditions were very poor, they had no phone, the farm was remote and getting to the city was expensive and they depended on the boss to get there. Enrique worked six days a week, from morning to dusk, and he made barely enough for his food and rent. He felt trapped. He kept working because of the hope that he would make enough, one day.

There is no doubt that Enrique's work is happening in conditions that violate human dignity he lived under undignifying conditions, was de facto deprived of his freedom to make choices about employers and types of work, and he was exploited, reduced to an instrument for the sake of other people's gain. There is also no doubt, however, that the service Enrique rendered to society through his work was crucial for the agricultural sector and the food

* Clemens Sedmak is professor of social ethics and director of the Nanovic Institute for European Studies in the Keough School of Global Affairs, University of Notre Dame. He has previously served as F.D. Maurice Professor of Moral and Social Theology at King's College London and is also Senior Research Associate at St Edmund's College, University of Cambridge. Sedmak is particularly interested in integral human development, human dignity, the ethics of institutions and poverty research. Relevant recent publications include: ENACTING INTEGRAL HUMAN DEVELOPMENT (sole author, 2023), ENACTING CATHOLIC SOCIAL TRADITION (sole author, 2022), THE ROUTLEDGE HANDBOOK OF PHILOSOPHY AND POVERTY (coeditor, 2024), INTEGRAL HUMAN DEVELOPMENT (co-editor, 2023), A COMMON GOOD APPROACH TO DEVELOPMENT (co-editor, 2022), and THE PRACTICE OF HUMAN DEVELOPMENT AND DIGNITY (co-editor with Paolo Carozza, 2020).

1. SIDDHARTH KARA, MODERN SLAVERY: A GLOBAL PERSPECTIVE 82–83 (2017).

supply of American society; his work was also an expression of his sense of identity as a person who sought to support his family.

There is dignity of work and dignity at work. If Enrique was properly paid and treated, there would be dignity of work and dignity at work. There is freedom of work and freedom at work. If Enrique was able to choose from different employers and types of work, he would enjoy freedom of work; if he enjoyed autonomy and decision-making powers in his workday, he would experience freedom at work. He holds on to his self-respect and dignity through the hope of a better future for himself and his family.

The following text offers an analysis of the relationship between dignity and freedom with regard to work, in conversation with the European Court of Human Rights and its jurisprudence on slavery, servitude, and forced labor.

I. DIGNITY, FREEDOM, AND WORK

Human dignity and freedom are linked in many ways. The first article of the Universal Declaration of Human Rights begins with the sentence: "All human beings are born free and equal in dignity and rights."[2] Freedom and Equality are presented, at least implicitly, as aspects of human dignity. Granting freedom and agency to a person is an expression of respecting this person's dignity. In a very basic sense "respect" means acknowledging the freedom of a person to make decisions and choices and to treat the person as an agent.[3]

If we were to look at three "ideal typical ways of conceptualizing human dignity" that have been identified by Marcus Düwell,[4] we can see the plausibility of the idea that dignity and freedom are inextricably linked. A first approach uses religious language and a creation story and justifies human dignity on the grounds that the human person has been created in the image and likeness of God;[5] the subsequent expulsion from paradise in the Jewish creation story points to the freedom of the human person, especially the freedom to make choices and the freedom to follow orders or violate normative expectations. Paradoxically, dignity-challenging conditions ("cursed is the ground because of you; in toil you shall eat of it all the days of your life") are a consequence and expression of human (and actually divine) freedom.[6] The Judeo-Christian tradition is clear about its commitment to the connection between dignity and freedom.

The approach from "rank" approaches dignity as a concept linked to nobility. Those with elevated rank have dignity. Even though this idea has been democratized in the sense that all human beings have dignity status ("we are all noble in this regard"), it is traditionally and culturally clear that higher rank

2. G.A. Res. 217 A (III), at 72 (Dec. 10, 1948).

3. *See generally* Werner Schirmer, Linda Weidenstedt & Wendelin Reich, *Respect and Agency: An Empirical Exploration*, 61 CURRENT SOCIO. 57 (2013).

4. *See* Marcus Düwell, *Human Dignity: Concepts, Discussions, Philosophical Perspectives*, *in* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES, 23–49 (Marcus Düwell et al. eds., 2014).

5. *Genesis* 1:26–27 (King James).

6. *Id*. at 3:17.

leads to higher decisionmaking powers. Michael Marmot's "Whitehall Studies" have established a link between decision latitude that comes with higher status in a professional hierarchy and health.[7] Dignity is "supported" or "affirmed" through freedom and the conceding of agency, which, traditionally, has been a matter of privileges and elevated status.

A third approach would look at dignity from the cosmological perspective of understanding the special status of the human person. "Pico della Mirandola would in this sense describe the human being as specifically different from animals (humans are free), from the angels (humans are free and vulnerable) and from God (humans are not perfect)."[8] Animals are bound by their instincts and have a clearly allocated place in the universe; human persons have to carve out their niches; in this sense, freedom is also responsibility and even burden, pressure, and hard work.

Dignity and freedom are linked in many and diverse ways. Robert Nozick famously argued in his thought experiment of an "experience machine" (a machine that can produce any experience or sequence of experiences a person might desire) that it would not be compatible with a person's dignity to lose the freedom of "real experiences,"[9] under the understanding that freedom means risk and risk means potential suffering, failure, and pain.

One could certainly discuss the question whether dignity and freedom have the same weight. Some traditions may lean more towards dignity, others more towards freedom. The German *Grundgesetz* (the Basic Law for the Federal Republic of Germany from 1949) for example, shows a dignity-centered approach to the foundations of a state.[10] This emphasis on dignity is, of course, linked to Germany's dark history in the twentieth century, especially during the Nazi regime. A key value emerged in response to the atrocities, namely dignity. The U.S. American tradition, on the other hand, seems to pursue a freedom-centered approach, reflecting a colonial past. This does not mean that the two normative traditions of the U.S. and Germany are mutually exclusive, but they do create different nuances and different moral ecosystems.

Based on the many ways dignity and freedom are linked, it is plausible to explore the connection between the idea of the dignity of work and freedom. Dignity and freedom are connected in many ways, including within the workplace. The dignity of work refers both to the dignity of the kind of work being carried out, and to the persons carrying out the work. Work can be "dignified" through proper remuneration, through elevating the status of the work done, and through appropriate working conditions. There is a twofold understanding of freedom of work when we talk about the connection between dignity and freedom: the freedom to choose work and the freedom a person experiences at work.

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7. *See* Michael Gideon Marmot et al., *Health Inequalities Among British Civil Servants: The Whitehall II Study*, 337 THE LANCET 1387–93 (1991).

8. Düwell, *supra* note 4, at 26.

9. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42–43 (1974).

10. Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.

There is an important body of literature on "dignity and work." The ILO (International Labor Organization) defines decent work as "*productive work, in conditions of freedom, equity, security[,] and human dignity* . . . in which rights are protected, which generates an adequate income, with adequate social protection."[11]

This implies that decent work deficit occurs when work lacks meaning and productivity, when work is forced or when unemployment is involuntary, when fairness standards are not respected, when dignity is violated and human rights are abused, when basic living and income security is compromised, and when the wage does not allow for decent living.

If we take the four features of dignity that Paul Perrin has identified in a global literature review[12] (acceptance of identity, inclusion, acknowledgment, recognition for agency and autonomy), we can establish further links between work and dignity: dignity-centered work does not require the person to deny or hide essential aspects of her identity; human-centered work does not exclude employees from major decisionmaking processes, creates a culture of recognition[13] and allows for the greatest possible freedom and agency, for example through "job crafting."[14]

The dignity of work can be linked to basic dimensions of work. We can fundamentally distinguish three main functions of work: life sustenance, self-realization, and a contribution to the common good. Thus, work and dignity are related in at least three ways: (a) work ensures living conditions in accordance with human dignity; (b) work allows a person to express her uniqueness; and (c) work enables a person to contribute to the community and to shape their community, thus expressing her status as a member of the community. These three dimensions can easily be connected to the idea of freedom: securing one's life sustenance allows for the freedom to choose a life one has reasons to value, self-realization refers to the freedom of developing capabilities and realizing one's potential, and the contribution to the common good means inhabiting the role of a contributive agent who is free to give to the flourishing of a community.

The above-mentioned aspects speak to the agent-specific aspect of work-related dignity. Additionally, there is the activity-specific aspect of work-related dignity, i.e., the nature of the activity and the question whether the activity per se can be justified on dignity-grounds; and we can additionally consider the framework and macro conditions of work. Crowley and Hodson, for example, found a correlation between neoliberalist organizational practices and reduced job security, low pay and benefits, and an increase in humiliation

11. *Report of the Director-General: Decent Work*, INT'L LAB. ORG. 3, 13 (June 1999), https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm.

12. *See* PAUL PERRIN ET AL., PULTE INST. FOR GLOB. DEV., UPHOLDING HUMAN DIGNITY: A LITERATURE REVIEW 7–8 (2022).

13. *See generally* Anders Petersen & Rasmus Willig, *Work and Recognition: Reviewing New Forms of Pathological Developments*, 47 ACTA SOCIOLOGICA 338 (2004).

14. *See* Amy Wrzesniewski & Jane E. Dutton, *Crafting a Job: Revisioning Employees as Active Crafters of Their Work*, 26 ACAD. MGMT. REV. 179 (2001); Amy Wrzesniewski et al., *Job Crafting and Cultivating Positive Meaning and Identity in Work*, 1 ADVANCES POSITIVE ORGANIZATIONAL PSYCH. 281 (2013).

and meaningless work.[15] Here again, the aspect of the nature of the activity calls for the freedom to choose a particular activity (freedom of work), and the aspect of the conditions points to the freedom to organize one's work (freedom at work).

Let us take a look at an example: "[A] young man who worked in an outpatient nursing service in lieu of military service . . . describes how he took his revenge on a senile old man with whom he had been annoyed: He used the washcloth first for the lower parts of the old man's body and then the same cloth also for his upper parts, particularly his face."[16] He uses strong emotional language to describe his doings:

> *I could strangle him with my bare hands! Yet, I decide for a more subtle revenge. Normally we use two washcloths: a bright one for the face and upper part of the body and a dark one for the legs and genitals. He, however, gets the dark washcloth for his bum as well as for his face.*[17]

The young man found himself in challenging working conditions and in a situation where he was forced to do service instead of military service. Let us say that these were unfavorable freedom-related aspects of his work situation. This does not, however and most clearly, justify the violation of human dignity that happened in this situation. We are actually depending on dignity-language to describe what happened since:

> it sounds somewhat forced to maintain that what is morally at stake in the example is merely a violation of autonomy. The young man's deed was so bad not just because he treated his client in a way that he would not have agreed to but because the treatment was deeply humiliating; it violated the old man's dignity.[18]

I asked students to comment on this situation and one student suggested that "it is undignified for a person to have to clean another's feces, and that in an ideal world the young man would not have to do such tasks for his job."[19] Not surprisingly, I strongly disagree with this idea that basic bodily service is "undignified" per se. It depends on the circumstances, including the dignity-culture, but also the freedom-conditions in that situation. The latter points to the limited agency of the dementia-patient who did not know what he was doing. Forcing the young man into this kind of work in lieu of military service is certainly not dignity-conducive, but it can reasonably be expected that the young man would honor minimum standards for respecting human dignity. The respect for human dignity can be pursued in a more maximal way and by way

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15. *See* Martha Crowley & Randy Hodson*, Neoliberalism at Work*, 1 SOC. CURRENTS 91 (2014).

