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School for Advanced Legal Studies – Faculty of Law
UNIVERSITY OF CAPE TOWN



REGULATING DOMESTIC WORK

International and Comparative Perspectives in
South Africa, Namibia and Indonesia

Course Code: CML5614W
Student Name: Amanoshokunu Afadameh
Student Number: AFDAMA001
Supervisor: Professor Evance Kalula

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PLAGIARISM DECLARATION

Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation/research paper. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

Signed by candidate

Amanoshokunu Afadameh

DEDICATION

For Loveth- mother, aunt, friend

To Ashi- brother, confidante, true friend, mentor

For Ken- uncle, General, dear friend

‘For I reckon that the sufferings of this present time are not worthy
to be compared with the glory which shall be revealed in us’

-Romans 8:18-

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An acknowledgement page is always an opportunity to express appreciation and heartfelt feelings. Therefore, this page is no different from others.

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ABBREVIATIONS

- BCEA- Basic Conditions of Employment Act of 1997
- C189- ILO Domestic Workers Convention (No. 189) of 2011
- CEACR- ILO Committee of Experts for the Application of Conventions and Recommendations
- EDVA- Indonesia's Elimination of Domestic Violence Act of 2004
- EEA- Employment Equity Act of 1998
- ESA- Employment Service Act of 2011
- HRA- Indonesian Human Rights Act of 1999
- HRW- Human Rights Watch
- ILO- International Labour Organisation
- LA- Namibian Labour Act No. 11 of 2007
- LRA- South Africa's Labour Relations Act of 1993
- OHSA- Occupational Health and Safety Act of 1993
- PEAs- Private Employment Agencies
- Regulation 156- Namibian Regulations relating to the Health and Safety of Employees at work, 1997.
- SADSAWU- South African Domestic Services and Allied Workers Union
- SD7- Sectoral Determination 7: Domestic Work Sector 2002 (South Africa)
- SSA- Social Security Act of 1994
- UIA- Unemployment Insurance Act of 2001

ABSTRACT

This dissertation evaluates the regulation of domestic work. It approaches this topic from an international and national perspective. An international perspective in this context means the regulation of domestic work as an international labour standard by the International Labour Organization (ILO). Its national perspective entails the various models of national regulation in three countries- South Africa Namibia and Indonesia.

This dissertation also brings to the fore the nature of domestic work in its evaluation as a labour standard. It does this to give a general understanding of the subject. In recent years, regulating domestic work has been a popular topic within international labour law circles. However, the popularity of this discussion is not reflected in the working lives of a majority of domestic workers worldwide. Therefore, this dissertation reiterates specific issues that affect the lives of domestic workers in a bid to contribute to the body of knowledge on the subject; and the achievement of social justice and decent work in this 'invisible' sector.

This dissertation concludes that the proper regulation of the domestic work sector is the first step in the achievement of social justice for domestic workers. It also posits after a comparative analysis that the regulation of decent work requires a framework in which hard and soft law approaches are interwoven in the regulation of domestic work. This framework is important as the intertwining of hard and soft law regimes will enable the reaffirmation of and compliance with ILO standards for domestic work regulation.

National legislation of ILO member states also have to be fine-tuned or amended to accommodate the protection of domestic workers in line with ILO requirements. Domestic workers need to be enlightened to enable them properly understand their rights and seek its protection and enforcement. Finally, this dissertation generally reaffirms the notion that domestic work can be properly regulated.

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CHAPTER ONE

GENERAL INTRODUCTION AND OVERVIEW

*'If We Have Understood Housework,
Then We Have Understood the Economy'*

-Claudia von Werlhof-¹

1.1 INTRODUCTION

Domestic work is an integral part of the home and society. This makes it one of the oldest occupations in the world² and it gives employment opportunities to millions of people worldwide. Despite its prevalence which stems out of necessity and the decline of the welfare state,³ it remains undervalued and insufficiently regulated worldwide.⁴ The increase in demand for domestic work and the importance of its market-enabling role are connected with the emergence of dual-income, middle-class households in consumption based economic structures.⁵ Also, an increase in the aging population and dependent elderly needing continuous tending has created a heightened challenge for working parents in both developed and developing countries.⁶ Therefore, the increased value attached to the ability to afford care work at home rather than rely on public

¹ Claudia von Werlhof 'The Proletarian is dead: Long live the Housewife?' in Joan Smith, Immanuel Wallerstein, Hans-Dieter Evers (eds) *Households and the World-Economy* (1984) 31.

² ILO, *Effective Protection of Domestic Workers: A guide to designing Labour Laws* (2012) 1.

³ Adele Blackett 'Introduction: Regulating Decent Work for Domestic Workers' (2011) 23 *Canadian Journal for Women and the Law* 2; Peter Townsend, ed., *Building Decent Societies: Rethinking the Role of Social Security in Development* (2009) Palgrave Macmillan & ILO, Basingstoke. 'The welfare state is a concept of government in which the state plays a key role in the protection and promotion of the economic and social well-being of its citizens. It is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those unable to avail themselves of the minimal provisions for a good life...its fundamental feature is social insurance'; 'Welfare State' available at <http://www.britannica.com/EBchecked/topic/639266/welfare-state> accessed on 2 February 2013.

⁴ ILO, *Decent Work for Domestic Workers, Report IV(1)*, International Labour Conference, 99th Session, Geneva, 2010.

⁵ Ibid at 3; ILO, *Creating effective equality of opportunity and treatment for men and women workers: The ILO policy framework for workers with family responsibilities and national practices around the world* (2008); Catharina Calleman 'Domestic Services in a "Land of Equality": The case of Sweden' (2011) 23 *Canadian Journal for Women and the Law* 122.

⁶ ILO 'Work and Family: The way to care is to share' 4 available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_101758.pdf accessed on 18 July 2012.

services and the steady availability of productive migrant workers as a result of globalization has led to an increased demand for domestic workers.⁷ This demand for domestic workers has led to the steady growth of a ‘domestic workers rights movement’ that has attracted political and media attention worldwide.⁸

In spite of the attention garnered by the domestic workers rights movement, domestic work remains heterogeneous,⁹ invisible and excluded either implicitly or explicitly from labour law and social security legislation in most countries.¹⁰ This has left domestic workers vulnerable to unequal, unfair and abusive treatment worldwide. In the case of migrant domestic workers, there is an increased level of vulnerability. The peculiar nature of migrant domestic workers’ circumstance is the complex connection between their employment and immigration position. This makes their access to justice limited, as they are reluctant to claim their rights in most cases.¹¹ Various reasons have been provided for these problems which affect all kinds or classes of domestic workers. They include domestic work not been recognized as a form of employment because it is viewed as part of a woman’s ‘normal’ role¹², and the location of workplace being a private household¹³ among others. These issues have led to the need and call for specific regulation of domestic work and the need to translate such progressive legislation into reality to achieve decent work for domestic workers.

⁷ Ibid; See also Nisha Varia “Sweeping Changes?” A review of Recent Reforms on Protections for Migrant Domestic Workers in Asia and the Middle East’ (2011) 23 *Canadian Journal of Women and the Law*, 266.

⁸ Ibid.

⁹ Jose Maria Ramirez-Machado ‘Domestic work, conditions of work and employment: A legal perspective’ (2003) *Conditions of Work and Employment Series No. 7* (ILO, Geneva) v.

¹⁰ Manuela Tomei ‘Decent Work for Domestic Workers: Reflections on Recent Approaches to Tackle Informality’ (2011) 23 *Canadian Journal for Women and the Law*, 186.

¹¹ Adelle Blackett ‘Making domestic work visible: The case for specific regulation’ (1998) *Labour Law and Labour Relations Working Paper No. 2* (ILO, Geneva) 2; P. Weinert ‘Foreign female domestic workers: Help Wanted!’ (1991) *World Employment Programme Working Paper No. 50* (ILO, Geneva).

¹² Ally Shireen *From Servants to Workers: South African Domestic Workers and the Democratic State* (2009) 3.

¹³ Ibid. This is the case in most African societies where domestic workers are relatives of their employers. For a general discussion, Dorte Thorsen ‘Child Domestic Workers: Evidence from West and Central Africa’ *UNICEF* April 2012 available at http://www.unicef.org/wcaro/english/Briefing_paper_No_1_-_child_domestic_workers.pdf accessed on 2 August 2012.

1.2 OBJECTIVES OF DISSERTATION

A distinct problem of regulating domestic work is the opinion in most societies that it is not a form of employment.¹⁴ This has been reinforced by early economic theories that portray it as unproductive and non-contributory to the wealth of nations.¹⁵ This fosters its undervalued nature and poor regulation. Conversely, studies reflect that domestic workers have confidence in the dignity of their industry and labour.¹⁶ This necessitates recognition, respect, proper regulation and protection.¹⁷ In giving credence to this theory, the central focus of this dissertation is the evaluation of the concept of domestic work; its regulation as an international labour standard within the International Labour Organization (ILO) framework and a comparative analysis of national regulations on domestic work in South Africa, Namibia and Indonesia.

This dissertation evaluates the concept of domestic work by giving credence to the recognition of domestic work as well as acknowledging the plight of domestic workers worldwide. As Francis Fukuyama points out, ‘recognition is not a good that can be consumed. Rather, it is an intersubjective [*sic*] state of mind by which one human being acknowledges the worth or status of another human being.’¹⁸ This feature differentiates the need to be recognized from the desire for material resources that governs economic behaviour.¹⁹ He explains further that ‘when norms are invested with intrinsic meaning, they become objects of what the philosopher Georg W.F. Hegel called the ‘struggle for recognition’²⁰ and most issues in modern-day politics are centred around the quest for recognition, especially for groups that have a history of inadequate acknowledgement of their worth. In a similar manner as Fukuyama, this dissertation acknowledges that the quest for recognition may have economic elements

¹⁴ Pierette Hondagneu-Sotelo *Domestica: Immigrant Workers Cleaning and Caring in the Shadows of Affluence* (2001) 9.

¹⁵ Adam Smith, *The Wealth of Nations, Books I-III* (1986) 429-49, 133-40; Karl Marx, *Capital Volume 1*, (1990)1043-45.

¹⁶ ILO, *Decent Work for Domestic Workers* op cit 4 at 5; Dorothy E. Roberts ‘Spiritual and Menial Housework’ (1997) 9(51) *Yale Journal of Law and Feminism* 17.

¹⁷ Ibid.

¹⁸ Francis Fukuyama *The Origins of Political Order: From Pre-human times to the French Revolution* (2011) 41.

¹⁹ Ibid.

²⁰ Ibid; For a general overview of norms and their recognition component, see Francis Fukuyama *The End of history and the Last Man* (1992) 13-17.

(as in the case of domestic work); however its economic elements are ‘markers of dignity rather than ends in themselves.’²¹

In addressing domestic work regulation as a labour standard, this dissertation enumerates rights necessary for the efficient and proactive regulation of domestic work internationally and within the jurisdiction of ILO member states. Additionally, it addresses issues concerning compliance with the ILO Domestic Workers Convention of 2011 (C189) and questions the adequacy of a legislative framework in domestic worker protection. This dissertation asserts that in spite of the problems that plague domestic work, it is a profession to be proud of and ‘there is no acceptable justification for domestic work not to be also a source of decent work’²² for all domestic workers. Accordingly, the evaluation of domestic work as a concept in this dissertation acknowledges that it has become an accepted form of employment worldwide with intrinsic meaning. This meaning can be traced to feminist economists’ critique of the ‘universal breadwinner’ model.²³

For the comparative analysis, South Africa, Namibia and Indonesia will serve as case studies because of the different approaches adopted by each nation towards regulating domestic work. While South Africa has a Sectoral Determination 7: Domestic Worker Sector, 2002 (SD7) as its specific legislation and other ancillary legislations which provide for the regulation of domestic work, domestic workers in Namibia are implicitly protected under the Labour Act No. 11 of 2007(LA). In the case of Indonesia, domestic workers are expressly excluded from its key labour legislation, Act No. 13 of 2003 on Manpower (MPA). However, other national laws provide some sort of disjointed and limited protection for these Indonesian workers. Thus, this dissertation will examine the different modes of regulation in light of the minimum standards of labour protection available to domestic workers in these countries within the purview of their ILO obligations. The adoption of these countries for this comparative analysis brings to light the plight a cross-cutting view of domestic work

²¹ Ibid at 42; Francis Fukuyama ‘Identity, Immigration, and Liberal Democracy’ (2006) 17(2) *Journal of Democracy* 5-20

²² Maria Gallotti ‘The Gender Dimension of Domestic Work in Western Europe’ (2009) *International Migration Papers No. 96* (ILO, Geneva) IX.