16. Ralf Stoecker, *Three Crucial Turns on the Road to an Adequate Understanding of Human Dignity*, *in* HUMILIATION, DEGRADATION, DEHUMANIZATION: HUMAN DIGNITY VIOLATED, 7, 10 (Paulus Kaufmann et. al. eds., 2011).

17. *Id.* at 7.

18. *Id.* at 11.

19. This question comes from a homework assignment that Professor Clemens Sedmak gave his students.

of setting minimum standards. Minimum standards for respecting human dignity could be listed as: non-humiliation, non-infantilization, and non-instrumentalization.[20] It can be argued that these minimum standards are at the intersection of the discourse and practice of dignity and freedom.

Article 4 of the European Convention on Human Rights is an expression of the intention to secure and protect these minimum standards.

II. ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE SOCIAL WORLD

The European Convention on Human Rights is an international human rights treaty between the states that are members of the Council of Europe; it was drafted by the Council of Europe in Strasbourg in 1949 by more than a hundred members of parliament from across Europe. The Preamble refers to the Universal Declaration of Human Rights and the aim to secure "the universal and effective recognition and observance of the Rights therein declared;"[21] it recognizes the realization of Human Rights as a means to achieve greater unity between the members of the Council of Europe; it reaffirms the "belief in those fundamental freedoms which are the foundation of justice and peace in the word;" it refers the governments of European countries as sharing "a common heritage of political traditions, ideals, freedom[,] and the rule of law;" and it appeals to the principles of subsidiarity and responsibility in the implementation of the Convention.[22] Since the early 1950s, the Convention has been amended by a series of Protocols. It still serves the purpose of protecting ordinary people from abuse by the state and of ensuring that states fulfill their duties to protect individuals.

In this article I am focusing on Article 4 of the text. This is the wording of Article 4 of the European Convention on Human Rights:

> 1. No one shall be held in slavery or servitude.
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> 2. No one shall be required to perform forced or compulsory labour.
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> 3. For the purpose of this article the term "forced or compulsory labour" shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised [sic], service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; [and] (d) any work or service which forms part of normal civic obligations.23

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20. *See* CLEMENS SEDMAK, ENACTING INTEGRAL HUMAN DEVELOPMENT 12–24 (Orbis Books 2023) (1999).

21. *Convention for the Protection of Human Rights and Fundamental Freedoms*, EUR. CT. HUM. RTS. (Nov. 4, 1950) at 5, https://www.echr.coe.int/documents/d/echr/convention_ENG.

22. *Id*. at 5–6.

23. *Id*. at 7.

"Article 4 of the Convention, together with Articles 2 and 3 of the Convention, enshrines one of the fundamental values of democratic societies."[24] Article 2 refers to the right to life and Article 3 to the prohibition of torture and inhuman and degrading treatment. Article 4 cannot be understood or applied without proper considerations of the previous articles. It has to be seen as a further expression of the need to protect and respect human dignity. As a foundational article it can be understood to refer to minimum standards of democracies. Democracies are not compatible with slavery, servitude, or forced/compulsory labor. However, the third paragraph of the article introduced nuances.

Article 4 suggests two tiers of work situations that are incompatible with human dignity on the grounds of a notion and experience of freedom: slavery and servitude on tier one and forced/compulsory labor on tier two. The distinction between slavery and servitude is left open, and so is the distinction between forced and compulsory labor. It is remarkable that the article explicitly mentions exceptions to the category of inacceptable forced labor: prison work, military service or its substitute, emergency services, and "normal civic obligations." There is no doubt that these exceptions create an even wider gap between the two tiers: the prohibition of slavery and servitude is absolute, whereas the prohibition of forced or compulsory labor is open to exceptions. This, of course, weakens the prohibition, and opens the door for the interpretation of the exceptions, particularly the third and the fourth one.

By allowing exceptions, Article 4 clearly acknowledges the idea that the human person is part of a social fabric with duty-bearing relationships to this social fabric. The term "normal civic obligations" is quite elastic since changing cultural norms and political climates influence the perception of "normal." It is understood that the application of Article 4 has to consider all the circumstances of each case; the articles of the European Convention are not meant to be considered "in a vacuum."[25] Furthermore, since the famous case of *Tyrer v. United Kingdom* it has been recognized that the Convention is "a living instrument . . . which . . . must be interpreted in the light of present-day conditions."[26]

The phenomenon of human trafficking has not been mentioned in Article4, but has been recognized in the jurisprudence of the European Court of Human Rights as falling under the scope of Article 4.[27] The court's "Guide on Article 4" identifies key aspects of human trafficking and explains why this is covered by Article 4: Human trafficking

> treats human beings as commodities to be bought and sold and put to forced labour [sic], often for little or no payment, usually in the

24. EUR. CT. HUM. RTS, GUIDE ON ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2022), https://www.echr.coe.int/documents/d/echr/guide_art_4_eng.

25. *Id.*

26. Tyrer v. United Kingdom, App. No. 5856/72, Eur. Ct. H.R. para. 31 (1978).

27. *See generally* Vladislava Stoyanova, *Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking*, CAMBRIDGE J. INT'L & COMPAR. L. 407 (2014).

> sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions.[28]

Here we see that the aspect of "commodification" is crucial for the hermeneutics of Article 4. This term is also relevant in the cases of slavery, servitude, and in the case of forced labor. The person is reduced to an object, to a commodity that can be sold and bought. Another relevant aspect of Article 4, identified in this comment, is the dimension of "deprivation of freedom." If the freedom to move, the freedom to leave, the freedom to connect, and the freedom to understand a situation are taken away from a person, we are confronted with the emergence of an Article 4-relevant situation.

However, given the exceptions mentioned in the third paragraph of Article 4, the court has to assess on a case-by-case basis the "reasonableness" and "normality" of restrictions of freedoms. For example, in the case of *Adıgüzel v. Turkey*, the court had to decide whether the applicant (a medical doctor working as a civil servant working in a municipal authority) was doing "forced/compulsory labor" given the fact that he performed unremunerated work (especially the issuing of burial certificates) outside working hours. Even though the (timing of the) particular activities were not freely chosen and not remunerated, the court decided that the applicant—on taking up his medical post with the municipal services—should have known that his status required him to intervene in cases of deaths in order to draw up the requisite burial certificates. The court ruled that there is a specific civil service status for occupational doctors employed in municipalities. It is normal and has to be expected that these services cannot be predicted. There was no provision enabling the applicant to seek paid monetary compensation, but Turkish law nonetheless entitled him to apply for a day's leave for every eight hours' overtime. The court did not accept that this situation violated Article 4 of the Convention.[29]

Each case has to be judged on its own merits, taking into account the general context and the specific circumstances. With each judgment and decision, the court creates reference points and "discursive commitments" that structure future discourses deliberations, decisions, and judgments. The court needs to ensure that the States follow their duty: (a) to put in place an appropriate legislative and administrative framework to prevent violations of Article 4; (b) to take operational measures to protect victims, or potential victims; and (c) to properly investigate suspected cases of slavery, servitude, and forced labor (procedural obligation).

Article 4 does not provide a definition of the key terms used. Questions of definitions are, however, crucial. The question, "Who creates the definition for which purpose and for which audience," matters.

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28. GUIDE ON ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 22, at 6; *see also* Tenia Kyriazi, *Trafficking and Slavery*, 4 INT'L HUM. RTS. L. REV. 33 (2015).

29. Adıgüzel v. Turkey, App. No. 7442/08 Eur. Ct. H.R. (Feb. 6, 2018), https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-181255%22]}.

Let us take a look at the definition of slavery. In considering the scope of 'slavery' under Article 4, the court refers to the classic definition of slavery contained in the 1926 Slavery Convention (adopted by the Assembly of the League of Nations on September 25, 1926 and entered into force internationally on March 9, 1927), which defines slavery as "'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'"[30]

This influential definition underlines the commodification aspect of slavery. The definition, however, may not be the most appropriate for the late twentieth and early twenty-first centuries. The UN Working Group on Slavery defined slavery in 1975 as "any form of dealing with human beings leading to the forced exploitation of their labour [sic]" and as "all institutions and practices which, by restricting the freedom of the individual, are susceptible of causing severe hardship and serious deprivations of liberty."[31] This definition does not operate with the concept of comprehensive "ownership," but allows for the use of the term "slavery" already in conditions of serious deprivations of liberty (specifically forced exploitation). In those cases where freedoms are severely restricted, we would still find the reduction of a human person to an object (a *res*), even though this may not amount to full ownership the way a person can own a car or a house. Janne Mende has identified three denominators for modern slavery: control of a person over another; an involuntary aspect in their relation; and the element of exploitation.[32] Siddarth Kara defined slavery as "a system of dishonoring and degrading people through the violent coercion of their labor activity in conditions that dehumanize them."[33] Here, the key intention is to use categories like "honor" and "dignity" as key reference points. This definition establishes a firm link between dignity and freedom. Even though the demands on the intension of the term "slavery" vary, there is a consensus on the idea of a deprivation of human liberty that is not compatible with human dignity. We see a violation of a minimum standard of dignity, if a person is *reified*, reduced to a *res* (a "thing").

The Bellagio–Harvard Guidelines on the Legal Parameters of Slavery (adopted on March 3, 2012, by the Members of the Research Network on the Legal Parameters of Slavery) have underlined the commodification aspect in their 2012 approach:

> Possession is foundational to an understanding of the legal definition of slavery, even when the State does not support a property right in respect of persons. To determine, in law, a case of slavery, one must

30. GUIDE ON ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 22, at 8 (citation omitted). *See* Siliadin v. France, App. No. 73316/01, Eur. Ct. H.R. para. 122 (2005).

31. *See* Mahmoud Cherif Bassiouni, *Enslavement: Slavery, Slave-Related Practices, and Trafficking in Persons for Sexual Exploitation*, *in* INTERNATIONAL CRIMINAL LAW 535, 541–42 (3d ed. 2008); *cf.* Kathryn Zoglin, *United Nations Action Against Slavery: A Critical Evaluation*, 8 HUM. RTS. Q. 306 (1986).

32. Janne Mende, *The Concept of Modern Slavery: Definition, Critique, and The Human Rights Frame*, HUM. RTS. REV. 229, 231 (2019).