²³ Marianne A. Ferber & Julie A. Nelson (eds.) *Feminist Economics Today: Beyond Economic Man* (2003); Immanuel Wallerstein & Joan Smith ‘Introduction: Households as an institution of the World-Economy’ in Immanuel Wallerstein & Joan Smith (eds) *Creating and Transforming Households: the constraints of the world economy* (1992) 3-10; Fraser, N. *Justice Interruptus: Critical Reflections on the ‘Postsocialist’ Condition* (1996) Routledge, New York.

regulation. It will enable this dissertation to properly evaluate domestic work regulatory models in the light of the ILO objective of attaining social justice for all working men and women.

The objectives of this dissertation are vital because a thorough regulation of domestic work would be impossible without an in-depth understanding of;

- a.) the domestic work concept which is historically created²⁴,
- b.) the international standard of its regulation,
- c.) a comparative analysis of attempts at regulating domestic work nationally,
and
- d.) queries concerning the sufficiency of a legislative framework in the objectives of regulation.

Finally, as a result of the nature of domestic work and its impact on the world economy, this dissertation intends to stimulate an understanding of domestic work and facilitate discussions concerning the potency of specific legislations and regulatory policies that enhance compliance with regulation.

1.3 CHALLENGES OF THE DISSERTATION

The intrinsic nature of domestic work makes collection of accurate data difficult. Therefore, where necessary, this dissertation relies on ILO surveys and estimates to reflect the number of domestic workers and their impact on the global economy and national economies of South Africa, Namibia and Indonesia. The primary source of estimates in this dissertation is the 2011 ILO survey which states as follows: ‘approximately 52.6 million women and men above the age of 15 were domestic workers in their main job. This figure represents some 3.6 per cent of global wage employment. Women comprise the overwhelming majority of domestic workers: 43.6 million workers or some 83 per cent of the total number. Domestic work is an important source of wage employment for women, accounting for 7.5 per cent of female employees worldwide.’²⁵ The survey also points out that a majority of domestic workers are migrant women and children with little access to other job opportunities and with little or no formal education.²⁶

²⁴ The nature of definition of domestic work/worker might vary country to country as a result of community history. The ILO ISCO classification reflects this.

²⁵ ILO, ‘Global and regional estimates on domestic workers’ (2011) *Domestic Work Policy Brief No. 4*.

²⁶ Op cit 1 at 1.

It is important to note that reliance on this survey poses a challenge because between the period the survey was conducted and the period this dissertation is being written, these numbers might have changed significantly. However, this does not alter the basis of this dissertation concerning the plight of domestic workers or the international and national regulatory framework for domestic work discussed in this dissertation.

1.4 STRUCTURE OF DISSERTATION

This dissertation consists of five chapters. Chapter one contains a general introduction and overview of the dissertation. It outlines the objectives, challenges and chapter structure of the dissertation.

Chapter two gives an analysis of the nature of domestic work. It does this by highlighting the evolution of domestic work, and its specificity in relation with inequality theories of Marxist feminists. It evaluates features such as the employment relationship and live-in challenge, migration for domestic work and the role of Private Employment Agencies (PEAs) in the domestic work sector. Chapter two also highlights the size and significance of domestic work and its impact on the world economy. Finally, it concludes by enumerating four major issues related to features of domestic work that pose challenges for standard setting.

Chapter three contains international regulations of domestic work and existing labour standards that ensure domestic worker protection. It commences by highlighting initial recognition of the plight of domestic workers by the ILO. Consequently, the chapter analyses the rationale for international regulation of domestic work. It gives a synopsis of the context in which domestic work is regulated as an international standard and enumerates Conventions relevant to its regulation. Based on C189, chapter three enumerates core labour standards that are essential to the international regulation of domestic work. This chapter concludes by analysing the relationship between the rationale behind the regulation of labour standards and its impact on domestic work regulatory framework.

Chapter four contains a comparative analysis of the existing legislative framework available for domestic work regulation in South Africa, Namibia and Indonesia. The chapter focuses on legislations as a means of regulation and assesses the

mode of regulation in each country. These legislative frameworks are also compared with C189 to measure the extent of their regulatory prowess.

Chapter five deals with the quest for thorough compliance and queries the sufficiency of a legislative framework in domestic work regulation. It rationalizes the importance of the ILO Decent Work Agenda and Declarations for domestic worker protection. The chapter concludes this dissertation by highlighting vital strategies that would facilitate better protection for domestic workers worldwide.

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CHAPTER TWO

DOMESTIC WORK: WORK LIKE ANY OTHER, WORK LIKE NO OTHER

*"There is no freedom for domestic workers...
we are still in prison, locked away in those houses.*

*We are the workers that freedom forgot".
-Joyce Nhlapo²⁷*

2.1 INTRODUCTION

Households are key institutional constituents of the world-economy. However, household work²⁸ has neither been properly understood nor regulated. This is because housework has been effectively gendered and regarded as a woman's traditional responsibility over time. Its connection with slavery, imperialism and servitude has also been a key factor.²⁹ Thus as much as household work is crucial to the economy; it has been undervalued and treated as immaterial to the effective running of most national economies.³⁰

Despite the vital nature of domestic work to the global economy, it would be a futile task to describe it as a homogenous trend.³¹ A good example of this assertion is reflected in the relationship between domestic work and informal employment. While

²⁷ Words of a South African domestic worker interviewed during research. See Ally Shireen *From Servants to Workers: South African Domestic Workers and the Democratic State* (2009) 67.

²⁸ Household work and Care work are terms that have been used to describe domestic work. I would also use them interchangeably in this chapter. Helma Lutz & Ewa Palenga-Mollenbeck 'Care Work Migration in Germany: Semi-Compliance and Complicity' (2010) 9(3) *Social Policy & Society* 419 at 420. Lutz points out that ... 'domestic and care work' denotes household work described as 'the three C's' – cooking, cleaning and caring. Distinguishing these separate domestic activities is very useful for analytical purposes. However these tasks are not divided into separate working areas in reality; rather, they usually coincide.' Rania Antonopoulos 'The Unpaid Care Work-Paid Connection' (2008) *Levy Economics Institute of Bard College Working Paper No. 541*, 10; Bridget Anderson *Doing the Dirty Work? The Global Politics of Domestic Labour* (2000).

²⁹ ILO, *Decent Work for Domestic Workers* op cit 4 at 5; Antoinette Fauve-Chamoux 'Domestic Service and the formation of European Identity: Understanding the globalization of domestic work 16th-21st Centuries' in Antoinette Fauve-Chamoux (ed) *Domestic Service and the formation of European Identity: Understanding the globalization of domestic work 16th-21st Centuries* (2004).

³⁰ Nisha Varia & Jo Becker 'World Report 2012: A Landmark Victory for Domestic Workers' available at <http://www.hrw.org/world-report-2012/world-report-2012-landmark-victory-domestic-workers> accessed on 2 August 2012.

³¹ Adelle Blackett op cit note 11 at 4.

the expression that majority of domestic workers are employed in the informal sector is a safe definition-assumption, its actual description does not align with the foremost notions of informality.³² Chen points out that dominant scholarship on the informal economy focus primarily on the self-employed and disregards waged workers. For this reason and the fact that the nature of the domestic work relationship evolves to suit the economic reality of developed and developing countries, it is safe to classify it as a heterogeneous trend.³³

Adelle Blackett indicates that this heterogeneous feature is a result of the ‘interplay between cultural, social, racial, religious and linguistic dimensions and economic, historical and political factors.’³⁴ Despite the differences engineered by these factors, scholarship on this subject reiterates that the intrinsic nature of housework rationalizes the vulnerability of its providers³⁵ and the similarity of experiences of domestic workers worldwide.³⁶ This is the bedrock on which this section is built. This chapter gives an analysis of the specificity of domestic work and its relationship with the economy and inequality; the role of migration and globalization on the demand for domestic work and its size and significance. It concludes with the inherent challenges in standard setting for decent domestic work.

³² Martha Alter Chen ‘Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement and Regulatory Challenges’ (2011) 23 *Canadian Journal for Women and the Law* 167 at 174; WIEGO ‘Informal Economy debate: Four Dominant Schools of Thought’ available at <http://wiego.org/informal-economy/informal-economy-debate-four-dominant-schools-thought> accessed on 28 September 2012. The four theories of informal employment are the: Dualist School, Structuralist School, Legalist School and the Voluntarist School. For an understanding of the Dualist theory, see ILO, *Employment, Incomes and Equality: A Strategy for increasing productive employment in Kenya* (1972) International Labour Office, Geneva; S.V. Sethuraman ‘The Urban Informal Sector: Concept, Measurement and Policy’ (1976) 114 *International Labour Review* 69. For Structuralist theories, Caroline O.N. Moser ‘Informal Sector or Petty Commodity: Dualism or Dependence in Urban Development’ (1978) 6 *World Development* 1041. Manuel Castells & Alejandro Portes ‘World Underneath: The Origins, Dynamics and Effects of the Informal Economy’ in Alejandro Portes et al (eds) *The Informal Economy: Studies in Advanced and Less Developed Countries* (1989) 11-37. For Legalist theories, Hernando de Soto *The Other Path: The Invisible Revolution in the Third World* (1989); Hernando de Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and fails everywhere else* (2000) Basic Books, New York.

³³ Martha Alter Chen op cit note 32 at 175.

³⁴ Adelle Blackett op cit note 11 at 4.

³⁵ Paula England & Nancy Folbre ‘Contracting for Care’ in Marianne A. Ferber et al (eds) *Feminist Economics Today: Beyond Economic Man* (2003) 62.

³⁶ Adelle Blackett op cit note 11 at 4.

2.2 THE SPECIFICITY OF DOMESTIC WORK

The specificity of domestic work is inherent in it being regarded as the preserve of women for centuries.³⁷ This was popularized by Marxist feminist views in the 1960s and 1970s that ‘housework was supposed to be the equalizer of all women’.³⁸ This assumption led to economic dependence on men and an evolution of the ‘male breadwinner’ model over time. Therefore social inequality became apparent, as the housewife was not paid for her work that had no working conditions or hours and put her at the disposal of her family always.³⁹ However, the quest for capital accumulation and advent of dual-income households created a class of women who could pay for domestic work.⁴⁰ The increasing involvement of women in the labour force and the associated inability to reconcile work and family life accelerated the demand for paid domestic work.⁴¹ Hence, feminist treatise in the 1980s emphasized that paid domestic work fostered inequality on a different scale as it created a class of women, principally middle-class that were exempted from domestic work based on racial, ethnic and class privilege.⁴² The paid domestic work phenomenon resulted in employment for a large number of women who were poor, immigrants, and women of colour.⁴³ Consequently, the duties of the housewife that were undervalued, perceived as innate, and considered a ‘labour of love’⁴⁴ were transferred to the paid domestic worker.⁴⁵

The specificity of domestic work is appropriately reflected in the daily life of the paid domestic worker. The paid domestic worker in this age confronts issues such as

³⁷ Veronika Bennholdt-Thomsen ‘Towards a Theory of the Sexual Division of Labor’ in Joan Smith et al (eds) *Households and the World-Economy* (1984) 252-271. In this treatise, Veronika Bennholdt-Thomsen analyzes the sexual division of labour based on a critique of the ‘hunter-gatherer complex’. This is the idea that a man is the hunter in the home, while the woman stays at home because of pregnancy and breast-feeding and gathers.

³⁸ Barbara Ehrenreich ‘Maid to Order’ in Barbara Ehrenreich & Arlie Russell Hochschild (eds) *In Global Woman: Nannies, Maids, and Sex Workers in the New Economy* (2003) 85-103.

³⁹ Claudia von Werlhof op cit note 1 at 140.

⁴⁰ Ally Shireen op cit note 12 at 5; Barbara Ehrenreich ‘Maid to Order: The politics of other women’s work’ Harper Magazine (April 2000) 61. In this article, Ehrenreich refers to the rise of the ‘two-income family’. Used in the same manner as dual-income households in this dissertation.

⁴¹ ILO, *Decent Work for Domestic Workers* op cit note 4 at 5; See also ILO, *Effective Protection of Domestic Workers* op cit note 2 at 3.

⁴² Ally Shireen op cit note 12 at 5.

⁴³ Ibid.

⁴⁴ Dorothy E. Roberts ‘Spiritual and Menial Housework’ op cit note 16 at 17.

⁴⁵ Adelle Blackett op cit, note 11 at 4; A.B. Bakan & D Stasiulis ‘Foreign Domestic Worker policy in Canada and the social boundaries of modern citizenship’ (1994) 58(1) *Science and Society*, 7; Bakan and Stasiulis explain that domestic workers are ‘socially and politically constructed to provide a waged substitute for unwaged labour’. In this sense, feminists have highlighted that paid domestic work reflects, represents and replicates gender inequality according to race, ethnic and class lines; B.T Dill *Across the Boundaries of Race and Class: An exploration of Work and Family Among Black Female Domestic Servants* (1994) Garland Publishing, New York.

unending working hours, an informal employment relationship and discrimination based on ethnicity, race, class or social status. While some issues they face are unrelated to their means of livelihood, they are essential to their existence as human beings.