33. KARA, *supra* note 1, at 8.

> look for possession. While the exact form of possession might vary, in essence it supposes control over a person by another such as a person might control a thing.[34]

Here we see a stronger link between the idea of ownership and slavery, closer to the spirit of the 1926 Slavery Convention. There is an undeniable political dimension to definitions—as Stanley Engerman observed:

> [I]t is often hard to know exactly where to draw the line . . . . If slavery is regarded as a unique mode of control of individuals, this would seem to make all nonslavery appear as freedom and, therefore, to be regarded as a progressive and desirable development. If however, slavery is regarded as only one part, or one end, of a spectrum of controls, then some would argue that this makes slavery seem less evil and more benign than it was, compared to other forms of social control.[35]

A definition of slavery has to suggest that we are dealing with a homogeneous concept; the concept of slavery "has become a metaphor for extreme inequality, for subordination, deprivation[,] and discrimination."[36] These definitions are negotiated within and through a political discourse; they are created by (well-informed and well-educated) elites.

In contrast to "elitist" definitions of slavery, there is something to be said about victim-centered definitions that ask the following question: how would victims of slavery define slavery? For example, Dwain, a former child slave from Niger defines slavery as "removing someone's autonomy. Their way of thinking, their freedom to act out on their impulses . . . ."[37] Here we see less the idea of ownership, but the idea of deprivation of autonomy and freedom, including the deprivation of thought, and in this sense an aspect of colonization of the mind. Victim-centered definitions may differ from legal or other professional definitions. Andrea Nicholson, Minh Dang, and Zoe Trodd recount the assessment of a Lithuanian Pranus, a forty-six-year-old Lithuanian man who came to the UK to work:

> On his arrival in the UK, he was met by traffickers and forced into severe labour [sic] exploitation in the agricultural sector. His traffickers exercised control over his movements, accommodation[,] and income. They subjected him to violence and the threat of violence and retained a significant proportion of his pay. When he protested, his traffickers denied him further work in order to force

34. Jean Allain, *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, *in* THE LAW AND SLAVERY 555, 556 (2015).

35. Stanley L. Engerman, *Slavery at Different Times and Places*, 105 AM. HIST. REV. 480, 480 (2000).

36. Suzanne Miers, *Slavery: A Question of Definition*, 24 SLAVERY & ABOLITION 1, 1 (2003).

37. Andrea Nicholson, Minh Dang & Zoe Trodd, *A Full Freedom: Contemporary Survivors' Definitions of Slavery*, 18 HUM. RTS. L. REV. 689, 698 (2018).

> compliance. However, the power exercised over Pranus was not absolute . . . .[38]

He was also not treated "as a thing." His own assessment:

> To hear about slavery in the twenty-first century, a person is a slave when that person is under the control of other people, when a person is locked up, physically used and when a person gets beaten up sometimes and is sleep deprived. I read such stories in the papers sometimes. Worse situations, worse than mine, have happened to people.[39]

Here, we see the dynamic of considering inhumane conditions as not constituting a situation of slavery because of the availability of even more atrocious reference points, and maybe because the dynamic that it is hard to self-categorize as "slave." This is where the limits of subjective definitions (based on one's own experience) could be discussed.

Definitions also shape and reflect the imagination. Frederick Cooper, Thomas Holt, and Rebecca Scott observe:

> For North Americans, and perhaps others, the image of a sugar or cotton plantation in the early nineteenth century—with a labor force comprised of black slaves subject to arduous work routines and harsh discipline from white owners and overseers, living in "quarters" sharply demarcated from the housing of those not enslaved is so powerful that it tends to stand in for the very essence of slavery. These images make it hard to tell a more nuanced and complicated story, wider in space and deeper in time, about a set of practices that can still be usefully labelled slavery.[40]

This is also the case for the legal discourses within the European Court of Human Rights. The judges operate within a certain horizon of the imagination and a certain experiential horizon. Their own life experience matters. This has become evident in the above mentioned case *Tyrer v. United Kingdom* where we find a Separate Opinion of Judge Sir Gerald Fitzmaurice who argued against the judgment that the corporal punishment of Mr. Tyrer was a violation of Article 3 of the Convention: "I have to admit that my own view may be coloured [sic] by the fact that I was brought up and educated under a system according to which the corporal punishment of schoolboys (sometimes at the hands of the senior ones—prefects or monitors—sometimes by masters) was regarded as the normal sanction for serious misbehaviour [sic], and even sometimes for what was much less serious."[41] This illustrates the idea that the application of Article 4 will depend on the experiential horizon and the images connected to the category of "slavery."

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38. *Id*. at 692.

39. *Id*. at 693.

40. THOMAS CLEVELAND HOLT, FREDERICK COOPER & REBECCA J. SCOTT, BEYOND SLAVERY: EXPLORATIONS OF RACE, LABOR, AND CITIZENSHIP IN POSTEMANCIPATION SOCIETIES 6 (2000).

41. *See* Tyrer v. United Kingdom, App. No. 5856/72, Eur. Ct. H.R. para. 12 (1978) (separate opinion by Fitzmaurice, J.).

Before moving to the engagement with specific cases, a word about social realities: Article 4 does not refer to an empty extension. Slavery and servitude are real; so is forced labor. Article 4 of the Convention is not a luxury norm referring to a dystopian scenario. Kevin Bales begins his study on contemporary slavery with the story of Seba. Seba was taken by an acquainted lady from her grandmother's home in Mali to Paris with the promise of a school education. She was a small girl at that time and ended up as a domestic slave who was terribly abused in the midst of Paris. It is needless to say that the colonial ties, as the story of Seba also illustrates, play a role in this moral and human catastrophe. Sadly, this is not a rare case.[42] The number of domestic slaves and persons kept in forced labor is in the (dozens of) millions.[43] Domestic workers are an especially vulnerable group in particular.[44] Today, slavery is on the rise because of factors such as the often short, inexpensive journeys; the many industries that benefit from and create avenues for exploitation; and the high return on investment. Many victims of contemporary slavery are poor, belong to an ethnic minority, live in isolation, lack education, have unstable family units, and (quite often and sadly) do not have reasonable alternatives.

Let us take a look, at the end of this section, at the account of an experience of decade-long slavery. I refer to the powerful and famous story that has been told by Francis Bok, a Dinka and member of a large Catholic family of cattle herders; he was captured and enslaved at the age of seven during an Arab militia raid on the village of Nyamlell in southern Sudan during the Second Sudanese Civil War.[45] At that time, he knew very little of the outside world. He was held as a slave by a man named Giemma. After seven years, he tried twice to escape, but did not succeed. He waited another three years and managed to flee after ten years in slavery. He offers an account of his experience of slavery. Crucial aspects include fear, anxiety and toxic stress, isolation, objectification, and identity-defining lack of freedom. Bok's fear was nurtured by threats: "Whenever I showed any resistance, Giemma would use this same threat: 'You want your legs cut off, okay, act that way.'"[46] This threat became very real when he saw a boy on the neighbor's property missing a leg. His fear was constant ("The fear that something would go wrong that would earn me a beating never left me"), which created toxic stress.[47] "I was constantly balancing my fear of getting hurt on the job with the prospect of getting beaten

42. *See generally*, KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 1–33 (2012).

43. INT'L LAB. ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE (2022), https://www.ilo.org/publications/major-publications/global-estimates-modern-slavery-forced-labour-and-forced-marriage.

44. *See generally* Virginia Mantouvalou, S*ervitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers*, 35 INDUS. L.J. 395 (2006).

45. FRANCIS BOK & EDWARD TIVNAN, ESCAPE FROM SLAVERY: THE TRUE STORY OF MY TEN YEARS IN CAPTIVITY—AND MY JOURNEY TO FREEDOM IN AMERICA (2003).

46. *Id.* at 31.

47. *Id*. at 43.

when I returned with the animals."[48] He felt and was isolated, taken away as a seven-year-old boy from his family, into a foreign village where he did not know the language, the religion, and the culture. The sense of isolation was overwhelming: "There were only the goats to talk to—and myself."[49] "Giemma and his kids barely spoke to me, and my master kept me away from the only other people in the area who would have wanted to talk, the other Dinka boys;"[50] his social life was non-existing, it was "limited to grabbing a few quick sentences with another slave at the water hole."[51] He was reduced to an object and treated like an animal: "'I make you sleep with the animals,' Giemma announced to me, '*because you are an animal*;'"[52] consequently, Giemma's wife "treated me as if I were a diseased animal."[53] His loss and lack of freedom defined his identity; he was called *abeed*: "the word that these north Sudanese used for us black Sudanese . . . . A very useful word: it meant both 'black person' and 'slave.'"[54] His whole life belonged to somebody else, right after the first day: "I was now a worker. I worked all day, every day. With no choice. My childhood was behind me. I was seven years old."[55] He was forced to lose his language and was not allowed to speak a single word in Dinka. He realized the fundamental elements of slavery, being in another person's control, against one's will: "Although the concept of slavery was not clear to me, I understood that I had been taken from my family against my will, that I was working for Giemma against my will, and that Giemma and his family could beat me against my will."[56]

Bok mentioned wanting to escape because of his sense of future. We will come back to the importance of hope and the sense of future since this category plays an important role, also in the considerations of the European Court of Human Rights.

III. ETHICS AND ARTICLE 4 JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Let us explore the jurisprudence of the European Court of Human Rights on Article 4 cases. There is much to learn from the judges—they have to decide and make use of standard criteria and categories while at the same time honoring the individual case on its specific merits. I am particularly interested in the way the court's jurisprudence deals with aspects of human freedom and the connection between freedom and dignity. I will discuss cases of slavery and servitude first, then move to cases of forced or compulsory labor.

48. *Id*. at 44.
49. *Id*. at 38.
50. *Id*. at 67.
51. *Id.* at 68.
52. *Id*. at 46 (emphasis added).
53. *Id*. at 50.
54. *Id*. at 29.
55. *Id*. at 36.
56. *Id*. at 68.