2.2.1 THE EMPLOYMENT RELATIONSHIP AND THE LIVE-IN CHALLENGE

The specific nature of domestic work is reflected in employment arrangements. Domestic workers constitute a small amount of workers whose employer is presumed to be a woman.⁴⁶ This mirrors the ‘gendered’ assumption of domestic work even though tasks such as gardening, provision of security services and chauffeuring that are mostly performed by men are included in the category of domestic work.⁴⁷ Being that the range of tasks for domestic work have been gendered, there is the creation of a challenge in defining what domestic work is and what tasks are performed in the course of employment. Therefore, the result of this vagueness is that the range of tasks undertaken by most domestic workers become limitless and may ‘range from baby-sitting to assuming primary responsibility for the employer’s children’s education.’⁴⁸

Another feature that makes domestic work unique is that the home is the physical workplace.⁴⁹ This workplace relatively makes them invisible. This invisibility obscures domestic workers from the limelight that enables labour legislation cater for them. It also accounts for the failure of labour legislation to protect them where such legislation exists. Thus, majority of domestic workers are dependent on the fair-mindedness of their employers rather than existing legal norms.⁵⁰

The home as a workplace fosters wage discrimination and inequality which are by-products of the invisibility feature of domestic work. Domestic workers earn less than their employers who work in other sectors of the labour market. Ally Shireen states that ‘dirty work’ carried out by domestic workers enable capital, cultural and other forms of accumulation by their employers and limits the capacity of domestic workers

⁴⁶ ILO, *Decent Work for Domestic Workers* op cit note 4 at 8; Adelle Blackett op cit note 11 at 4.

⁴⁷ ILO, *Effective Protection of Domestic Workers* op cit note 2 at 1; Martha Alter Chen op cit note 32 at 169; ILO, *Decent Work for Domestic Workers*, op cit note 4 at 7.

⁴⁸ Ibid; ILO, *Equality at Work: Tackling the Challenges*, Report 1(B) (2007) 96th International Labour Conference, Geneva, para 428.

⁴⁹ Ibid.

⁵⁰ Ibid at 8.

to achieve ‘value-added’ activities.⁵¹ Thus, Sanjek and Colen point out that through this ‘the multiple axes of inequality dividing household workers and employers intensify and harden’.⁵² This undervalued nature of domestic work in monetary terms is reflected in the ‘strong historical tendency to remunerate domestic workers by payments in kind’.⁵³ Wage discrimination on the bases of gender, race, nationality and ethnicity can also be linked to the personal and intimate knowledge of their employers which is a result of their employment arrangement.⁵⁴

Live-in domestic workers suffer a worse fate than other domestic workers.⁵⁵ A major disadvantage is that the intimate nature of the live-in relationship makes this class of domestic workers susceptible to verbal, physical, racial and sexual abuse.⁵⁶ These kinds of abuses range from shouting at and insulting the employee; insulting their race, ethnic group or nationality; beatings in front of third-parties to humiliate and exact submission, and rape in extreme cases.⁵⁷ Like all forms of abuse, these abuses produce short and long-term psychological and physical after-effects on the development, health and well-being of a domestic worker, especially where the victims are young.⁵⁸ Live-in domestic workers in most cases toil under slave-like conditions because of the unregulated nature of their working hours and conditions. The 2012 Human Rights Watch Report⁵⁹ states that ‘in a review of 72 countries’ labour laws, the ILO found that 40 per cent did not guarantee domestic workers a weekly rest day, and half did not limit hours of work.’

The isolation of live-in domestic workers makes them endure horrible living conditions, and unsafe working conditions. This also affects their individual autonomy,

⁵¹ Ally Shireen op cit note 12 at 5.

⁵² Roger Sanjek & Shellee Colen *At work in Homes: Household Workers in World Perspective* (1990) American Ethnological Society Monograph 3.

⁵³ Ibid at 7.

⁵⁴ Martha Alter Chen op cit note 32 at 169

⁵⁵ Ibid at 170.

⁵⁶ ILO, *Decent Work for Domestic Workers* op cit note 4 at 8. Martha Alter Chen op cit note 32 at 169. For further support of this claim, Nisha Varia & Jo Becker ‘World Report 2012:’ op cit note 30.

⁵⁷ Ibid; HRW, ‘Bottom of the Ladder: Exploitation and Abuse of Girl Domestic Workers in Guinea’ *Human Rights Watch* Volume 19, No 8(A) June 2007 available at

<http://www.hrw.org/sites/default/files/reports/guinea0607webwcover.pdf> accessed on 2 August 2012; See Dorte Thorsen ‘Child Domestic Workers: Evidence from West and Central Africa’ op cit note 13.

⁵⁸ Magdalena Diaz Gorfinkel ‘The Situation of migrant and non-migrant domestic labour in Latin America and ILO’s work in the region’ (2008) (ILO, Geneva); See ‘Education of Domestic Workers: Reinforcing the Tertiary Sector’ *IDAY Newsletter*, Summer 2012 available at http://www.iday.org/EN/05news/docs/Newsletter_IDAY_Summer_2012_EN.pdf accessed on 2 August 2012.

⁵⁹ Nisha Varia & Jo Becker op cit note 30.

decision-making and mobility.⁶⁰ As Gorfinkel points out, decisions concerning family life and child-bearing can be affected in some cases and this leaves the domestic worker lonely and without personal or financial support in old-age.⁶¹

The live-in relationship intersects in a peculiar manner with the employment relationship where domestic workers are considered ‘one of the family’. The 2010 ILO Report⁶² explains that ‘domestic workers tend to be distant relatives, often children, who are entrusted by their parents to wealthier or better-educated family members to be cared for and, ideally, educated in the hope of a better life.’⁶³ Thorsen’s study explains that in West and Central Africa, the nature of a child-domestic worker’s job is dependent on the nature of the household in which they work in. Therefore, while there may be two or three domestic workers in a household, there can also be one child-domestic worker that shares their duties with their employer and their employer’s children.⁶⁴ This form of arrangement blurs the employment relationship and makes the relationship intimate and paternalistic.⁶⁵ In effect, this intimate and paternalistic relationship evolves and bears traces of a master-servant relationship. Thus it defines the domestic worker, reduces their options, widens the power-balance between them and employers and blots out the kind of protection and employment relationship provides in the formal economy.⁶⁶

2.2.2 MIGRATION FOR DOMESTIC WORK AND PRIVATE EMPLOYMENT AGENCIES

Transnational provision of care work has been described as one of the most essential human facets of the many features of globalization.⁶⁷ Beyond transnational labour migration, individuals also move from rural to urban areas within their countries to be employed as domestic workers.⁶⁸ While this has been regarded as a century-old phenomenon its metamorphosis reflects the social change of the 21st century.⁶⁹

⁶⁰ ILO, *Decent Work for Domestic Workers* op cit note 4 at 8.

⁶¹ Magdalena Diaz Gorfinkel op cit note 52 at 25.

⁶² ILO, *Decent Work for Domestic Workers* op cit note 4 at 12.

⁶³ Ibid; Dorte Thorsen ‘Child Domestic Workers: Evidence from West and Central Africa’ op cit note 13 at 4-5.

⁶⁴ Dorte Thorsen ‘Child Domestic Workers: Evidence from West and Central Africa’ op cit, note 13 at 6.

⁶⁵ ILO, *Decent Work for Domestic Workers*, op cit note 4 at 12.

⁶⁶ Ibid.

⁶⁷ Jean L. Pyle ‘Globalization, Transnational Migration, and Gendered Care Work: Introduction’ (2006) 3(3) *Globalizations* 283-295 at 283.

⁶⁸ For a general understanding, See Dorte Thorsen ‘Child Domestic Workers: Evidence from West and Central Africa’ op cit note 13; Ally Shireen *From Servants to Workers* op cit note 12; Adelle Blackett

Another feature of migration for domestic work that reflects social change is the educational qualification of migrant domestic workers. Migrant domestic workers consist of a mixed educational group globally. This is evident from a working population without basic formal education in countries with developing economies and professional and skilled workers with formal education in developed economies.⁷⁰ Consequently, migrant domestic workers comprise of a large pool of workers ranging from nurses, school teachers, chauffeurs and security personnel to child domestic workers. Therefore, why is there a surge in the demand for migrant domestic workers?

Theories of migration state that labour scarcities in developed economies and societies attract cheap and accessible labour supply from economies or communities with relatively difficult economies. This creates a ‘demand and supply’ nexus for the ‘market relationship’.⁷¹ However, Helma Lutz argues that there is another dimension to the theory if it is applied to the domestic work sector.⁷² Lutz’ hypothesis is that ‘domestic work is not just another labour market’. Its ‘intimate character’, ‘social construction as a female gendered area’, the ‘highly emotional relationship between employer and employee’ and ‘mutual dependency framework’ makes an analysis of the global ‘demand and supply’ migration theory model a futile effort. Lutz concludes that the increase in the demand for migrant domestic workers is a result of its specificity. Compared to other transnational services, domestic work cannot be outsourced. It requires flexible migrants with integration capacity and is ‘insufficiently theorized if it is reduced to the issue of replacement or substitution’.⁷³

(ed) ‘Introduction: Regulating Decent Work for domestic Workers’ (2011) 23 *Canadian Journal of Women and Law* 1-45 at 4.

⁶⁹ Helma Lutz and Khalid Koser argue that the migrant domestic work phenomenon which we say is new is not entirely if it is viewed in a wider historical context. Historians have traced migration for domestic work in Europe to the 19th-century and state that it might be an older phenomenon. See Khalid Koser & Helma Lutz ‘The new migration in Europe: Contexts, Constructions and Realities’ in Khalid Koser & Helma Lutz (eds) *The New Migration in Europe: Social Constructions and Social Realities* (1998) 1-15 at 4; Rafaella Sarti ‘The Globalization of Domestic Service- A Historical Perspective’ in Helma Lutz (ed) *Migration and Domestic Work: A European Perspective on a Global Theme* (2008) 77-95 at 79.

⁷⁰ ILO, *Decent Work for Domestic Workers* op cit note 4 at 10.

⁷¹ Helma Lutz ‘Introduction: Migrant Domestic Workers in Europe’ in Helma Lutz (ed) *Migration and Domestic Work: A European Perspective on a Global Theme* (2008) 1-10 at 1; Alejandro Portes & Josh DeWind ‘A Cross-Atlantic Dialogue: The Progress of Research and Theory in the Study of International Migration’ in Alejandro Portes & Josh DeWind (eds) *Rethinking Migration: New Theoretical and Empirical Perspectives* (2007) 3-29.

⁷² Ibid.

⁷³ Ibid.

The increasing demand for migrant domestic workers has led to an increase in private employment or recruitment agencies.⁷⁴ While this has stimulated job creation, it has enabled a wave of exploitation.⁷⁵ Temporary migration schemes support the notion that domestic work is not regular employment. This intensifies the challenge of accessing personal freedoms and civil liberties for the migrant domestic worker.⁷⁶ Undocumented migrant workers also face a higher risk of exploitation as their fear of deportation may reduce their opportunities to access social and health services. These factors among others may make migrant domestic workers remain perpetual foreigners in their country of residence.⁷⁷

2.3 SIZE AND SIGNIFICANCE OF DOMESTIC WORK

The absence of accurate global statistical figures on the number of domestic workers led to an ILO survey in 2010.⁷⁸ While there are different approaches to measuring domestic work,⁷⁹ the survey was based on official labour force surveys and population censuses from 117 countries and territories. Based on this, global estimates reflect a minimum of 52.6 million domestic workers worldwide.⁸⁰ This represents 3.6 per cent of global wage employment globally. Women are the most dominant gender group as 43.6 million are engaged in the domestic work sector which accounts for 83 per cent of the total number while 17 per cent are male. Therefore, domestic work accounts for an estimated 7.5 per cent of female wage employment while 8.6 per cent of children in employment are engaged in child domestic work. This accounts for 11.3 million child domestic workers.⁸¹

In addition, Asia contributes the largest number of domestic workers with an estimated minimum of 41 per cent, while Latin America and the Caribbean contribute

⁷⁴ Asha D'Souza 'Moving towards Decent Work for Domestic workers: An Overview of the ILO's work' (2010) *ILO Bureau for Gender Equality Working Paper 2* (Geneva) 35.

⁷⁵ Ibid.

⁷⁶ ILO, *Decent Work for Domestic Workers* op cit note 4 at 10.

⁷⁷ Ibid; Rhacel Salazar Parrenas 'Perpetually Foreign: Filipina migrant domestic workers in Rome' in Helma Lutz (ed) *Migration and Domestic Work: A European Perspective on a Global Theme* (2008) 99-112.

⁷⁸ Yamila Simonovsky & Malte Luebker 'Global and Regional estimates on Domestic Workers' (2011) *ILO TRAVAIL Domestic Work Policy Brief*. This publication was based on a survey carried out in 2010. Thus these figures are subject to changes in 2012 when this dissertation was written.

⁷⁹ Ibid at 3. Other approaches are Task-based, Status-in-employment, Household-roster and Industry-based approaches.

⁸⁰ Ibid at 10.

⁸¹ Ibid.

37 per cent and Africa has the next highest contribution with 10 per cent.⁸² This survey reveals the significance of domestic work in terms of economic and financial contribution to the global economy as well as its job creation capabilities.

The contribution of domestic work to global economy resides not only in its market-enabling function but in monetary remittances made by migrant domestic workers to their families at home. These remittances have become a vital avenue for economic support. There is no gainsaying that domestic work has contributed a significant proportion to global remittances based on its prominence.

Apart from creating jobs for domestic workers, the domestic work sector had fuelled employment in other sectors connected with it such as employment and recruitment agencies, medical centres, customs and immigration, governmental departments and agencies, travel agencies, transport owners and workers and numerous other sectors. A good example of this phenomenon is Bangladesh which had 700 licensed private recruitment agencies, an estimated 10,000 sub-agents and 1350 travel agencies in 2002.⁸³ Thus, the importance of the domestic work sector cannot be over-emphasized.

2.4 CONCLUSION: THE CHALLENGE OF STANDARD-SETTING

As highlighted in this section, the challenge of standard-setting to promote decent work in the domestic work sector is embedded in its specificity. The challenges generated by its specific nature can be delineated into four major sub-issues as follows:

- a) Its global heterogeneous nature
- b) The gendered component and perception
- c) Migration dynamics, and;
- d) The 'concealed' nature of the workplace and the worker.⁸⁴

The factors have led to an unconscious exclusion of domestic workers from formal regulation afforded through national legislations. On the other hand, these workers are subject to non-state norms and regulation prescribed by cultural practices and training

⁸² Ibid at 8.

⁸³ Tasneem Siddiqui 'Protection of Bangladeshi migrants through good governance' in Christiane Kuptsch (ed) *Merchants of Labour* (2006) 63-86 at 70; Tasneem Siddiqui 'International Labour Migration from Bangladesh: A Decent Work Perspective' (2005) *ILO Policy Integration Department Working Paper No. 66* 5.

⁸⁴ Adelle Blackett op cit 11 at 4-5.

regarding their conduct in their employers' household.⁸⁵ Thus standard-setting in this context becomes an uphill task as it must address all these issues, players and norms.⁸⁶

There have been arguments and a strong call for specific regulation of domestic work among academics⁸⁷ and the ILO. However, while specific regulation and international standard-setting is an important step in regulating domestic work, social justice in the context of the preamble to the ILO Constitution can only be achieved in the domestic work sector through intensive social and technical cooperation and monitoring.

University of Cape Town

⁸⁵ ILO, *Decent Work for Domestic Workers* op cit note 4 at 11; Asha D'Souza op cit note 74 at 36.

⁸⁶ Ibid.

⁸⁷ Adelle Blackett op cit note 11.

CHAPTER THREE

DOMESTIC WORK: INTERNATIONAL REGULATION AND EXISTING LABOUR STANDARDS

... 'the International Labour Organization, dealing as it does with the homely problems of the welfare of the common man, has a universal constituency and a lasting cause to serve ... Its name belies its nature; for it represents all interests, not merely those of labour.

It is a world parliament limited in scope
to the problems that affect labour
but it acts in the name and the interests of all' ...

-James Shotwell⁸⁸

3.1 INTRODUCTION: AN AGE-OLD INTEREST OF THE ILO

The regulation of domestic work has been an ILO interest for a long time. An ILO Survey Report in 1970 (1970 Survey Report) stated that domestic workers are a group of workers that are 'peculiarly devoid of legal and social protection, who are singularly subject to exploitation, and whose legitimate interests and welfare have long been neglected in most countries.'⁸⁹ This ideal was at the centre of the resolution concerning the conditions of employment of domestic workers adopted five years earlier at the International Labour Conference (ILC) in 1965.⁹⁰ Therefore, the resolution as well as the 1970 Survey Report acknowledged the immediate need to provide domestic workers

⁸⁸ James T. Shotwell, At the Paris Peace Conference (1937) 54-55 cited in ⁸⁸ Brian A. Langille 'What is International Labour Law for?' (2009)3(1) *Law & Ethics of Human Rights* 47-82 at 76.

⁸⁹ ILO, 'The Employment and Conditions of Domestic Workers in Private Households: An ILO Survey' (1970) *102 International Labour Review* 391-401 at 391.

⁹⁰ ILO, Official Bulletin (July 1965) Supplement I, (ILO, Geneva) 20-21. The resolution prompted further studies by the ILO into the plight of domestic workers worldwide via materials provided by governments on the situation in their countries. Thus in 1967, the ILO issued questionnaires to governments on the employment and conditions of domestic workers and the content of the returned questionnaires were unavailable, incomplete or unreliable. The report of the survey was published as *The Employment and Conditions of Domestic Workers in Private Households: An ILO Survey* op cit note 89.

with basic protection that would guarantee ‘a minimum standard of living, compatible with the self-respect and dignity which are essential to social justice.’⁹¹

The 1970 Survey Report highlighted issues concerning domestic workers such as their general situation, training, recruitment and contracts, conditions of employment, social security, termination of employment, freedom of association, administration and enforcement and home-help services. These issues set the tone for present-day discussions concerning decent work for domestic workers. Thus, 46 years after the ILC adopted the resolution concerning the conditions of employment of domestic workers it adopted the ILO Domestic Workers Convention (C189) at its 100th Session in June 2011.⁹²

Despite the adoption of C189 and other efforts such as the reaffirmation in the ILO Declaration on Fundamental Principles and Rights at Work, and nominal inclusion in legislation, domestic work remains invisible as a form of employment in most countries worldwide.⁹³ This issue raises questions such as the rationale for the regulation of domestic work as an international standard and the extent of effectiveness of the ILO in regulating domestic work as a form of employment. This section explores the context and reasoning behind the regulation of domestic work internationally. It evaluates the coverage and supervision of domestic work in the light of existing ILO standards like freedom of association and the right to collective bargaining, eradication of forced labour, abolition of child labour, elimination of discrimination, protection against abuse, harassment and violence, living conditions, working time, remuneration and the formalization of the employment relationship.

3.2 THE RATIONALE FOR INTERNATIONAL REGULATION OF DOMESTIC WORK

The theory of Cornelius Castoriadis⁹⁴ explains the role of the ILO as an institution in the international regulation of labour standards. Castoriadis states that an ‘institution’ is

⁹¹ ILO, *The Employment and Conditions of Domestic Workers in Private Households: An ILO Survey* op cit note 89 at 391; Adelle Blackett ‘Making domestic work visible op cit note 11 at 1.

⁹² ‘100th ILO Annual Conference decides to bring an estimated 53 to 100 million domestic workers worldwide under the realm of labour standards’ Press release, 16 June 2011 available at http://www.ilo.org/ilc/ILCSessions/100thSession/media-centre/press-releases/WCMS_157891/lang-en/index.htm accessed on 8 August 2012.

⁹³ ILO, *Decent Work for Domestic Workers*, op it note 4 at 12.

⁹⁴ Cornelius Castoriadis *The Imaginary Institution of Society* (1975) MIT Press, Cambridge (translated by Kathleen Blamey). This work originally appeared in French with the title *L’institution imaginaire de la société* (1975) Seuil, Paris. For a brief discussion, see David Ames Curtis (ed) ‘The Social Imaginary and

the first reflection or description of human social reality. The ‘second institution’ becomes the law on which the ‘institution’ is built. Therefore, in the growth and incessant self-transformation of society and institutions, he highlights that the emergence of an institution is not subject to a determined sequence but the emergence of nontrivial novelty.⁹⁵ This makes institutions a confluence point for social reality and the law in an enduring interaction which enhances human scopes of action.⁹⁶

In reflecting the human social reality, the ‘general notion’ at the formation of the ILO in 1919 was that it was created to prevent a ‘race to the bottom’⁹⁷ by nations.⁹⁸ Langille in his article⁹⁹ argues that in the text of the Preamble to the ILO Constitution¹⁰⁰ the following propositions ‘P1. UNIVERSAL PEACE CAN ONLY BE ESTABLISHED IF IT IS BASED UPON SOCIAL JUSTICE, and; P2. THE FAILURE OF ANY NATION TO ADOPT HUMANE CONDITIONS OF LABOUR IS AN OBSTACLE IN THE WAY OF OTHER NATIONS WHICH DESIRE TO IMPROVE THE CONDITIONS IN THEIR OWN COUNTRIES’¹⁰¹ explains how the world works and the rationale for the creation of the ILO. However, P2 gives birth to the ‘general notion’ concerning the rationale behind the creation of the ILO and the regulation of domestic work.

the Institution (1975):Excerpt’ in *The Castoriadis Reader* (1997) 214 (Blackwell, Oxford); Massimo La Torre ‘Institutional Theories and Institutions of Law: On Neil MacCormick’s Savoury blend of Legal Institutionalism’ in Maksymilian Del Mar & Zenon Bankowski (eds) *Law as an Institutional Normative Order* (2009) 67-82 at 73.

⁹⁵ David Ames Curtis (ed) ‘The Social Imaginary and the Institution op cit 94 at 214.

⁹⁶ Massimo La Torre ‘Institutional Theories and Institutions of Law: On Neil MacCormick’s Savoury blend of Legal Institutionalism’ op cit., 67-82 at 73. Massimo La Torre highlights that two constant movements proper to human sociality are ‘its “instituting” moment and its “instituted” one. The “instituting” moment refers to the social reality that causes the institution to be created and the “instituted” one is the law.

⁹⁷ This is the competitive bidding down or lowering of labour standards and regulatory competition by countries in order to attract new investment or maintain existing investment in their economies. This phenomenon began in the 19th century with competition among employees at the labour market. This culminated in the need for a recompense of bargaining power inequality. See generally, Otto Kahn-Freund *Labour and the Law* 2 ed (1977) Stevens & Sons, London. For a general discussion of the ‘race to the bottom’ hypothesis, see Richard McKenzie & Dwight Lee *Quicksilver Capital* (1991) Free Press.

⁹⁸ Brian A. Langille ‘What is International Labour Law for?’ (2009) 3(1) *Law & Ethics of Human Rights* 47-82. In this article, Brian Langille states that this is the dominant account of international labour law and has ‘been central to debates about the ILO’s *raison d’être* from the beginning.’ He posits further that the preamble to the original 1919 ILO constitution expresses this very idea as a central rationale for the existence of the organization; see also Manfred Weiss ‘Re-Inventing Labour Law?’ in Guy Davidov & Brian Langille (eds) *The Idea of Labour Law* (2011) 43-56 at 44.

⁹⁹ Ibid.

¹⁰⁰ The original ILO Constitution was drafted in 1919 as Part XIII of the Treaty of Versailles. See the Preamble Versailles Peace Treaty, June 28, 1919, 225 Cons. T.S. 188 [hereinafter ILO Constitution].

¹⁰¹ He originally developed this propositions in Brian Langille ‘Re-reading the 1919 ILO Constitution in Light of Recent Evidence on Foreign Direct Investment and Workers Rights’ (2003) 42 *Columbia Journal of Transnational Law* 87.

In re-thinking the purpose of international regulation of labour standards and a new working model in this age of globalization, Langille points out that an integrated reading of P1 and P2 must be adopted. This integrated approach is necessary because the empirical reality of international labour law has grown beyond the employer-employee relationship and bargaining power associated with the 19th and 20th century industrialist model of production to a model where the ILO must 'lead member states to pursue their self-interest through the construction of social policies which are...complex and mutually supporting aspects of human freedom which... make possible the construction of just and durable societies'.¹⁰²

Concerning domestic work, increasing evidence from both developed and developing countries shows that the lack of effective policies to address the work-family conflict can cause major problems for societies, enterprises, families, men and women.¹⁰³ Therefore, the establishment of universal peace based on social justice for a teeming population of domestic workers worldwide becomes contingent on the need to 'adopt humane conditions' for the regulation of domestic work.

From another purview, the rationale for the international regulation for domestic work is reflected in Hugo Sinzheimer's concept of 'human freedom and the dignity of man' as a motive for labour law regulation.¹⁰⁴ While it is believed that most of his work has become obsolete, his sociological approach to labour law which belies the acknowledgement of and respect for workers' humanity and dignity are essential to the realization of 'free and equal societies'.¹⁰⁵ In explaining Sinzheimer's analysis of the 'driving force for labour law regulation', Manfred Weiss reiterates that 'the object of transaction in an employment relationship is not a commodity but the human being'.¹⁰⁶ Being that 'human dignity may be endangered by the employment relationship,...one of

¹⁰² Brian A. Langille 'What is International Labour Law for?' op cit note 98 at 76.

¹⁰³ ILO 'Work and Family: The way to care is to share'

http://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_101758.pdf accessed on 18 July 2012.