A. Slavery and Servitude

The arguably most important case to date related to servitude in the jurisprudence of the European Court of Human Rights is the case *Siliadin v. France*.[57] The court's conclusion that the applicant was held in servitude was reached unanimously. The story of the case is sad: the applicant, a young woman from Togo, traveled to France on a tourist visa with Mrs. D. (a French national of Togolese origin), when she was fifteen-years-and-seven-months-old. It had been agreed that she would work at Mrs. D.'s home until the cost of her plane ticket had been compensated for; it was also part of the oral agreement that Mr. and Mrs. D. would regulate her immigration status and find her a place at school. The applicant then became an unpaid housemaid in the D. household and her passport was taken away from her. According to the court, about six months later "Mrs[.] D. 'lent' the applicant to Mr[.] and Mrs[.] B., who had two small children, so that she could assist the pregnant Mrs[.] B. with the household work. . . . The applicant lived at Mr[.] and Mrs[.] B.'s home, her father having given his consent."[58]

The applicant argued that her situation should be qualified as forced labor and even servitude:

> [H]er situation was not temporary or occasional in nature, as was normally the case with "forced or compulsory labour [sic]." Her freedom to come and go had been limited, her passport had been taken away from her, her immigration status had been precarious before becoming illegal, and she had also been kept by Mr[.] and Mrs[.] B. in a state of fear that she would be arrested and expelled. She considered that this was equivalent to the concept of self-imposed imprisonment . . . .[59]

The concept of self-imposed imprisonment was taken from supporting Council of Europe texts on domestic slavery with the following relevant criteria: "confiscation of the individual's passport, the absence of remuneration or remuneration that was disproportionate to the services provided, deprivation of liberty or self-imposed imprisonment, and cultural, physical[,] and emotional isolation."[60] The applicant used the argument of "identity" as a criterion for servitude: her exploitation at Mr. and Mrs. B.'s "hands had compromised her education and social integration, as well as the development and free expression of her personality. Her identity as a whole had been involved, which was a characteristic of servitude . . . ."[61] And further, "in addition to the unremunerated exploitation of another's work, the characteristic feature of modern slavery was a change in the individual's state or condition, on account

57. Siliadin v. France, App. No. 73316/01, Eur. Ct. H.R. (2005).

58. *Id*. para. 12.

59. *Id*. para. 94.

60. *Id*. para. 93.

61. *Id*. para. 95.

of the level of constraint or control to which his or her person, life, personal effects, right to come and go at will[,] or to take decisions was subjected."[62]

Let us summarize the main points here: temporality is a crucial factor (is the situation temporary or permanent?); the deprivation of freedom is based on the criteria of freedom of movement which, in this case, was restricted in physical, legal, and psychological ways; the idea of identity and social status is key.

The appeals court—having denied her servitude status—noted that the applicant was proficient in French and that she had learnt to find her way around Paris, given the responsibilities she had had in two households:[63]

> She had a degree of independence, since she took the children to the locations where their educational and sports activities were held, and subsequently collected them. She was also able to attend a Catholic service in a church near Mr[.] and Mrs[.] B.'s home. In addition, she left the house to go shopping . . . .[64]

The appeals court also questioned her vulnerability status—it considered:

> that it had not been established that the applicant was in a state of vulnerability or dependence since, by taking advantage of her ability to come and go at will, contacting her family at any time, leaving Mr[.] and Mrs[.] B.'s home for a considerable period and returning without coercion, the girl had, in spite of her youth, shown an undeniable form of independence, and vulnerability could not be established merely on the basis that she was an alien.[65]

This may be a bit surprising. Even though the description of "cumulative disadvantage"—found in many labor trafficking situations (powerlessness, illegal status, language barrier, replaceability, lack of cultural knowledge, lack of connections)–was not the case in this situation (there was no language barrier, the applicant would not easily be replaced, there was some cultural knowledge, however limited, and very few connections)–the above mentioned identity-affecting freedom constraints are too grave to be downplayed in that manner.

An interesting aspect of the discussion of the notion of freedom is told in section 39 of the judgment, quoting the applicant's uncle:

> The applicant's uncle stated that she was free, among other things, to leave the house and call him from a telephone box, that she was appropriately dressed, in good health[,] and always had some money, which could not have come from anyone but Mr[.] and Mrs[.] B. He had offered to give her money, but she had never asked for any. He added that he had raised this question with Mrs[.] B., who had told him that a certain amount was set aside every month in order to build up a nest egg for the applicant, which would be given to her when she left, and that the girl was aware of this arrangement. He stated

62. *Id*. para. 96.

63. *Id*. para. 35.

64. *Id*. para. 36.

65. *Id*. para. 40.

> that, on the basis of what he had been able to observe and conclude from his conversations with the applicant and with Mrs[.] B., the girl had not been kept as a slave in the home in which she lived.[66]

Unpacking this statement shows that it sets the bar for "slavery" very high. The passage seems to suggest that party A can be kept in slavery by party B if: A is not free to leave the house; A is not free to contact (people from) the external world; A is not properly dressed; A is not in good health; or A has no money and expressed the need for money if the opportunity arises.

This list does not consider the identity-affecting feature of the applicant's condition, such as the instance where the applicant may be "free" to leave the house, but she may not be "free" to move around as she pleases, and she may be "free" to communicate in a phone call her real situation. There can be a severe deprivation of freedom, even if the person is properly dressed and without visible health issues. This is not to say that the situation could be worse and that conditions of slavery will normally have health impacts. But the reduction of the understanding of freedom to external conditions does not allow for a deep reading of the situation.

Furthermore, the court went a step further and used the following terms to describe the applicant's situation: "vulnerability," "dependence," fear because of unlawful status, lack of resources, and lack of friends.[67] The court offered the following description of her situation: "She was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police. Indeed, Mr[.] and Mrs[.] B. nurtured that fear . . . ."[68] As a criterion for (lack of) freedom the court used (absence of) choice: "As to whether she performed this work of her own free will, it is clear from the facts of the case that it cannot seriously be maintained that she did. On the contrary, it is evident that she was not given any choice."[69] The court used the following definition of slavery from the 1926 Slavery Convention: "'slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised . . . .'"[70] This clear and strong reference to ownership could not be identified by the court in Siliadin's case: "Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr[.] and Mrs[.] B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an 'object.'"[71]

Here again, we see the limits of a definition of slavery, based on a legal understanding of slavery, as used in 1926 with many colonies still fully in place. In this judgment of "non-slavery" the court used the proxy of "reduction to an

66. *Id*. para. 39.
67. *Id*. para. 22.
68. *Id*. para. 118.
69. *Id*. para. 119.
70. *Id*. para. 122.
71. *Id*.

object" as an indicator of slavery—this proxy is related to the "ownership"-motif from the 1926 Slavery convention.[72]

In its assessment, whether the situation amounted to servitude, the court referred to the case of *Van Droogenbroeck v. Belgium*.[73] This is an interesting case. There, the applicant, a frequent recidivist in the Belgium justice system, complained about his multiple detentions and the fact that he was asked to work in prison. He claimed that this was a violation of Article 4 of the Convention. The court, unanimously, decided that this was not the case. The court held, "The applicant's first allegation was that by being placed at the Government's disposal he was held in 'servitude' . . . he was subjected 'to the whims of the administration.'"[74] The court held that his situation did not involve a "'particularly serious' form of 'denial of freedom' . . . ."[75] The applicant also complained that he was "forced to work," which the government rejected: "According to the Government, he was simply 'invited' to work."[76] The court concluded that the work required to be done happened "in the ordinary course of detention" and what Mr. Van Droogenbroeck was asked to do "did not go beyond what is 'ordinary' in this context since it was calculated to assist him in reintegrating himself into society . . . ."[77] Hence, the criterion employed for "servitude" was the category "serious form of denial of freedom." It goes without saying that not any and every prison sentence can be construed to violate Article 4 of the Convention.

In the case of *Siliadin v. France*, the court observed that servitude as "a 'particularly serious form of denial of freedom' . . . includes, 'in addition to the obligation to perform certain services for others . . . the obligation for the "serf" to live on another person's property and the impossibility of altering his condition.'"[78] This text would give us three reference points for "servitude": obligation to perform services, obligation to live on another person's property, and lack of possibilities to change the situation. These three elements together constitute a particularly serious form of denial of freedom.

The court used the following key observations as the foundation for its judgement in *Siliadin*: The applicant was required to perform forced labor; she had not chosen to work for Mr. and Mrs. B.; she was a vulnerable and isolated minor without resources and no means of living elsewhere than in the home of Mr. and Mrs. B. The court emphasized this, stating, "She was entirely at Mr[.] and Mrs[.] B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised [sic], which had never occurred."[79] She was afraid of the police, she had no freedom of

72. *See generally* Andrea Nicholson, *Reflections on* Siliadin v. France*: Slavery and Legal Definition*, 14 INT'L J. HUM. RTS. 705 (2010).

73. Van Droogenbroeck v. Belgium, App. No. 7906/77 Eur. Ct. H. R. (1982).

74. *Id*. para. 58.

75. *Id*.

76. *Id*. para. 59

77. *Id*.

78. Siliadin v. France, App. No. 73316/01, Eur. Ct. H.R. para. 123 (2005).

79. *Id*. para. 126.

movement and no free time;[80] she was not sent to school, against promises made; she "could not hope that her situation would improve and was completely dependent on Mr[.] and Mrs[.] B."[81]

Even though there is a certain lack of systematicity at the end of the document, the three conditions outlined (obligation to perform services, obligation to live on another person's property, lack of possibilities to change the situation) shed light on the category of servitude.

The *Siliadin* case has become instrumental in the court's understanding of human trafficking; this has become apparent in the case of *Rantsev v. Cyprus and Russia*.[82] This case is another sad story. There, Russian citizen Oxana Rantseva arrived in Cyprus in March 2001. X.A., the owner of a cabaret, had applied for an "artiste" visa and work permit to allow Mrs. Rantseva to work in his cabaret. After three days she left. Mr. M.A., the brother of X.A. and manager of the cabaret, notified the police and wanted her to be arrested and expelled from Cyprus. She was found in a nightclub a few days later. X.A. called the police and she was taken to a police station. Later, M.A. picked her up from the police station. And:

> According to M.A.'s witness statement, when he collected Ms[.] Rantseva from the police station, he also collected her passport and the other documents which he had handed to the police when they had arrived. He then took Ms[.] Rantseva to the apartment of M.P., a male employee at his cabaret.[83]

The following morning Oxana Rantseva was found dead on the street below the apartment.

The court considered an application by Oxana Rantseva's father who suspected a case of human trafficking and made reference to the *Siliadin* case. The court unanimously held that the complaint under Article 4 was admissible and that there had been a violation of Article 4 of the Convention by Cyprus. According to the court, Cyprus violated the Convention by not affording Ms. Rantseva practical and effective protection against trafficking and exploitation in general and by not taking the necessary specific measures to protect her. The Cypriot authorities had failed to conduct any investigation into whether Mrs. Rantseva had been a victim of human trafficking and whether she had been subjected to sexual or other exploitation.[84] The court explicitly considered the definitions of slavery and servitude, used in the *Siliadin* case.[85] It elaborated on the concept of servitude ("entails an obligation, under coercion to provide one's services, and is linked with the concept of 'slavery'") and on the concept of forced labor ("there must be some physical or mental constraint, as well as some

80. *Id*. para. 127.

81. *Id*. para. 128.

82. Rantsev v. Cyprus and Russia, App. No. 25965/04 Eur. Ct. H.R. (2010); *see also* Vladislava Stoyanova, *Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the* Rantsev *Case*, 30 NETH. Q. HUM. RTS. 163 (2012).

83. *Rantsev* para. 21.

84. *See id*. para. 253.