¹⁰⁴ Otto Kahn-Freund 'Hugo Sinzheimer 1875-1945' in Roy Lewis & Jon Clark (eds) *Labour Law and Politics in the Weimar Republic* (1981) 72-107 at 74; Freund points out that 'Sinzheimer's thought and activity is permeated by insights into the fundamental role of "the human being in the law"'. This reflected the focus of his research and became the focus of his Amsterdam Inaugural Lecture titled 'The Problem of the Human Being in the Law' in 1938.

¹⁰⁵ Ruth Dukes 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (2011) 57-68 at 57.

¹⁰⁶ Manfred Weiss 'Re-Inventing Labour Law' in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (2011) 43-56 at 44. See Hugo Sinzheimer 'The Essence of Labour Law' (*Das Wesen des Arbeitsrechts*) (1927) in Otto Kahn-Freund & Thilo Ramm (eds) 1 *Labour Law and the Sociology of Law (Arbeitsrecht und Rechtssoziologie)* (1976) 108 at 110. (Bund Verlag)

the main goals of labour law is the fight for human dignity.’¹⁰⁷ While these principles encapsulate the Decent Work Agenda of the ILO, a crucial force behind Sinzheimer’s concept of labour law is his ideal that the scope of labour law goes beyond the regulation of the employment relationship, to the regulation of the ‘needs and risks’ in an employee’s life.¹⁰⁸ This is an acknowledgement of the importance and role of labour law in providing social security for workers.

For domestic workers in the periphery of the economy, these principles summarize their aspirations and hopes. These aspirations commence with their recognition, and inevitably lead to the ascription of their dignity and the evolution of a rights-based regime of regulation and protection which the ILO has sought for since 1965.

Therefore, in line with the quest for social justice and the notion that ‘labour legislation could not be solidly established in individual countries unless supported by parallel standards adopted internationally’¹⁰⁹ the ILO has embarked on a drive to ensure the visibility and protection of domestic workers via Conventions, Recommendations, Declarations and its Decent work Agenda in this era of labour flexibility and ‘non-standard employment’.

3.3 INTERNATIONAL INSTRUMENTS AND THE CONTEXT IN WHICH DOMESTIC WORK IS REGULATED

The framework for the regulation of international labour standards is hinged on the following:

- (i) Membership of the ILO which foists a duty to protect the labour force and promote the aims and objectives of the organization within its jurisdiction on a member state;
- (ii) The ratification of Conventions and Recommendations;
- (iii) The adoption of Declarations by the International Labour Conference; and
- (iv) The supervisory mechanism of the ILO through its Committees such as the CEACR and the Committee on the Application of Standards (CAS).

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Lee Swepston ‘International Labour Law’ in Roger Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 9 ed (2007)137 para 2.

While the ratification of Conventions imposes obligations on the ratifying country, Declarations are statements of endorsement that reaffirm the importance which the parties attach to certain principles and values. Thus, there are no obligations attached to the adoption of Declarations.

With the recent adoption of the C189, the Convention has ratification from Uruguay.¹¹⁰ The sole reliance on a universal ratification of the C189 for the regulation and protection of domestic workers would be a futile exercise as universal ratification may not be achieved. Therefore, the reliance on other Conventions is an essential ingredient in the immediate regulation of domestic work. Of particular importance, are the eight fundamental conventions encapsulated in the Declaration of the Fundamental Principles and Rights at Work.¹¹¹ These rights: freedom of association and the effective recognition of the right to bargain collectively, the eradication of forced labour, the effective abolition of child labour, and the elimination of discrimination in employment, have almost achieved universal ratification and their application to domestic work would facilitate the recognition and protection of domestic workers worldwide.¹¹² Conventions significant to the regulation of domestic work are as follows:

- i. the Domestic Workers Convention (No. 189)2011;
- ii. the Freedom of Association and Protection of the Right to Organize Convention (No. 87) 1948, and the Right to Organize and Collective Bargaining Convention (No.98) 1949;
- iii. the Forced Labour Convention (No. 29) 1930, and the Abolition of Forced Labour Convention (No. 105) 1957;
- iv. the Equal Remuneration Convention (No. 100) 1951, and the Discrimination (Employment and Occupation) Convention (No. 111) 1958;

¹¹⁰ On 26 April 2012, the Uruguayan parliament approved as the first country ratification the convention and deposited the instrument for ratification to the ILO in June 2012; ILO 'One year on, Uruguay is first to ratify ILO domestic work Convention' *ILO News* 14 June 2012 available at http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_183396/lang--en/index.htm accessed on 20 August 2012.

¹¹¹ ILO, *Effective Protection of Domestic Workers* op cit note 2 at 25. In this publication, the ILO points out that 'Domestic workers are particularly vulnerable to violations of these fundamental rights at work, given the historic links between domestic work and slavery and other forms of servitude, persisting patterns of discrimination based on sex, ethnicity, social origin and other grounds, and the fact that domestic work is often performed informally...[thus] respect for and the full realization of the fundamental principles and rights in the domestic work context are essential to empower domestic workers and ensure conditions of decent work for them.'

¹¹² *Ibid* at 5.

- v. the Minimum Age Convention (No. 138) 1973, and the Worst Forms of Child Labour Convention (No. 182) 1999;
- vi. the Wage-Fixing Machinery Convention (No. 26) 1928, and the Minimum Wage Fixing Convention (No. 131) 1970;
- vii. the Protection of Wages Convention (No. 95) 1949;
- viii. the Maternity Protection Convention (No. 95) 2000;
- ix. the Workers with Family Responsibilities Convention (No. 156) 1981;
- x. the Termination of Employment Convention (No. 158) 1982;
- xi. the Private Employment Agencies Convention (No. 181) 1997;
- xii. the Migration for Employment Convention (Revised) (No. 97) 1949 and the Migrant Workers (Supplementary Provisions) Convention (No. 143) 1975.

Another context which can serve as an avenue for the protection of domestic workers is the contention that the ILO Constitution is a treaty which creates obligations for member states. These obligations include the pursuit of the aims, purposes and principles enunciated in the Preamble and the Declaration of Philadelphia 1944.¹¹³ Therefore an attempt by member states to regulate labour in line with the text of the constitution would ensure fair labour practice and regulation for the labour force.

3.4 INTERNATIONAL STANDARDS RELEVANT TO DOMESTIC WORK REGULATION

In the regulation of domestic work, the first standards to evaluate are those encapsulated in the ILO Declaration on Fundamental Principles and Rights at Work.¹¹⁴ Article 3(2) of the Domestic Workers Convention (No. 189) 2011 states as follows:

‘Each Member shall, in relation to domestic workers, take the measures set out in this Convention to respect, promote and realize the fundamental principles and rights at work, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;

¹¹³ Neville Rubin *Code of International Labour Law* Vol. 1 (2005) 3-5; ILO, *Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (1996) 4th (revised) ed. Paragraph 1 states that ‘When a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of Association....’

¹¹⁴ ILO, *Effective Protection of Domestic Workers* op cit note 2 at 25.

- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.’

Therefore, these standards will be the first to be examined.

3.4.1 Freedom of Association and the Right to Collective Bargaining

Freedom of association expresses the principle that individuals have the liberty to decide whom they associate with.¹¹⁵ Along with collective bargaining, freedom of association has become a fundamental right and an essential ILO value. It has been described as integral for effective labour market governance, decent conditions at work and as ‘one of the primary safeguards of peace and social justice.’¹¹⁶ However the nature of domestic work, which involves the domestic worker being secluded in the home challenges the domestic worker’s right to freedom of association.

Therefore, Article 3(3) of the Domestic Workers Convention (No. 189)2011 imposes an obligation on ILO member states to ‘protect the right of domestic workers and employers of domestic workers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing.’ In giving this right a broader application, Article 2 of the Freedom of Association and Protection of the Right to Organize Convention (No. 87) 1948 is a similar provision. Domestic workers are covered by Article 2 of the Freedom of Association and Protection of the Right to Organize Convention (No. 87) 1948 because the words ‘workers and employers, without distinction’ make it an omnibus provision which applies to all workers.

The full enjoyment of this right by domestic workers cannot be realized without the support of government policies to create an enabling environment for the exercise of this right. Thus, Article 2 (1) of the Right to Organize and Collective Bargaining Convention (No.98) 1949 prevents the interference of member states in the establishment and operation of these associations. Paragraph 2 of the Recommendation concerning Decent Work for Domestic Workers (No.201) 2011¹¹⁷ imposes a duty on member states to ensure that ‘legislative or administrative restrictions or other obstacles to the right of domestic workers to establish their own organizations or to join the

¹¹⁵ Bradley A & Ewing KD *Constitutional and Administrative Law* (2003) 551.

¹¹⁶ ILO, *Freedom of Association: Digest of decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, (2006)5th (revised) ed 7 para 1.

¹¹⁷ Hereafter Recommendation No. 201 of 2011.

workers' organizations of their own choosing'¹¹⁸ are recognised and eliminated. The duty of member states to 'support and give consideration to measures which strengthen the capacity' of organizations representing the interest of domestic workers and their employers is also set out in Recommendation No. 201 of 2011.¹¹⁹ This duty encompasses the enactment of legislation to secure the exercise of this right¹²⁰ as well as its enjoyment 'in practice'.¹²¹

3.4.2 Forced Labour

Forced Labour is a domestic work concern. This is a result of the condition in which domestic work is performed and the employment relationship between domestic workers and their employers. The intertwined relationship between modern-day slavery, human trafficking and migration for domestic work, makes forced labour an enduring ill in the context of domestic work. The prohibition against forced labour is a peremptory norm of International Human Rights Law guaranteed by the Forced Labour Convention (No. 29) 1930, and the Abolition of Forced Labour Convention (No. 105) 1957.¹²² Article 2 (1) of the Forced Labour Convention (No. 29) 1930 states that forced or compulsory labour means 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered herself or himself voluntarily'. For domestic workers, while their employment maybe voluntary, the range of duties which they may be required to perform during the course of employment might fall under the definition of forced labour.¹²³ The ILO has also outlined other circumstances which can convert voluntary-employment into forced labour to include: 'physical confinement in the work location, psychological compulsion in the form of credible threats of penalties such as loss of employment, physical or sexual abuse, induced indebtedness, deception regarding nature or terms of

¹¹⁸ Paragraph 2 (a) Recommendation No. 201 of 2011.

¹¹⁹ Paragraph 2 (b) Recommendation No. 201 of 2011.

¹²⁰ ILO, *Effective Protection of Domestic Workers* op cit note 2 at 26.

¹²¹ ILO, *Decent Work for Domestic Workers* op cit note 4 at para 61.

¹²² ILO, *Decent Work for Domestic Workers* op cit note 4 at para 64; ILO, *Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report I(B)(2001) International Labour Conference, 89th Session, Geneva, para 7; ILO, *Eradication of Forced Labour: General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, Report III (1B) (2007) International Labour Conference, 96th Session, Geneva.

¹²³ ILO, *Eradication of Forced Labour* op cit note 122 at paras 37-41; ILO, *Effective Protection of Domestic Workers* op cit note 2 at 29.

employment, withholding of wages, and retention of identity documents.’¹²⁴ Therefore, the ILO has put into cognizance the dynamism of forced labour in domestic work and has put measures in place to forestall its incidence. These measure include protection against harassment, abuse and violence,¹²⁵ freedom of movement, and the right of a domestic worker to keep his or her travel and identity documents.¹²⁶ A very important measure is entrenched in Articles 7 and 8 of the Domestic Workers Convention (No. 189)2011 which imposes a duty on member states to initiate channels through which information concerning terms and conditions of domestic workers’ employment are communicated to them ‘in an appropriate, verifiable and easily understandable manner’.¹²⁷ The ILO has also made the exaction of forced labour a penal offence and states that penalties for this offence are strictly enforced.¹²⁸

3.4.3 Child Labour

In the same manner in which child labour was a principal standard regulated to curb the extremes of the Industrial revolution¹²⁹ so is defining the word ‘child’ an important first step in setting parameters for prohibiting child labour in the context of domestic work.¹³⁰ In this regard, the minimum age for admission to domestic work is not set by C189. However, a combined reading of the Minimum Age Convention (No. 138) 1973, and the Worst Forms of Child Labour Convention (No. 182) 1999 sets a standard which will be applied to domestic work.

The Minimum Age Convention (No. 138) 1973 sets the age of 13 for light work¹³¹, 15 for ordinary work¹³² and 18 for hazardous employment¹³³. It is also stated that a ‘child’ is anyone less than the age of 18 for the purpose of eliminating worst forms of child labour.¹³⁴

¹²⁴ ILO, *Effective Protection of Domestic Workers* op cit note 2 at 29; ILO, *Eradication of Forced Labour* op cit note 122 at paras 20-21; ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (1B) (2010) International Labour Conference, 99th Session, Geneva 265.*

¹²⁵ Article 5, C189 and Paragraph 7, Recommendation No. 201 of 2011.

¹²⁶ Article 9, C189.

¹²⁷ Ibid.

¹²⁸ Article 25, Forced Labour Convention (No. 29) 1930.

¹²⁹ Jean-Michel Servais *International Labour Law* 3 revised ed (2011) 139 para. 342.

¹³⁰ ILO: *Decent Work for Domestic Workers* op cit note 2 at para 69.

¹³¹ Article 7(1),

¹³² Article 7(2),

¹³³ Article 3,

¹³⁴ Article 2, Worst Forms of Child Labour Convention (No. 182) 1999; Article 1, UN Convention on the Rights of the Child.

Article 4(1) of C189 states that ‘Each Member shall set a minimum age for domestic workers consistent with the provisions of the Minimum Age Convention 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182), and not lower than that established by national laws and regulations for workers generally.’ The wording of this article is broad-based. It gives coverage to both conventions and does not illegalize the employment of persons under the age of eighteen as domestic workers. However, it is implicit in this article that where domestic work involves hazardous and slave-like conditions, it is illegal for children under the age of eighteen to be engaged in such employment. Thus, child domestic labour in International Law is ‘domestic work undertaken in the household of a third-person by a child below the legal minimum age for work or employment, or by a child above the legal minimum age but under the age of eighteen in hazardous or under slavery-like conditions, in which case it would be considered as a worst form of child labour.’¹³⁵

Child domestic work is socially acceptable in many cultures. Therefore, the ILO has created a framework to promote education among child domestic workers. Article 4(2) of C189 imposes a duty on ratifying states to ensure that child domestic workers under the age of 18 are not deprived of compulsory or further education or vocational training. In further regulation of this standard, the ILO has resorted to technical cooperation through the International Programme on the Elimination of Child Labour (IPEC). Another important point in the regulation of child domestic work is the flexible and holistic wording of Article 4 of C189. Article 4 takes into consideration labour and economic activities in most economies and cultures.¹³⁶ In this context, it authorizes work from the age of 13 to foster economic development as long as it does not amount to child labour. This flexibility of Article 4 enables difficulty in implementation in the context of domestic work.¹³⁷ However, the IPEC was created to curb this issue.¹³⁸ Thus, child domestic labour is reasonably regulated by International labour Law.

3.4.4 Equality and the elimination of discrimination

Discrimination and inequality are prevalent vices facilitated by the nature of domestic work. As with discrimination in other employment and occupation, it takes on many

¹³⁵ ILO, Children in Hazardous work: What we know, what we need to know (2011) *International Programme on the Elimination of Child Labour (IPEC)* 28.

¹³⁶ Jean-Michel Servais *International Labour Law* op cit 129 at 139 para 344.

¹³⁷ Ibid at 141, Para 349,.

¹³⁸ Ibid at 143, Para 355.

forms in the domestic work context. However, its conventional feature which involves ‘treating people differently based on characteristics, such as race, colour or sex, HIV status, pregnancy which results in loss of equality of opportunity and treatment’¹³⁹ makes it a right that has to be guaranteed in domestic work as much as it is protected as a labour standard in other forms of employment.

In protecting this standard, the Equal Remuneration Convention (No. 100) 1951, and Discrimination (Employment and Occupation) Convention (No. 111) 1958 are the primary conventions for its regulation and apply to all domestic workers. However, in tandem with the need for specific regulation of domestic work, Articles 10 and 11 of the Domestic Workers’ Convention (No. 189) prescribe equal treatment of domestic workers with respect to working hours, leave periods and remuneration respectively.

In tackling discrimination, the ILO has adopted a socially-inclusive model.¹⁴⁰ It has stated that ‘socially inclusive workplaces can pave the way for more egalitarian, democratic and cohesive labour markets and societies.’¹⁴¹ In line with the mandate of decent work for all, domestic workers are included in this model to protect them against the changing face of discrimination in domestic work.

3.4.5 Working Conditions

Labour standards guaranteed and covered concerning domestic work include the formalization of the employment relationship, protection against abuse, harassment and violence, working time (this includes night work), and remuneration.

3.4.5.1 Formalizing the Employment Relationship

One of the major contributions of the Domestic Workers’ Convention (No. 189) 2011 is the prescription of written contracts of employment for domestic workers.¹⁴² This reinforces the ability of specific regulation to formalize a prevalently informal relationship in most countries. Article 7 expressly prescribes the contents of a domestic worker’s contract of employment to include important details such as the duration of the contract, an enumeration of a domestic worker’s duties in the home, hours of work, and terms of repatriation for migrants, and termination notice and procedure. Also

¹³⁹ ILO, *Time for Equality at Work*, Report I(B) (2003) *International Labour Conference, 91st Session, Geneva*. 1.

¹⁴⁰ *Ibid* at 25.

¹⁴¹ *Ibid*.

¹⁴² Article 7; See Paragraph 6, Recommendation (No. 201) 2011.

implied therein is the right to negotiate the contract in terms with collective bargaining and agreements. Paragraph 6 of Recommendation (No. 201) 2011 goes a step further to impose a duty on states to provide assistance in helping domestic workers to understand their contracts as well as further contents of the terms and conditions of employment.

Concerning the live-in challenge, Article 6 of C189 provides for decent working and living conditions which protect the privacy of the live-in domestic worker. On the other hand, Article 9 ensures that the live-in choice, freedom of movement during rest, leave periods, annual leave and an entitlement to retain travel and identity documents are left to the discretion of the worker.

3.4.5.2 Abuse, Harassment and Violence

As a result of the heterogeneous nature of domestic work which creates a variety of experiences for domestic workers worldwide, C189 contains a blanket provision to protect against all forms of abuse, harassment and violence. Article 5 states that ‘Each member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence’. It has been expressed that manner in which this provision is structured will aid the definition, prevention, prohibition and the responsibility for monitoring and enforcement globally.¹⁴³

3.4.5.3 Working Time

C189 regulates normal hours of work, weekly and daily rests, overtime, night work¹⁴⁴ and leave.¹⁴⁵ Article 10(2) specifically prescribes 24 consecutive hours as weekly rest while time spent by domestic workers with holidaying employers is not part of their paid annual leave.¹⁴⁶ Issues such as sick leave, maternity leave¹⁴⁷, public holidays¹⁴⁸ and other types of personal leave¹⁴⁹ are catered for by International regulation.

3.4.5.4 Remuneration

The issue of domestic worker remuneration is dealt with in two ways: The payment of minimum wages to tackle relatively low wages and the protection of earnings to

¹⁴³ ILO, *Effective Protection of Domestic Workers* op cit note 2 at 42.

¹⁴⁴ Paragraph 9(2), Recommendation (No. 201) 2011.

¹⁴⁵ Article 10.

¹⁴⁶ Paragraph 13, Recommendation (No. 201) 2011.

¹⁴⁷ Article 14, Domestic Workers Convention (No. 189) 2011.

¹⁴⁸ Ibid.

¹⁴⁹ Paragraph 25(1) (b) and (c), Recommendation (No. 201) 2011. This paragraph encourages policies to ensure a work-life balance for domestic workers especially those with family responsibilities.

forestall exploitation of domestic workers through payment in kind, deductions and payment at irregular intervals. Article 11 of C189 aims at an equal and non-discriminatory level of remuneration based on a national, sectoral or occupational minimum wage rate. On the other hand, Article 12(1) prescribes cash payments or other lawful means of monetary payment to be made monthly with the consent of the worker. Payments in kind must not be made against the will of the worker and where such mode of payment is agreed to by the worker, its monetary value should be fair, reasonable and beneficial to the domestic worker.¹⁵⁰

In curbing arbitrary deductions, the ILO attempt to protect a large spectrum of domestic workers (especially migrants) from unlawful withholding of wages by employers or recruitment agencies.¹⁵¹ Thus, deductions are subject to national laws, regulations and terms of collective agreements.¹⁵²

3.4.6 Social Protection

Social protection standards such as social security,¹⁵³ maternity protection,¹⁵⁴ promotion of Occupational Health and Safety,¹⁵⁵ regulation of recruitment by private employment agencies,¹⁵⁶ labour inspection¹⁵⁷ and the establishment of a complaint mechanism¹⁵⁸ for domestic workers are covered under the C189. Article 18, states the implementation of the Convention in member states shall be through a tripartite consultative structure, collective agreements or appropriate adaptive or specific measures consistent with national practice.

3.5 CONCLUSION

The International regulation of domestic work reflects an understanding of domestic work issues in reality by the ILO. This is evident in the adoption of the C189 to tackle the challenge of specific regulation. The topical issues dealt with in the Conventions articles as well as the flexible manner in which they are drafted portrays the ILO ideal

¹⁵⁰ Article 12(2). See Paragraph 14, Recommendation (No. 201) 2011.

¹⁵¹ Article 15(1)(e).

¹⁵² Article 8, Protection of Wages Convention (No. 95) 1949.

¹⁵³ Article 14.

¹⁵⁴ Ibid.

¹⁵⁵ Article 13.

¹⁵⁶ Article 15.

¹⁵⁷ Article 17(2).

¹⁵⁸ Article 17(1).

of ‘socially-inclusive labour legislation’. Article 18 and 19¹⁵⁹ of C189 increase the flexible application of the convention and expand the application of all other international labour conventions to domestic workers respectively. This will effectively help states, employers and employees grapple with the heterogeneous and dynamic nature of domestic work.

The true litmus test for international regulation of domestic work lies in its ability to justify the rationale for its existence. The rationale put forth by this dissertation in section 3.2 above is ‘the description and acceptance of a human social reality by an institution’, ‘an integrated approach in an analysis of social justice and labour regulation in the Preamble to the ILO Constitution’, and concept of ‘human freedom and the dignity of man’ as a motive for labour law regulation. When evaluated in the light of this benchmark, international regulation of domestic work passes the litmus test in terms of standard-setting.

¹⁵⁹ This article states as follows ‘This Convention does not affect more favourable provisions applicable to Domestic workers under other international labour Conventions’.

CHAPTER FOUR

DOMESTIC WORK: A COMPARATIVE ANALYSIS

4.1 INTRODUCTION

Comparative Labour Law plays an invaluable role in the evaluation of labour standards. Based on this notion, an understanding of domestic work will be incomplete without an assessment of national regulation of the domestic work sector. Therefore, this comparative assessment of domestic work is intended to be a tool for law reform.¹⁶⁰ In doing this, this chapter seeks to analyse the application of international standards to the domestic sector in the national jurisdictions.¹⁶¹ As explained by Kahn Freund,¹⁶² other purposes of this comparative assessment include: affording the social change in this dissertation adequate legal effect, promoting social justice for domestic workers¹⁶³ and a better understanding of domestic work regulation.

Consequently, domestic work regulation in South Africa, Namibia and Indonesia would be compared. The individual regulatory regimes of these countries will be evaluated using the C189 as a yardstick to gauge the protection of a range of rights that pertain to domestic work. While it is generally accepted that there is no single correct approach to regulating domestic work¹⁶⁴, this comparative analysis would serve as an appropriate tool in the determination of the extent to which rights guaranteed by the states via their regulatory methods guarantee 'decent work' for domestic workers.

4.2 DOMESTIC WORK REGULATION IN SOUTH AFRICA

Employment in the domestic work sector in South Africa is not regulated by a singular legislation. The rights and conditions of employment for domestic workers are covered

¹⁶⁰Otto Kahn-Freund 'On Uses and Misuses of Comparative Law' (1974) 37(1) *The Modern Law Review* Vol 1.

¹⁶¹*Ibid* at 2.

¹⁶² *Ibid*.

¹⁶³ *Ibid*.

¹⁶⁴ILO, *Effective Protection of Domestic Workers* op cit note 2 at 10.

by general labour legislation. Furthermore, there is specific regulation of wages, particulars of employment, working hours, leave, child labour, forced labour and termination of employment for the domestic work sector under the Sectoral Determination 7. The specific regulation of the domestic work sector by the Sectoral Determination 7 provides for a pronounced form of recognition and regulation of domestic work. The BCEA empowers the Minister of labour to regulate the conditions of employment of sectors through Sectoral Determinations.¹⁶⁵ These determinations are products of extensive investigation and an understanding of the plight of workers in any sector regulated.¹⁶⁶ South Africa has taken advantage of this provision in their legislation to give effect to the needs of a large number of the population engaged in domestic work. Other relevant legislations are as follows:

1. The Constitution
2. The Labour Relations Act, 66 of 1995 (LRA)
3. The Basic Conditions of Employment Act, 75 of 1997 (BCEA)
4. The Employment Equity Act, 55 of 1998 (EEA)
5. The Unemployment Insurance Act, 63 of 2001 (UIA)
6. The Occupational Health and Safety Act, 85 of 1993.