85. *Id*. para. 276.

overriding of the person's will").[86] The court also made reference to the Criminal Tribunal for the Former Yugoslavia that had concluded that "the traditional concept of 'slavery' has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership."[87] The Tribunal had also held, when assessing whether a situation amounts to contemporary slavery, "that relevant factors included whether there was control of a person's movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour [sic]."[88]

This language nuances the category of "control" which is seen multidimensionally (physical, psychological, sexual, labor-related). The court arrived at the conclusion that human trafficking "threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention;" the court considered it "unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery,' 'servitude' or 'forced and compulsory labour [sic].'"[89] Trafficking itself falls within the scope of Article 4 of the Convention. This is a lesson in the justifiable limits of precision.

From a conceptual and ethical perspective, it is noteworthy that the court outlined aspects of trafficking: it is based on the exercise of powers attaching to the right of ownership; it treats human beings as commodities to be bought and sold and put to forced labor; it implies close surveillance of the activities of victims, whose movements are often circumscribed; it involves the use of violence and threats against victims, who live and work under poor conditions. The court also quotes the Cypriot Ombudsman who had referred to sexual exploitation and trafficking as "taking place 'under a regime of modern slavery.'"[90] Here, the category of "slavery" is moved away from the strict understanding of the definition under the 1926 Slavery Convention. Human trafficking may not lead to a sense of "ownership," but to a sense of serious exploitation based on strict control.

In the case of *Zoletic and Others v. Azerbaijan*, the applicants were recruited in Bosnia and Herzegovina and taken to Azerbaijan, as temporary foreign construction workers, by representatives of Serbaz, a construction company.[91] They arrived on tourist visas. Once they entered Azerbaijan, their passports were taken away by representatives of the company and no individual work permits for them were obtained from the authorities.[92] This leads to another story of control:

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86. *Id*.

87. *Id*. para. 280 (citation omitted).

88. *Id*. (citation omitted).

89. *Id*. para. 282.

90. *Id*. para. 281.

91. Zoletic and Others v. Azerbaijan, App. No. 20116/12, para. 5 (Oct. 7, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-212040%22]}.

92. *Id*. para. 6.

> While in Baku, the applicants lived in five houses transformed into dormitories, in rooms with bunk beds shared by twelve to twenty-four people. The dormitories were not equipped with drinking water, running hot water, gas[,] or heating. The conditions were unsanitary owing to the accumulation of garbage. The applicants were not provided with medical care. They had to comply with strict internal rules established by Serbaz. . . . [T]hey had been taken to work and back by a bus and, at other times, had not been allowed to leave their accommodation without a special written permission issued by representatives of Serbaz. Violations of rules were punished by fines, beatings, detention in "a specially designated place" and physical threats.[93]

Here again, we find that initial consent does not constitute non-forced labor.[94] The court identified the following key elements as constituting coercion and "work extracted under the menace of penalty:" physical and other forms of punishments and retention of documents and restriction of movement explained by threats of possible arrests of the applicants by the local police because of their irregular stay in Azerbaijan (without work and residence permits).[95] Additionally, the situation reveals a high level of vulnerability: "non-payment of wages and 'fines' in the form of deductions from wages, in conjunction with the absence of work and residence permits, disclosed a potential situation of the applicants' particular vulnerability as irregular migrants without resources."[96] Here again, strict and violently enforced control, exploitation and the explicit consideration of the level of vulnerability come into play. This case could be seen as one of the dark sides of globalization. The status of vulnerability can be significantly increased if a person depends on middlemen and is moved across a border. It has been observed that "[s]ystems that sever liability between primary employers and migrant laborers through labor subcontractors are responsible for a significant proportion of slavery and child labor in migrant worker populations around the world."[97]

Another highly instructive case in the history of Article 4 jurisprudence of the European Court of Human Rights is the case *C.N. and V. v. France* where the court clarified the distinction between servitude and forced/compulsory labor:

> [T]he fundamental distinguishing feature between servitude and forced or compulsory labour [sic] within the meaning of Article 4 of the Convention lies in the victim's feeling that their condition is permanent and that the situation is unlikely to change. It is sufficient that this feeling be based on the above-mentioned objective criteria or brought about or kept alive by those responsible for the situation.[98]

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93. *Id*. para. 7

94. *Id*. paras. 149–50.

95. *Id*. para. 166.

96. *Id.*

97. KARA, *supra* note 1, at 98.

98. C.N. and V. v. France, App. No. 67724/09, Eur. Ct. H.R para. 91 (2012).

Here again, we see, as in the *Siliadin* case, the dimension of temporality and hopelessness (permanence of the situation, impossibility of altering the condition).

In this case, the court was dealing with two applicants—the first applicant had arrived from Burundi in France with her sisters at the age of sixteen, an arrival arranged by their aunt, N., wife or Mr. M. (a former government minister of Burundi) who enjoyed diplomatic immunity was a UNESCO staff member. This fact created an asymmetry of power from the get-go (education, social status, legal status, etc.). The privileges that are granted with the kind of immunity Article 31 of the 1961 Vienna Convention on Diplomatic Relations spells out lead to an increase privilege on the side of diplomats and their families, and, at the same time, to an increase of the vulnerability of those who interact with and work for people enjoying the privilege of diplomatic immunity.[99] Any analysis of exploitation will have to take notice of asymmetries in social and legal protection, and the dynamics of power and privilege.

In the case of *C.N. and V. v. France* the first and second applicants stayed in the household of Mr. M., their sisters were handed over to foster families. The story is once again sad and familiar:

> The applicants said that as soon as they arrived they had been made to do all the housework and domestic chores necessary for the upkeep of the house and the M. family of nine. They alleged that they had been used as 'housemaids.' The first, older applicant said that she had to look after the family's disabled son and do the gardening. They were not paid for their work or given any days off.
>
> The applicants affirmed that they had had no access to a bathroom and only an unhygienic makeshift toilet at their disposal. The Government submitted that they were not denied access to the bathroom, but that it was limited to certain times of day. The applicants added that they were not allowed to eat with the family. They were given only pasta, rice, and potatoes to eat, and occasionally leftovers from the family's meat dishes. They had no leisure activities.
>
> . . . .
>
> . . . The first applicant was never sent to school or given any vocational training. She spent all day doing housework and looking after her disabled cousin. . . .
>
> . . . .
>
> . . . The applicants further alleged that they had been physically and verbally harassed on a daily basis by their aunt, who regularly

99. *See* Samuel Lovett, *Foreign Diplomats Trap and Abuse Domestic Workers in Private Households across London*, THE TELEGRAPH (Feb. 2, 2023), https://www.telegraph.co.uk/global-health/climate-and-people/foreign-diplomats-trap-abuse-domestic-workers-private-households/.

> threatened to send them back to Burundi to punish them and made disparaging remarks about their late parents.[100]

The court arrived at the conclusion that the situation of the first applicant amounted to servitude, but not the situation of the second applicant.

Here is the reasoning: the first applicant was convinced that her administrative situation in France depended on her living with Mr. and Mrs. M., and that she could not free herself from their hold without placing herself in an illegal situation; she did not attend school

> and she received no training that might have given her any hope of ever finding paid work outside the home of Mr[.] and Mrs[.] M. With no day off and no leisure activities, there was no possibility for her to meet people outside the house whom she might ask for help.[101]

Hence, she had the justified feeling that her condition was permanent and could not change. The second applicant was not kept in servitude because she was less isolated than her sister—she attended school and her activities were not confined to the home of Mr. and Mrs. M. She also had time to do her homework.[102] Education and time for homework also gave her not only more freedoms to move, but also the hope to change her situation and build a life.

Once again, we see the role of hope. Hope and dignity can be linked in the sense that "the right to hope" can be used to show respect for human dignity. In a decision that received a lot of public attention, the case of *Vinter and Others v. United Kingdom*, the European Court of Human Rights had ruled that it was a violation of Article 3 of the Convention if a person was sentenced to life-long imprisonment without the possibility of parole.[103] In a Concurring Opinion, Judge Power-Forde stated:

> what tipped the balance for me in voting with the majority was the [c]ourt's confirmation, in this judgment, that Article 3 encompasses what might be described as 'the right to hope.' It goes no further than that. The judgment recognizes, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to, change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.[104]

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100. *C.N. and V* paras. 12–13, 15, 20.

101. *Id*. para. 92.

102. *Id*. para. 93.

103. Vinter and Others v. United Kingdom, App. Nos. 66069/09, 130/10, 3896/10, Eur. Ct. H.R. (2013).

104. *Id*. (Power-Forde, J., concurring).

The connection of hope and dignity can be established for the most serious criminals. The same connection has to be made relevant in cases of servitude of slavery. Hope is not per se a legal category, but it can be turned into a moral category and thus it can become legally relevant. It is interesting that Nicholson, Dang, and Trodd quote Douglass and Jacobs, authors of the two most celebrated nineteenth century slave narratives, who "offered a definition of slavery as the eternal present—a space of no-time. Slavery is suspended time where the future is inaccessible, and human beings cannot hope or plan because they cannot decide or act."[105]

The same idea of hopelessness and impossibility to alter a situation can be found in the case of *C.N. v. the United Kingdom*: the Ugandan applicant claimed that she was held in servitude as live-in-carer for Mr. and Mrs. K., an elderly Iraqi couple:

> She submitted that she was required to live with Mr[.] and Mrs[.] K., who demanded difficult care and needed her to be 'on call' twenty-four hours a day. She did so under coercion by S. and M. and she received no notable remuneration. Her working hours and conditions, and the removal of her travel documents, were such as to render her unable to alter her own situation.[106]

Sadly, many migrants perceive exploitative labor conditions as a necessary step in their upward labor market mobility and are driven by the hope for and the dream of a better life for their families. The role of hope therefore, however dignifying, remains ambivalent. It can be used as an important criterion to understand dignity-relevant deprivations of freedoms, but hope can also be appropriated to endure inhumane conditions. Slavery and servitude are conditions without freedom and without reasons to hope.

B. Forced Labor

The second term, covered by Article 4, is the category of forced labor. We have seen that one criterion to distinguish between servitude and forced labor, as applied by the European Court of Human Rights, is the temporality and openness of the situation—is it permanent, are there reasons to hope for change?

Forced labor refers to a social context. The term can only be used in a relational context where we deal with power asymmetries. In the Case of *V.C.L. and A.N. v. the United Kingdom*,[107] the court underlined that "where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. In this regard, the prior consent of the victim is not sufficient to exclude the characterisation [sic] of work as forced labour [sic]."[108]

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105. Nicholson, Dang & Trodd, *supra* note 34, at 695.

106. C.N. v. United Kingdom, App. No. 4239/08, Eur. Ct. H.R. para. 48 (2012).

107. V.C.L. and A.N. v. United Kingdom, App. Nos. 77587/12, 74603/12, Eur. Ct. H.R. (2021).

108. *Id*. para. 149 (citation omitted).

The key term here at stake is the term vulnerability. Vulnerability is exposure to risk without proper protection. Vulnerability can be characterized as the condition "to be susceptible to harm, injury, failure, or misuse."[109] Vulnerability means that precious goods cannot be safeguarded. The levels of vulnerability are unequally distributed: "a person is vulnerable to the extent to which she is not in a position to prevent occurrences that would undermine what she takes to be important to her."[110] The cases dealing with forced labor or even servitude are always also tales about vulnerability and power.