In a holistic manner, these legislations regulate all areas of domestic work. The Constitution as the *grund norm* protects the rights of all citizens. The Bill of Rights embedded in Chapter 2, guarantees equality¹⁶⁷, human dignity¹⁶⁸, freedom from slavery, servitude or forced labour¹⁶⁹, privacy¹⁷⁰ as well as the unique right to labour relations¹⁷¹ and fair labour practices¹⁷² for all citizens. Furthermore, the legislations above apply to domestic workers through their recognition of domestic workers by defining or interpreting the term or by an inclusive reading of the definition of the word ‘employee’ embedded in their provisions. The LRA, EEA and the UIA interpret the term ‘employee’ as

- (a) ‘any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

¹⁶⁵Section 51, BCEA.

¹⁶⁶Sections 52-55, BCEA.

¹⁶⁷Section 9.

¹⁶⁸Section 10.

¹⁶⁹Section 13.

¹⁷⁰Section 14.

¹⁷¹Section 23.

¹⁷²Section 23(1).

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee";¹⁷³

South African labour legislation lacks an exact definition of the term 'domestic work' as characterized by the Convention. As has been explained by the ILO, this is an important first step in the recognition of domestic workers.¹⁷⁴ However, this deficiency is cured by the definition of the term 'domestic worker' in the SD7 and BCEA.¹⁷⁵ The Sectoral Determination 7 reinforces the definition of domestic worker. It states that "domestic worker" means any domestic worker or independent contractor who performs domestic work in a private household and who receives, or is entitled to receive, pay and includes -

- a) a gardener;
- b) a person employed by a house hold as a driver of a motor vehicle; and
- c) a person who takes care of children, the aged, the sick, the frail or the disabled;
- d) domestic workers employed or supplied by employment services..¹⁷⁶

The broad nature of definitions adopted by these legislations takes into cognizance the nature of domestic work. They also attempt to address and give a thorough effect to their provisions through these definitions. The inclusion of independent contractors, chauffeurs, gardeners and the recognition of private employment agencies in the definition, reflects this understanding.

Domestic workers in South Africa have a right to freedom of association. The Constitution protects this domestic worker's right.¹⁷⁷ It is also set out by the LRA.¹⁷⁸ In a similar manner with Section 23(2) of the Constitution, the LRA guarantees an employee's right to form or join a trade union and participate in its lawful activities. Ancillary to this right is the right to collective bargaining, which is protected by legislations.¹⁷⁹ The C189 imposes a duty on members to respect, promote and put measures in place to realize the right to freedom of association and the effective

¹⁷³Section 213, LRA; Section 1, EEA; Section 1, UIA.

¹⁷⁴ILO, *Decent Work for Domestic Workers* op cit note 4 at 11 para 39.

¹⁷⁵Section 1, BCEA.

¹⁷⁶Section 31, Sectoral Determination 7.

¹⁷⁷Section 18 and 23(2).

¹⁷⁸Section 4, LRA.

¹⁷⁹Section 23(5), Constitution of the Republic of South Africa, 1996; Chapter II, LRA.

recognition of the right to collective bargaining.¹⁸⁰ In giving effect to this right, the Convention and its corresponding Recommendation¹⁸¹ advocate a voluntary framework for membership of these unions.¹⁸² This framework will be facilitated by the elimination of administrative and legislative restrictions in the exercise of this right by domestic workers and their employers.¹⁸³ In line with the Convention and Recommendation this right has been extended to domestic workers' employers¹⁸⁴ and the relevant legislations have been drafted in a manner that eliminates restrictions in their application to domestic workers.

In this manner, the EEA provides a wide coverage area against discrimination as it affects domestic work. The EEA defines 'harassment' as a form of discrimination.¹⁸⁵ The specific and express nature in which section 6 of the EEA is drafted benefits domestic workers immensely based on the unique circumstances in which their employment is carried out. The EEA also prohibits Medical and Psychometric testing of employees.¹⁸⁶ It provides some exceptions to medical testing where such testing is authorized by legislation or becomes justifiable based on inherent job requirements, medical facts, and employment conditions or for a fair distribution of employee benefits.¹⁸⁷

A loophole in South African labour legislation is the presence of inadequate mechanisms that specifically protect domestic workers from abuse and violence. The specific prohibition of abuse and violence directly impact on a domestic worker's privacy, living conditions (in case of live-in domestic workers) and their working conditions. Therefore, Article 6 of C189 imposes a duty on states to make sure domestic workers enjoy privacy, decent work and living conditions and fair terms of employment. Consequently, this is a corollary provision to Article 5, which prohibits abuse, harassment and violence. However in South Africa, a similar provision as Article 6 is not specifically provided for in the labour legislation. The closest reference to accommodation or the living conditions of a domestic worker is in the 'Deductions'

¹⁸⁰ Article 3.

¹⁸¹ Recommendation No. 201 of 2011.

¹⁸² Article 2, Recommendation No. 201 of 2011.

¹⁸³ Article 2(a).

¹⁸⁴ Section 6, LRA; Section 23(3)-(6), Constitution of the Republic of South Africa, 1996.

¹⁸⁵ Section 6(3), EEA.

¹⁸⁶ Section 6-7, EEA.

¹⁸⁷ Section 6(1)(a)-(b), EEA.

clause.¹⁸⁸ This clause requires ‘deduction of not more than 10 per cent of the wage for a room or other accommodation supplied to the domestic worker by the employer if the accommodation is weatherproof and generally kept in good condition; has at least one window and door, which can be locked; has a toilet and bath or shower, if the domestic worker does not have access to any other bathroom.’¹⁸⁹ There is no provision with regards to the voluntary nature of the domestic worker’s accommodation as contained in the Convention.¹⁹⁰ This creates situation where domestic workers may be forced to live in the workplace subject to their particulars of employment and be subject to a reasonable degree of abuse, intrusion of privacy, humiliation and violence. Thus, the framework to effectively guarantee and combat abuse and violence that emanate from lack of a domestic worker’s privacy, living and working conditions and terms of employment are inadequate.

In consonance with Article 7 of C189, the SD7 requires written particulars of employment for domestic workers on the commencement of their employment.¹⁹¹ The written document must contain: the full name and address of the employer; the name and occupation of the domestic worker, or a brief description of the work for which the domestic worker is employed; the place of workplace or workplaces; the commencement date of the employment; the domestic worker’s hours and days of work; the wage or the rate and method of payment; payment rate for overtime work; other entitlements and frequency of wage payment; any deductions to be made from the domestic worker’s wages; leave periods and notice period required to terminate the employment.¹⁹² The SD7 imposes an obligation of the employer to explain the written particulars of employment in a language and manner the domestic worker can understand.¹⁹³ Variation of the terms of the written particulars of employment must be a result of an agreement to change the existing particulars and an agreement to the new terms contained therein.¹⁹⁴ The SD7 also contains a sample ‘written particulars of employment’ as an annexure, which serves as a drafting guide for employers and domestic workers. With regard to formalizing the employment relationship, Clause 9 of the SD7 serves as an adequate mechanism for the recognition of domestic work.

¹⁸⁸ Clause 8(b), SD7.

¹⁸⁹ Ibid.

¹⁹⁰ Article 9, C189.

¹⁹¹ Clause 9(1), SD7.

¹⁹² Ibid.

¹⁹³ Clause 9(2), SD7.

¹⁹⁴ Ibid.

Another area South African labour legislation has a loophole when examined in the light of the Domestic Workers' Convention is employment contracts for migrant domestic workers prior to their entry into South Africa. C189 requires national regulations to ensure that migrant domestic workers receive job offers and contracts of employment before they cross national borders.¹⁹⁵ While this provision does not apply to workers that enjoy freedom of movement under bilateral, multilateral or regional trade agreements¹⁹⁶, Clause 9 of the SD7 applies to every domestic worker within the jurisdiction of South African labour legislation. A provision that specifically caters for migrant workers is imperative in the context of national domestic work regulation. This is because issues such as confiscation of travel and identity documents are facilitating factors for human trafficking and abuse which are akin to domestic work. Another right that can be guaranteed by national legislations within the framework of the convention is repatriation on the termination of a migrant domestic worker's employment at no cost to the domestic worker.¹⁹⁷ Being that most domestic workers in South Africa are migrant workers,¹⁹⁸ a minimum provision that guarantees them the rights to their identity and travel documents ought to be specifically provided for by legislation.

The SD7 specifically regulates hours of work¹⁹⁹ and leave periods²⁰⁰. It stipulates that detail the amount of hours a domestic worker should work per week; which time should not exceed 45 hours in any week or nine hours per day where the domestic worker works for five days or eight hours where the domestic worker incurs more than a five-day working week.²⁰¹ Concerning rest periods, the SD7 provides for a minimum rest period of 12 consecutive hours daily between the close of work and the beginning of a new working day and 36 consecutive hours as weekly rest period.²⁰² Subject to an agreement in writing, a domestic worker can negotiate a 60 consecutive

¹⁹⁵ Article 8, C189.

¹⁹⁶ Article 8(2), C189.

¹⁹⁷ Article 9, C189.

¹⁹⁸ Mohammed Motala 'Domestic Workers in South Africa: It's Modern Day Slavery' The South African Civil Society Information Service Newsletter, 3 May 2010 available at <http://sacsis.org.za/site/article/473.1> accessed on 25 November 2012. 'South African-born domestic workers have, in effect, always been migrant workers due to economic and racial legislation that forced mothers and daughters to be separated from their families and live in suburban maid's quarters or 'backrooms'. Historically, apartheid legislation dictated that their families live far from their places of employment, as their presence in the cities was made illegal.'

¹⁹⁹ Part D, Clause 10-18, SD7.

²⁰⁰ Part E, Clause 19-22, SD7.

²⁰¹ Clause 10, SD7.

²⁰² Clause 16(1), SD7.

hour rest period every second week.²⁰³ This rest period provided by the SD7 exceeds the '24 consecutive hours' minimum standard set in Article 10(2) of C189.

With regards to leave periods, the SD7 provides for annual leave,²⁰⁴ sick leave,²⁰⁵ family responsibility leave²⁰⁶ and maternity leave²⁰⁷. In providing for these forms of leave periods, the SD7 makes definitions where possible, when and how they may be taken and the duration of the leave. Other ancillary conditions of work provided for by the SD7 are: overtime work and compensation, work on public holidays, regulation of meal intervals, night work and standby. Based on the unique circumstances of South African domestic workers, the SD7 defines 'night work' as 'work performed after 18:00 and before 06:00 the next day.'²⁰⁸ Night work can only be performed subject to an agreement in writing and financial compensation where the domestic worker resides in the workplace or transport is made available for the domestic work at the beginning and end of the night shift.²⁰⁹

Remuneration of domestic workers is covered in its entirety by Part B of the SD7. This part tackles challenging issues such as payments in kind, wage increment, minimum wage and deductions. It tackles wage discrimination by setting a minimum wage that is not gender based but dependent on the municipality the workplace is located and the hours of work of domestic workers.²¹⁰ It contains comprehensive provisions on the manner in which hourly, daily, weekly and monthly wages should be calculated.²¹¹ In effectively dealing with mode of payment, the SD7 states that domestic workers must be paid in South African currency.²¹² Such payments for daily, weekly, fortnightly or monthly work should either be paid in cash, cheque or direct deposit into a bank account chosen by the domestic worker.²¹³ Cash or cheque payments must be made on the normal pay day agreed by the domestic worker in a sealed envelope during working hours at the workplace.²¹⁴ Other prohibited acts in respect of remuneration of a domestic worker are include direct or indirect payments to an employer or denial or

²⁰³ Clause 16(3), SD7.

²⁰⁴ Clause 19, SD7.

²⁰⁵ Clause 20, SD7.

²⁰⁶ Clause 21, SD7.

²⁰⁷ Clause 22, SD7.

²⁰⁸ Clause 13(1), SD7.

²⁰⁹ Clause 13(2), SD7.

²¹⁰ Clause 2, SD7.

²¹¹ Clause 4, SD7.

²¹² Clause 5(1), SD7.

²¹³ Ibid.

²¹⁴ Clause 5 (2)-(3), SD7.

deductions from a domestic wages as a result of 'employment or training of the domestic worker; supply of work equipment, tools, work clothing or food while a domestic worker is working at the workplace'.²¹⁵ Permissible deductions include deductions for medical insurance, savings, pension payments, trade union subscription, and order of account payment to a financial institution, rentals, loan or advance of not more than ten per cent of the total wage.²¹⁶ These permissible deductions are subject to the written consent of the domestic worker.

Under the SD7, a domestic worker is entitled to detailed information concerning remuneration on the day such remuneration is made.²¹⁷ Payment statements must show: 'the employer's name and address, the domestic worker's name and occupation, the period in respect of which payment is made, the wage rate and overtime rate, the number of ordinary hours worked by the domestic worker during that period, the number of overtime hours worked by the domestic worker during that period, the number of hours worked by the domestic worker on a public holiday or on a Sunday, the domestic worker's wage, details of any other pay arising out of the domestic worker's employment, details of any deductions made, and the actual amount paid to the domestic worker.'²¹⁸ There is also an accompanying duty on employers to keep a copy or record of payment statements for three years.²¹⁹

The detailed nature of the remuneration provisions sufficiently covers on-the-ground realities of domestic workers in South Africa. It also aligns with the demands of C189.