We find the same emphasis on vulnerability in the case of *Chowdury and Others v. Greece*, where the court considered:

> that where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. The prior consent of the victim is not sufficient to exclude the characterisation [sic] of work as forced labour [sic]. The question whether an individual offers himself for work voluntarily is a factual question which must be examined in the light of all the relevant circumstances of a case.[111]

Vulnerability comes in many forms—linguistic, epistemic, social, physical, mental and psychological—if a person does not have the epistemic (and educational) resources to understand the implications and the complexity of a situation, there is no possibility for robust consent. Hence, the different types of vulnerability reenforce each other. Forced labor is often the result of the cumulative disadvantage of multiple vulnerabilities.

In their Concurring Opinion in the case of *J. and Others v. Austria*,[112] Judge Pinto de Albuquerque, joined by Judge Tsotsoria, characterize forced labor as a relational situation:

> A forced labour [sic] situation is determined by the nature of the relationship between a person and the "employer," and not by the type of activity performed, the legality or illegality of the activity under national law, nor its recognition as an "economic activity." The exaction of labour [sic] under the threat of a penalty is the characteristic feature of this relationship. Forced labour [sic] thus

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109. Paul Formosa, *The Role of Vulnerability in Kantian Ethics*, *in* VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 88 (Catriona Mackenzie et al., eds., 2014).

110. Joel Anderson, *Autonomy and Vulnerability Entwined*, *in* VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 135 (Catriona Mackenzie et al., eds., 2014).

111. Chowdury and Others v. Greece, App. No. 21884/15, para. 96 (Mar. 30, 2017), https://hudoc.echr.coe.int/eng?i=001-172701. Furthermore: "In the present case the [c]ourt notes that the applicants began working at a time when they were in a situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported. The applicants probably realised [sic] that if they stopped working they would never receive their overdue wages, the amount of which was constantly accruing as the days passed. Even assuming that, at the time of their recruitment, the applicants had offered themselves for work voluntarily and believed in good faith that they would receive their wages, the situation subsequently changed as a result of their employers' conduct." *Id*. para. 97.

112. J. and Others v. Austria, App. No. 58216/12 (Jan. 17, 2017), https://hudoc.echr.coe.int/eng?i=001-170388.

> includes forced prostitution, forced begging, forced criminal activity, forced use of a person in an armed conflict, ritual or ceremonial servitude, forced use of women as surrogate mothers, forced pregnancy and illicit conduct of biomedical research on a person.[113]

Here we also see that "vulnerability" is a relational concept—the vulnerability status of a person is rarely absolute, it depends on the social, cultural, political and legal context. The link between vulnerability and prostitution will be discussed further down.

Not all candidates for forced labor are based on a high level of vulnerability. A landmark case in the history of European jurisdiction has been the case of *Van der Mussele v. Belgium*.[114] This is not a case of cruel exploitation—which is not to say that the application lacked any basis.

The applicant was a Belgian lawyer who had to serve three years in a "pupillage" before being allowed to open his own law office. The applicant claimed that he was called upon to provide free lawyer services to assist indigent defendants. He brought a complaint arguing that he had been required to provide such services without receiving remuneration or being reimbursed for his expenses, and that the Judicial Code of Belgium would make him liable to sanctions if he refused to represent the offender. He argued that such circumstances gave rise to forced or compulsory labour, contrary to Article 4 of the European Convention on Human Rights.

The court discussed whether Mr. Van der Mussele had done "labor" and arrived, without properly defining "labour" [sic] (but introducing the French "travail" to underline that "labor" is more than manual labor), at the conclusion that the applicant had provided labor indeed.[115] In Paragraph 34 of the court's judgment, the court begins a discussion of the term "forced labor." It uses terms such as "physical or mental constraint" and uses as a reference point the ILO's Convention 29 from 1930 characterization of forced labor as: (a) work "exacted . . . under the menace of any penalty;" and (b) work against the will of the person concerned, i.e. work for which the concerned person "has not offered himself voluntarily."[116] After having established a reference point, the court then needed to explore whether the "penalty" aspect was relevant in Mr. Van der Mussele's case. His refusal to do pro bono work would not have been punishable, but "he would have run the risk of having the Council of the Ordre strike his name off the roll of pupils or reject his application for entry on the register of avocats."[117] The court concluded: "these prospects are sufficiently daunting to be capable of constituting 'the menace of [a] penalty' . . . ."[118]

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113. *Id*. para. 9 (footnote omitted).

114. Van der Mussele v. Belgium, App. No. 8919/80, Eur. Ct. H.R. (1983).

115. *Id*. para. 33.

116. International Labour Organization, Forced Labour Convention, C29, Art. 2 § 1 (June 28, 1930) https://webapps.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

117. *Van der Mussele* para. 35.

118. *Id.*

"Daunting" means: something being intimidating, causing fear or discouragement.[119] The concept of "menace of penalty" is another category where we need to make use of a sense of future (and the opposite of hope). There is an identity-threatening aspect to it and a deep emotional dimension. The term "penalty" has been elaborated in *C.N. and V. v. France* and in the case *S.M. v. Croatia* where penalty was characterized as "[']physical violence or restraint, but it can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal.'"[120] Here, we see that subtle categories enter the deliberation.

From a philosophical perspective, it is even more interesting to see the court deal in the case of *Van der Mussele* with the second criterion of "forced labor:" has the applicant "not offered himself voluntarily?"[121] Here the document refers to a distinction that has been suggested by the government, namely a distinction between what could be called general consent and immediate consent: "the applicant had consented in advance to the situation he complained of."[122] The government described the future advocate as a rational agent who weighed advantages and disadvantages. The court's assessment of this argument is interesting:

> Mr. Van der Mussele undoubtedly chose to enter the profession of avocat, which is a liberal profession in Belgium, appreciating that under its rules he would, in accordance with a long-standing tradition, be bound on occasions to render his services free of charge and without reimbursement of his expenses. However, he had to accept this requirement, whether he wanted to or not, in order to become an avocat and his consent was determined by the normal conditions of exercise of the profession at the relevant time.[123]

The court here refers to stable and predictable conditions that allow for informed consent. This consent can be expected from a well-educated person who prepares for a professional career where we can assume that the person looked very carefully into this decision which would amount to a fundamental life decision.

The court then adds further criteria: the obligation to carry out the labour [sic] "must be 'unjust' or 'oppressive' or its performance must constitute 'an avoidable hardship', in other words be 'needlessly distressing' or 'somewhat harassing.'"[124] From a philosophical perspective, it must be noted that these are quite different categories: suggesting that "unjust" is close to "oppressive" is as interesting as the idea of "an avoidable hardship." The term "avoidable" seems

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119. *Daunting*, DICTIONARY.COM, https://www.dictionary.com/browse/daunting (last visited Apr. 29, 2024).

120. S.M. v. Croatia, App No. 60561/14, para. 284 (June 25, 2020), https://hudoc.echr.coe.int/eng?i=001-203503.

121. *See Van der Mussele* paras. 32, 34.

122. *See id*. para. 36.

123. *Id*.

124. *Id*. para. 37.

quite weak in a world full of contingent situations that are possible, but not necessary. One must assume that there is a quiet qualifier at work ("avoidable under normal circumstances").

In its decision, the court applied a principle of proportionality, looking into the question "if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession, that the service could not be treated as having been voluntarily accepted beforehand."[125] Using this principle of proportionality, the court concludes that the advantages for the applicant were substantial and that the burden imposed on the applicant was not disproportionate.[126] The duty to perform pro-bono work left enough time for the performance of paid work. The court unanimously reached the decision that this case does not constitute a breach of Article 4 of the Convention. An important aspect in this proportionality equation plays the factor of remuneration; in his Concurring Opinion in the case of *J. and Others v. Austria,*[127] Judge Pinto de Albuquerque, joined by Judge Tsotsoria, observe that the assessment of Article 4 requires a sense of proportionality—they observe: "While remunerated work may also qualify as forced or compulsory labour [sic], the lack of remuneration and of reimbursement of expenses constitutes a relevant factor when considering what is proportionate."[128] Remuneration clearly reduces or at least mitigates the exploitative nature of the relationship that gives rise to the suspicion of "forced labor."

The term "disproportionate burden" was also used in the case of *C.N. and V. v. France*. Here, it was also connected to "reasonable expectations." The court asked to "distinguish between 'forced labour' [sic] and a helping hand which can reasonably be expected of other family members or people sharing accommodation."[129] The court also made use of the term "in excessive measure" to shed more light on the guiding ideas of disproportionate burdens and unreasonable expectations.[130]

After the case of *Van der Mussele v. Belgium*, we are left with the following criteria for "forced labor"—menace of penalty, absence of voluntariness, injustice/oppression, avoidable hardship—and an important application principle—a principle of proportionality which indicates that the imposition of hardships and the introduction of penalties can be, in principle, justified. This gives us four criteria and a general principle whereby the criteria operate with heavily loaded terms ("injustice" and "oppression").

A further key issue for the understanding of "forced labor" is the term "consent." In the case *of S.M. v. Croatia* the Grand Chamber of the Court stressed that "'where an employer abuses his power or takes advantage of the

125. *Id*.

126. *Id*. para. 39.

127. J. and Others v. Austria, App. No. 58216/12 (Jan. 17, 2017), https://hudoc.echr.coe.int/eng?i=001-170388.

128. *Id*. para. 32 (Pinto de Albuquerque, J., concurring).

129. C.N. and V. v. France, App. No. 67724/09, Eur. Ct. H.R para. 74 (2012).

130. *Id.* para. 75.

vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily.'"[131] Thus, "[']prior consent of the victim is not sufficient to exclude the characterisation [sic] of work as forced labour' [sic] . . . ."[132] All relevant circumstances of a case have to be examined in order to establish whether there has been free consent or not. The court has to reach a reflective equilibrium between the general principles and the general normative texts and the particular circumstances of each case. We have seen above that consent cannot be easily construed in the case of persons who lack educational and epistemic resources and find themselves in asymmetrical relationships; consent is not so much an epistemic, but a social exercise.[133]

Another important term to approach the concept of "forced labor" is the term "control." In the case of *C.N. and V. v. France*, the court quotes an NGO, "Aire Centre," that submitted "that the notion of 'control' of an individual was a crucial element common to all the forms of exploitation of human beings covered by Article 4 of the Convention. It stressed the psychological aspects of this 'control' in so far as it was exercised in relation to the victim's vulnerability. It pointed out that the term 'control' was not defined in the Convention . . . ."[134] In philosophical terms, "control" can be defined as the power to make decisions and to create or transform situations, whereby power can mean that A has power over B to the extent that A can get B to do something that B would not otherwise do.

Related to the aspect of "control" is the aspect of "exploitation." This concept has played a major role in the case of *Chowdury and Others v. Greece*.[135] Exploitation means to take unfair advantage of another person; to use another person's vulnerability for one's own benefit. In the case of *Chowdury and Others v. Greece*, the applicants, Bangladeshi migrants living in Greece without a work permit, were recruited to work on the region's biggest strawberry farm, at Manolada, in the western part of the Peloponnese peninsula:

> They worked in greenhouses every day from 7 a.m. to 7 p.m. picking strawberries under the supervision of armed guards employed by T.A. They lived in makeshift shacks made of cardboard, nylon and bamboo, without toilets or running water. According to them, their employers had warned them that they would only receive their wages if they continued to work for them.[136]

The situation escalated:

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131. S.M. v. Croatia, App No. 60561/14, para. 285 (June 25, 2020), https://hudoc.echr.coe.int/eng?i=001-203503.

132. *Id*.

133. Neil Manson and Onora O'Neill have argued that consent is largely a matter of communication and that in many cases informed consent cannot be fully specific or fully explicit; the important currency to work with is trust. *See* NEIL C. MANSON & ONORA O'NEILL, RETHINKING INFORMED CONSENT IN BIOETHICS (2007).

134. C.N. and V. v. France, App. No. 67724/09, Eur. Ct. H.R para. 67 (2012).

135. Chowdury and Others v. Greece, App. No. 21884/15 (Mar. 30, 2017), https://hudoc.echr.coe.int/eng?i=001-172701.

136. *Id.* para. 7.

> On 17 April 2013 the employers recruited other Bangladeshi migrants to work in the fields. Fearing that they would not be paid, between one hundred and one hundred and fifty workers from the 2012–2013 season who worked in the fields started moving towards the two employers, who were on the spot, in order to demand their wages. One of the armed guards then opened fire against the workers, seriously injuring thirty of them, including twenty-one of the applicants . . . .[137]

The Ombudsman of Greece drew up a report dated April 22, 2008, where he stated that:

> hundreds of economic migrants lived in impoverished conditions in improvised camps in the region. He said that, in addition to being subjected to poor working conditions, the migrants appeared to be deprived of their liberty because, according to press reports, their employers—owners of strawberry greenhouses referred to as the "greenhouses of shame"—had imposed supervision of their activities, even during their free time.[138]

He further referred to the notion of exploitation, stating:

> that the labour [sic] relations were characterised [sic] by an uncontrolled exploitation of migrants, which was reminiscent of the early years of the Industrial Revolution, and that they were governed by the physical and economic domination of the employers. He noted that groups of vulnerable people were affected and noted that the State was completely inactive.[139]

The applicants claimed that their situation amounted to a situation of forced labor;[140] they sought to clarify the concept:

> They stated that the prohibition in Article 4 of the Convention did not apply only to cases of absolute weakness of the victims, total abandonment of their freedom or "exclusion from the outside world" . . . . They added that the concepts of "threat of punishment" and "involuntary work" included subtle forms of psychological threat, such as the threat of denunciation to the police or immigration authorities and refusal to pay wages.[141]

They also pointed to the similarities between their case and the case of *Siliadin v. France*. The Faculty of Law of the University of Lund, Sweden, as third-party intervener, analyzed the concept of forced labour [sic] in the context of Article 4 of the Convention:

> In this regard, it proposed clarification regarding the application of the "impossible or disproportionate burden" test to determine the factual circumstances that might constitute forced labour [sic]. In its

137. *Id*. para. 8.

138. *Id*. para. 49.

139. *Id*. para. 51.

140. *Id*. para. 58.

141. *Id*. para. 70.

> view, the [c]ourt in the present case should consider whether there was a threat of punishment and look at the difference between the actual working conditions of the applicants and those of the relevant employment legislation. In its view, the restriction on freedom of movement was a criterion which characterised [sic] servitude but not forced labour [sic]. The third-party intervener submitted that in order to determine whether the situation in question had reached a certain threshold in order to qualify as servitude, it would be necessary to consider whether the applicants were in total isolation, whether they were deprived of autonomy and whether they were subjected to subtle forms of control over different aspects of their lives.[142]

Here, we see isolation emerge as a further criterion and as an important aspect of a deprivation of freedom(s). Freedom, then, is not to be construed as primarily the property of an individual, but a social and political arrangement. This brings the concept of freedom closer to a Greek ideal of political freedom in a community and cannot be reduced to a liberal ideal of an individual person's choices alone.

Let us reiterate this point: freedom is incompatible with isolation. In the case of *J. and Others v. Austria*,[143] the fact that the first applicant, a Filipina who had been recruited by an employment agency in Manila to work as a maid in Dubai, was held by her employers in isolation, was a major factor in assessing her situation. She "spent significant amounts of time locked up in hotel rooms or under the close supervision of her employers . . . the first applicant was not allowed at any time to leave the apartment in which they were staying."[144] And:

> During the first nine months she was required to perform this work seven days per week without a single day off, and was not allowed to leave the house unsupervised. She was not allowed to have her own telephone and was only allowed to call her family in the Philippines once a month, the costs of these calls being deducted from her wages. Further, the first applicant was forbidden from speaking to any of the other workers from the Philippines in their native language.[145]

Freedom emerges as a social concept—it does not reflect the idea of an isolated individuals going about to make decisions. Isolation was also a major factor in the case of *C.N. v. the United Kingdom*.[146] The applicant had traveled from Uganda to the United Kingdom with a false passport and visa, obtained by a relative named S.

> The applicant lived for a number of months at various houses belonging to S. in London. She claimed that during this time he

142. *Id*. para. 78.

143. J. and Others v. Austria, App. No. 58216/12 (Jan. 17, 2017), https://hudoc.echr.coe.int/eng?i=001-170388.

144. *Id*. para. 14.

145. *Id*. para. 9.

146. C.N. v. United Kingdom, App. No. 4239/08, Eur. Ct. H.R. (2012).

> constantly warned her that she should not talk to people and that she could easily be arrested or otherwise come to harm in London. She was also shown violence on television and told that this could happen to her if she was not careful.[147]

What does it mean to be free? In the case of *C.N. v. the United Kingdom*, the Ugandan applicant tried to escape from her situation of captivity in England, collapsed in a bank, then was taken to a hospital, where she was diagnosed as HIV positive. H., the person who had held her in her house, visited her in hospital and "tried to persuade her to return to S.'s house. In particular, she warned her that when she left the hospital she would have to pay for anti-retroviral medication and if she did not return to the house she would be 'on the streets.'"[148] The applicant, who had been sexually assaulted in Uganda and desperately left the country (illegally entering the UK), applied for asylum. The application was refused: "The Secretary of State for the Home Department considered that the applicant could access protection in Uganda to prevent further sexually motivated attacks. Moreover, he found that if she had been genuinely afraid of S., she would have tried to escape from him earlier."[149] We can question the understanding of the quality of institutions in Uganda, but the philosophically more substantial point is the question of "the logic of fear." The logic of fear is based on vulnerability.

In the case of *Chowdury and Others v. Greece*, the third-party intervener in this case established a strong link between vulnerability and Article 4:

> The main argument of this intervener was as follows: while the recognition and classification of the concepts contained in Article 4 of the Convention had evolved over time, the common feature of all forms of exploitation described was the abuse of vulnerability. In its view, that concept had to be the starting point for the [c]ourt's consideration of the form of exploitation in question under Article 4 of the Convention.[150]

We have seen the normative force of the concept of vulnerability in understanding Article 4 above. The category of exploitation cannot be built without an understanding of vulnerability. There are more details:

> More specifically, the intervener submitted that, in certain circumstances—where the employer exploited and controlled workers by taking advantage of their status as irregular migrants and thus of their vulnerability, surveillance became oppressive, accommodation was on site, working hours were long, wages were low or unpaid and there were threats of violence in the event of refusal to cooperate—work is obtained under threat of punishment and without the consent of the person concerned and constitutes forced labour [sic]. According to the intervener, these elements can

147. *Id*. para. 7.

148. *Id*. para. 13.

149. *Id*. para. 14.

150. Chowdury and Others v. Greece, App. No. 21884/15, para. 82 (Mar. 30, 2017), https://hudoc.echr.coe.int/eng?i=001-172701.

> also be included in the definition of human trafficking, which in its view was a means of imposing slavery or forced labour [sic]. It considered that human trafficking was defined by slavery and forced labour [sic], and not the other way round.[151]

This connection between human trafficking, slavery, and forced labor was not part of the 1926 Slavery convention but cannot be left out of Article 4 deliberations in the twenty-first century. Human trafficking is said to be the fastest growing source of income for organized crime—the risks of detection, arrest, and prosecution are comparatively low. Forced labor is not an easily recognizable or an obvious condition.[152] Furthermore, Raimo Väyrynen had observed "that people are a good commodity as they do not easily perish, but they can be transported over long distances and can be re-used and re-sold."[153]

There is a connection between human trafficking and vulnerability, but also a connection between human trafficking and human greed. In fact, Siddarth Kara states unequivocally that "slavery is motivated by greed."[154] We see this greed at work in excessive exploitation and making maximal profit on a person's labor. Greed-based exploitation leads to "identity theft" and the deprivation of hope. The full person is taken over.

In *C.N. and V. v. France*, we also find terms like "complete administrative and financial dependence" and the notion of "deceit" and exploitation by deceit.[155] The risk of exploitation is aggravated through dynamics of multiple dependency: workers depend on their employers (or intermediaries) for housing, insurance, food, translation services, etc.; and their ability to walk away is compromised because of a lack of money, of contacts, of clothes, of a place to go, etc. An interesting aspect discussed in this case is the role of working hours; the second applicant in the case was allowed to go to school; her situation was different from the situation of the first applicant who "had been used as a 'housemaid' . . . with no pay and no time off."[156] Freedom to

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151. *Id*. para. 84.

152. David Doyle and his co-authors have shown through interviews in Ireland that forced labor or human trafficking can be disguised under labels of friendship or family:

> Some of the difficulties in practice are highlighted in the case of one of the participants; here, the police visited the house in which she worked for immigration-related reasons and asked the victim questions about her immigration status. The employer instructed the victim to lie and tell the police that they were related—which she did. The police left the house without further action. When the victim subsequently escaped her situation, she met the same police officers again. She states: "They said 'we sensed that there was, something was going on, but we didn't figure out what was it." The participant's view is that they should have talked to her in private, away from her trafficker (Female, Malawi, T7).

David M. Doyle et al., *'I Felt Like She Owns Me': Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland*, 59 BRITISH J. CRIMINOLOGY 231, 237 (2019).

153. Raimo Väyrynen*, Illegal Immigration, Human Trafficking, and Organized Crime* 3 (U.N. Univ. World Inst. for Dev. Econ. Rsch., Working Paper No. 2003/72, 2003).

154. *See* KARA, *supra* note 1, at 21.

155. C.N. and V. v. France, App. No. 67724/09, Eur. Ct. H.R paras. 81–83 (2012).

156. *Id*. para. 60.

have decisions about the way time is being spent clearly emerges as an important aspect of the overall freedom of a person. The question of working hours has been explicitly discussed in *C.N. and V. v. France*:

> In reply to the Government's observation that she had not been held in servitude because she had not been made to work full time, the second applicant argued that in the *Siliadin* case, in finding that there was a state of servitude the [c]ourt had taken the excessive number of hours worked by the applicant into account among other factors but had not made it the decisive factor.[157]

The second applicant used strong language to describe her situation and the situation of her sister, the first applicant:

> She considered that Mr[.] and Mrs[.] M. treated her and the first applicant like "dogs," considering that even a "maid" was paid for the work she did. In her observations in reply to those of the Government, she submitted that the fact that she went to school did not mean that the housework she had to do when she was not in school could not be classified as forced or compulsory labour [sic] or servitude. She argued that the mere fact that the work concerned was done at specific times did not suffice to establish that she did it of her own free will or that it was not done under the threat of some form of punishment. On the contrary, she argued that her aunt constantly threatened to send her back to Burundi and that she maltreated her when she refused to do as she was told.[158]

Here, we see the use of categories ("dogs") that reflect self-perception and situated identity. We also see the complexities of "freedom of will." Can there be "free will" if there is a concrete and general threat (to be sent back to Burundi) looming in the background, thus creating a toxic situation of permanent disparity of power and the possibility for arbitrariness?

This question of free will also plays a role in a further important case with regard to the discourse on "forced labor," the case *S.M. v. Croatia*.[159] This is the sad story in the background: the applicant, a young woman, had been befriended by a man, T.M., who had claimed in social media to be a friend of her parents. He coerced her into prostitution, threatening and physically abusing her, and keeping her under his control in a flat. T.M. also expressed threats that made the applicant worry about the safety of her parents and sister. The Chamber of the European Court of Human Rights noted that she had been psychologically and physically forced by T.M. to participate in a prostitution ring organized by him which led to the recognition of her status as a victim of human trafficking. The case led to a further clarification of "forced labor," by clarifying that "'force' may encompass . . . subtle forms of coercive

157. *Id*. para. 80.

158. *Id*. para. 62.

159. S.M. v. Croatia, App No. 60561/14, (June 25, 2020), https://hudoc.echr.coe.int/eng?i=001-203503; *see also* Kirsty Hughes, *Human Trafficking,* S.M. v. Croatia *and the Conceptual Evolution of Article 4 ECHR*, 85 MOD. L. REV. 1044 (2021).

conduct . . . ."[160] and by explicitly considering the environment where T.M. had assumed a dominant position over the applicant and had recourse to force.[161] The characterization of forced labor in this case was criticized by Judge Pastor Vilanova in a Concurring Opinion:

> To date, in order to characterise [sic] forced labour [sic], the [c]ourt has indeed required the presence of a threat, but also the absence of genuine consent. However, the latter element appears to be ultimately excluded, or at least assigned minimal importance, in the present case since the Grand Chamber concentrates on the notion of force.[162]

This, of course, raises the question of necessary and sufficient conditions. There is a positive condition (presence of threat) and a negative condition (absence of genuine consent). Both terms ("threat" and "consent") need to be explored. We have seen some challenges with the notion of "consent." Similarly, we would worry about precise definitions of a "threat." A threat is a statement of an intention to inflict hostile action on someone as a response to specific behavior. A credible threat depends on the vulnerability of the addressee and the power of the addresser. We can distinguish between vague and specific threats and gain a higher level of precision. The same exercise in increasing levels of precision can be pursued with regard to the notion of consent. What now does constitute consent? Here again, we can identify certain precise and specific conditions. As always, we are faced with a dilemma: the more precise we define the meaning of "forced labor," the fewer cases fall under the definition and the less flexible the definition will be. This could mean the tradeoff of losing important occurrences as not qualifying for a case of forced/compulsory labor. In a further Concurring Opinion in the case *S.M. v. Croatia*, Judge Serghides refers to this intension/extension dilemma and calls for a narrow intension of the term "forced or compulsory labour [sic]."[163]

Nonetheless, the court unanimously held that the case constituted a violation of Article 4 of the Convention thus creating an important reference point for future jurisprudence.

Let us recapitulate the main lessons learnt in the concluding section.

IV. TOWARDS AN ETHICS OF DIGNITY-AFFIRMING FREEDOM

Freedom is a privilege and a burden, a right and a responsibility. Freedom is connected to human dignity. Human persons are born free and with equal dignity. The influential "Capabilities Approach" links the idea of development in the sense of a dignified life to enhancing freedoms.[164] The approach

160. *S.M. v. Croatia* para. 301.

161. *Id*. para. 331.The subtle forms of force have also been discussed in the case of Krachunova v. Bulgaria. Krachunova v. Bulgaria, App. No. 18269/18 (Nov 28, 2023), https://hudoc.echr.coe.int/eng?i=001-229129.

162. *S.M. v. Croatia* para. 3 (Vilanova, J., concurring).

163. *S.M. v. Croatia* para. 22 (Serghides, J., concurring).

164. *Cf*. SEDMAK, *supra* note 20, 152–55; *see also* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

emphasizes agency; agency is the capacity to act (i.e., the capacity to bring about intentional change). This idea can be applied to the workplace where we mentioned the idea of "job crafting" above. According to an agency-based understanding of dignity at work the proper "development" of the person at the workplace is the intentional effort to maximize her freedoms and continually enhance her freedoms. Rawl's first justice principle arguing for a maximum bundle of freedoms for all ("each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others")[165] expresses the fundamental importance of freedom for a life in integrity, for a life with self-respect. Freedom at work and dignity of work can be presented as inextricably linked.

Freedom, however, is a complex concept. A nuanced discussion of "freedom" can be held in conversation with the case *Krachunova v. Bulgaria*.[166] This is the story: after tensions with her parents, the applicant left a small village in north-western Bulgaria at the age of twenty-six and was taken in by Mr. X and his family. Mr. X offered to connect her to sex work. She agreed "because [she] needed the money and was curious about whether she would be able to earn as much as the other girls."[167] After a few months "the applicant wished to quit, but, according to her initial statement to the police . . . she was afraid of what X's reaction would be. It is unclear whether he ever threatened her."[168] She then ran away but was found by Mr. X who persuaded her to return to him and his family:

> According to the applicant's initial statement to the police . . . at that time X took away her identity card, telling her that he was doing so in order that she would not run away from him again. However, she also stated that he had not forced or coerced her to engage in sex work, but had simply offered the opportunity to do so, and that she had had no choice in the matter.[169]

Here again we can ask the question: was the applicant free in her decision?

When she worked for a few months as a sex worker, "X would take all her earnings away from her but would buy the things that she needed and gave her pocket money. She did not tell him that she wished to quit because she was afraid of him."[170] Then she ran away with a truck driver. She called X to let him know of her decision. "He threatened her that he would expose her real occupation to the people in her village, and she agreed to go back to him, fearing in particular that her parents would learn that she had been engaging in sex work."[171] She was eventually approached by two police officers, interviewed at the police station, and then returned to her village.

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165. JOHN RAWLS, A THEORY OF JUSTICE 53 (1999).

166. Krachunova v. Bulgaria, App. No. 18269/18 (Nov 28, 2023), https://hudoc.echr.coe.int/eng?i=001-229129.

167. *Id*. para. 6.

168. *Id*. para. 8.

169. *Id*. para. 9.

170. *Id*. para. 10.

171. *Id*.

How "free" was the applicant's decision to enter sex work? How free was she to quit at any time? The court commented on the limited freedom of hers:

> Even if on a practical level she had enough money to cover her most basic needs, it is not difficult to imagine that X's taking away her earnings left her with no resources that could facilitate her in establishing herself on her own. This perception must have thus also locked her, at least for a period, into staying with him.[172]

There was no evidence that "X resorted to violence or threats of violence to make the applicant engage in sex work for his benefit."[173] However, the court mentions subtle forms of force "such as deception, psychological pressure, and the abuse of a vulnerability,"[174] which was clearly the case in the asymmetrical relationship between X and the applicant. The asymmetry of the relationship was explicitly discussed by the court: the applicant ("a poor and emotionally unstable young woman hailing from a small village, who apparently had troubled relations with her parents") and X ("a man who was several years older than the applicant, had a criminal record, had been routinely engaging in professional dealings with sex workers and was apparently deriving all of his income from such dealings") had an unequal relationship with a clear sense that X had power over the applicant who was also living in X's house with himself and his wife and children: "It is not far-fetched to infer from all this that she felt sufficiently dependent on him to not overtly oppose him."[175] The court also alluded to subtle forms of coercion, including the pattern of creating a sense of emotional connection and dependence.[176] In the case of Mrs. Krachunova, Mr. X used the power of reputational damage (threatening to disclose to her co-villagers the fact that she was engaged in sex work).

Clearly, there are nuances of freedom; taking "essential freedoms" away can lead to the "serious deprivations of freedom" that constitute candidates for Article 4 violations.

Looking at the Article 4 jurisprudence of the European Court of Human Rights we can identify the following key aspects of freedom:

> (1) Freedom is enacted within the constraints of the ordinary lives of social arrangements. It allows for certain hardships, restrictions, and impositions as long as they are proportionate and not "excessive." Let us call this the *normalcy* condition.
>
> (2) A decent and minimum level of freedom is incompatible with control of movement and time and constant surveillance. Let us call this the *control* condition.
>
> (3) A decent and minimum level of freedom is incompatible with imposed social and experiential isolation. Let us call this the *isolation* condition.

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172. *Id*. para. 149.

173. *Id*. para. 148.

174. *Id*.

175. *Id.*

176. *Id*. para. 150.

> (4) A decent and minimum level of freedom is incompatible with violence and excessive threats ("menace of penalty") to break resistance. Let us call this the *violence* condition.
>
> (5) A decent and minimum level of freedom is incompatible with the commodification of the human person who is reduced to an object and treated exclusively as a means to an end. Let us call this the *commodification* condition.
>
> (6) A decent and minimum level of freedom is incompatible with the creation of conditions of unprotected vulnerability, multiple dependency, and the inability to consent. Let us call this the *exploitation* condition.
>
> (7) A decent and minimum amount of freedom is incompatible with a sense of permanent hopelessness and the inability to realistically conceive of a different future. Let us call this the *trap* condition.
>
> (8) Freedom is enacted by persons who have a sense of who they are and a social status; they have access to their identities and identity papers. Let us call this the *identity* condition.

These eight conditions together (normalcy condition, control condition, isolation condition, violence condition, commodification condition, exploitation condition, trap condition, identity condition) paint the picture of Article 4 jurisprudence of the European Court of Human Rights. We have two positive and six negative conditions. We could also translate these conditions into positive categories: *normalcy, agency, connectedness, safety, subjectivity, recognition, hope, identity.*

These dimensions could be translated into an ethics of work. Dignity of work can be approached through this idea of freedom at work. These eight dimensions can serve as criteria for "dignity of work through freedom at work."