The termination of domestic workers' employment is regulated by the SD7. It states the procedure required concerning notice of termination, method of termination, payments on termination, accommodation on the termination of a live-in domestic worker's employment, severance pay and the contents of a certificate of service. A domestic worker's contract of employment can only be terminated by any party to it subject to reasonable notice given to the other party. Reasonable notice in the context of the SD7 entails notice of termination of not less than one week where the domestic worker has been employed for six months or less, or a notice of four weeks where a

²¹⁵Clause 7(1), SD7.

²¹⁶Clause 8, SD7.

²¹⁷Clause 6, SD7.

²¹⁸Clause 6(1), SD7.

²¹⁹Clause 6(2), SD7.

domestic worker has been in employment for a period of time exceeding six months.²²⁰ Terms concerning a longer notice of termination maybe agreed to by the parties in writing.²²¹ Clause 24(2) of the SD7 also provides that agreements which provide for longer notices of termination must be applicable to the employer and domestic worker on equal terms. Notice of termination must be in writing.²²² Such notice must also be communicated in an official language a domestic worker understands.²²³ Where a domestic worker's employment is terminated, such worker is entitled to unpaid wages, allowances and other outstanding payments that accrued for the duration of the employment.²²⁴ Other crucial areas in terms of termination includes the duration of stay for a live-in domestic worker on termination of employment, deductions for such accommodation²²⁵, and severance pay for operational requirements dismissals²²⁶. In Clause 27(1) the SD7 defines 'operational requirements' as 'requirements based on the economic, technological, structural or similar needs of an employer'. The determination goes a step further to give descriptive illustrations of 'operational requirements' to include 'an employer moving to another city or country; if the employer is no longer able to afford a domestic worker; if a child no longer requires a child-minder; if an employer moves to a smaller house and as a result no longer requires a domestic worker'.²²⁷

The definition of operational requirements by the SD7 the same as contained in Section 213 of the LRA. Furthermore, nothing in the SD7 precludes a dismissed domestic worker from disputing the lawfulness or fairness of their dismissal in terms of Chapter VIII of the LRA.²²⁸ The nature of provisions that relate to the termination of a domestic worker's employment are intricate drafted in order to place the South African domestic worker on the same pedestal as other workers. In this manner, the SD7 lives up to the aspirations of the Convention and Recommendation 201 of 2011. It is also important to note that while the SD7 is silent on the case of domestic workers on the insolvency or death of their employers, in practice, they are dealt with like other

²²⁰ Clause 24(1), SD7.

²²¹ Clause 24(2), SD7.

²²² Clause 24(3)(a), SD7.

²²³ Clause 24(3)(b), SD7.

²²⁴ Clause 25, SD7.

²²⁵ Clause 26, SD7.

²²⁶ Clause 27, SD7.

²²⁷ Clause 27(1), footnote 4.

²²⁸ Clause 24(5)(a), SD7. Chapter VIII of the LRA deals with 'Unfair Dismissals and Unfair Labour Practice'.

employees under South African law. Thus, they become creditors of the insolvent or deceased employer's estate and payments which accrue to them are paid by the estate.²²⁹

The safety concerns of domestic workers at work are effectively covered by the Occupational Health and Safety Act (OHSA).²³⁰ The OHSA states that employers should provide and maintain a safe and risk-free working environment 'as far as reasonably practicable' for their employees.²³¹ This meets the requirements of Article 13 of C189. The Convention states that a safe and healthy working environment is a right for domestic workers. It also requires measures to be taken to ensure the enjoyment of this right. To this end, the OHSA requires specific provisions for the enjoyment of the right to a healthy and safe working environment which is separate from the wide coverage of Section 8(1). These provisions include: 'the provision and maintenance of systems of work, plant and machinery that are reasonably safe and without risk to health, taking practical steps to eliminate or mitigate hazards or potential hazards to the health and safety of employees before the use of personal protective equipment...the provision of information, instructions, training and supervision to ensure the safety and health of employees in the workplace, practical and reasonable use of precautionary measures, and the enforcement adherence to safety measures by employees'.²³²

The OHSA also places a general duties and safety responsibilities on employees.²³³ These duties include: 'taking reasonable care to ensure personal safety and the safety of other persons that can be affected by the employee's acts or omissions at work, co-operation with the employer to ensure the performance and observance of safety and health guidelines or regulations, execution of lawful orders given by the employer in respect of health and safety rules, prompt reporting of unsafe or unhealthy situations and injury or accidents to the employer or health representative.'²³⁴The OHSA

²²⁹ElsabeHuysamen, 'ILO Domestic Workers Convention and Recommendation: The Case of Domestic Workers in South Africa - A Comparative Report' DWRP, University of the Western Cape, 24 available at http://www.dwrp.org.za/images/stories/DWRP_Research/domestic_workers_convention_report_slp_web_site_24%20january%202020.pdf accessed on 23 October 2012.

²³⁰Act No 85 of 1993 as amended by Occupational Health and Safety Amendment Act, No 181 of 1993.

²³¹Section 8(1), OHSA.

²³²Section 8(2), OHSA.

²³³Section 14, OHSA.

²³⁴Ibid.

also imposes penalties for offences that emanate from contraventions.²³⁵ These penalties include but are not limited to fines and terms of imprisonment.

The jurisdiction and role played by private employment agencies in domestic work is acknowledged by the SD7. To this end the SD7 states that ‘a domestic worker whose services have been provided by an employment service is employed by that employment service for the purposes of this determination if the employment service pays the domestic worker.’²³⁶ It goes further to state that ‘An employment and the client are jointly and severally liable if the employment service, in respect of a domestic worker who provides services to that client, does not comply with the determination or any provision of the Basic Conditions of Employment Act.’²³⁷ While an effort has been made to regulate the actions of private employment agencies in regards to compliance with the SD7 and BCEA, this effort is insufficient in the national regulation of domestic work. Issues such as the ‘determination of conditions concerning the recruitment and placement of domestic workers by agencies and the provision of adequate machinery and procedures for the investigation of complaints, alleged abuses and fraudulent practices by private employment agencies’²³⁸ are not expressly covered by the SD7. While the Employment Services Bill²³⁹ will to regulate Private Employment agencies once it is passed into law, specific issues that are peculiar to these agencies concerning the domestic work sector should be contained in the SD7.

Social Security for domestic workers is governed by the Unemployment Insurance Act (UIA).²⁴⁰ The UIA provides for a wide range of social security benefits which cover unemployment, illness, maternity, adoption and dependants.²⁴¹ The only sets of domestic workers excluded from the ambit of the UIA are those who work for less than 24 hours a month with an employer or with employers.²⁴² In this manner, Section 3(1) of the UIA regrettably excludes domestic workers employed in multiple

²³⁵Section 38, OHSA.

²³⁶Clause 29(1), SD7.

²³⁷Clause 29(2), SD7.

²³⁸Article 15, C189.

²³⁹The Bill was first published for comments in 2010. Its provisions will regulate the registration, functions, procedures, usage and handling of information by Private Employment agencies. It also sets out the procedure for withdrawal of an agency’s license among other functions. The bill is still in parliament with a revised version published in the Government Gazette on 2 November 2012. A copy is available at <https://www.labour.gov.za/downloads/legislation/bills/bill/employmentservbill2012.pdf> accessed on 29 November 2012.

²⁴⁰Act No. 63 Of 2001.

²⁴¹Chapter 3 of the UIA.

²⁴²Section 3(1), UIA.

jobs or workplaces with working time of less than 24 hours in each of those workplaces. Another challenge the domestic work regulation encounters with regards to the UIA is that it excludes ‘persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if upon the termination thereof the employer is required by law or by the contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave the Republic, and their employers’.²⁴³ This implies that migrant domestic workers whose contracts of employment are terminated with their employer are excluded from social benefits and protection. Being that social security is a key component on ‘decent work’, it should be enjoyed by all workers irrespective of the fact that they are citizens or permanent resident permit holders. Thus, Section 3(1)(d) of the UIA should be redrafted in a manner that takes into consideration the plight of migrant workers in general.

The regulation and recognition of domestic work as ‘work like any other’ has dispute resolution as an important component. This is reflected in Article 16 of C189 which requires unbridled access to courts, tribunals and other modes of dispute resolution enjoyed by other workers. Corollary rights its effective operation includes effective labour inspection²⁴⁴ and the availability of ‘effective and accessible complaint mechanisms’.²⁴⁵ Domestic workers in South Africa are entitled to dispute resolution procedures and mechanisms available to employees in legislations that apply to domestic work.²⁴⁶ Generally, these mechanisms involve referring the dispute for conciliation and/or arbitration to the CCMA or to the Labour Court for litigation of the dispute where necessary. Complaints can also be made to the Department of Labour for investigation where legislation provides that [Elsabe Huysamen](#) points out that the present framework of dispute resolution and complaint mechanisms in labour legislation applicable to domestic work are not entirely considerate of its specific nature.²⁴⁷ The literacy level of most domestic workers and the location of their

²⁴³Section 3(1)(d), UIA.

²⁴⁴Article 17(1), C189.

²⁴⁵Article 17(2), C189.

²⁴⁶See Chapter VII of the LRA which deals with Dispute Resolution; See Section 74(2), BCEA; Section 46 and 48, EEA.

²⁴⁷Elsabe Huysamen, ‘ILO Domestic Workers Convention and Recommendation: The Case of Domestic Workers in South Africa - A Comparative Report’ DWRP, University of the Western Cape, 23 available at http://www.dwrp.org.za/images/stories/DWRP_Research/domestic_workers_convention_report_slp_web_site_24%20january%2020.pdf accessed on 23 October 2012.

workplace make them unaware of their rights of access to the CCMA and labour court. This, coupled with the financial implication of litigating a dispute at the labour court puts the dispute resolution mechanism beyond the reach of domestic workers to a certain extent.²⁴⁸

Bearing in mind that the SD7 and subsequent labour legislations that regulate to domestic work precede the adoption of the C189, these legislations address most issues covered by the Convention and Recommendation. The neglect of issues concerning migrant domestic workers and the absence of private employment agencies regulation are loopholes in the present framework. The improvement of complaint and dispute mechanisms to suit the needs of domestic work is also pertinent.

The success of domestic work regulation in South Africa is based on the specific regulatory nature of the SD7. However, a major factor that challenges efficient legislative attempts is poor implementation of the rights created. In this regard, while domestic workers have a right to freedom of association under the LRA, organizing them is an uphill task. Even though the a union like the South African Domestic Services and Allied Workers Union (SADSAWU) was formed in the year 2000²⁴⁹, a large number of domestic workers are not members of any union. It is also important to state that the system of collective bargaining and organizational rights availed under the LRA do not appropriately suit the domestic work sector.²⁵⁰ Other rights that require extensive monitoring and implementation are equality and non-discrimination and unfair dismissals.

While acknowledging that the domestic work sector is difficult one to regulate, the framework for its regulation under South African law does not fit on all fours in every aspect with the C189. While this model of regulation is a giant step in the right direction for South African domestic workers, it is not exhaustive of every issue that goes to the root of domestic work in South Africa. The specific nature of domestic work and the ever-changing nature of work (especially in the informal economy) require a pro-active and all-inclusive approach in the drafting of labour laws. Another issue to be determined in the fitting of domestic work standards in South Africa to international

²⁴⁸Ibid.

²⁴⁹'Domestic Workers' Union' of 3 October 2012 available at <http://www.mywage.co.za/main/decent-work/domestic-workers-union> accessed on 30 November 2012; South African Domestic Services and Allied Workers Union (SADSAWU) available at <http://www.dwrp.org.za/index.php/resources/by-subject-resources/author/38-south-african-> accessed on 30 November 2012.

²⁵⁰Elsabe Huysamen, 'ILO Domestic Workers Convention and Recommendation op cit note 247 at 27.

labour specification is ‘legal transplantation’. It has been expressed that wholesale application of the Convention and Recommendation’s articles may not be entirely implementable in South Africa.²⁵¹ This assumption is based on the developing nature of the South African economy and limited availability of skilled and qualified personnel to facilitate implementation.²⁵² Thus in translating the rights and provisions embodied in C189, the social and historic context of the sector had to be a significant factor and a subtle approach towards legal reform has to be adopted. This model is also advocated by the ILO.²⁵³ It states as follows ‘the mechanisms and methodologies available to ensure compliance with the applicable legislation need to be adapted to the specific context of domestic work. Prevention of transgression, accessible assistance and complaints procedures, and other measures for the protection of victims is important for all domestic workers, and particularly so in the case of migrant domestic workers engaged under live-in arrangements.’²⁵⁴

4.3 DOMESTIC WORK REGULATION IN NAMIBIA

The domestic work sector in Namibia takes on a similar semblance to its counterparts in other developing nations of the world. It reflects the feminine (gendered) component, the absence of a formalized structure and migration.²⁵⁵ Recent empirical research reveals that majority of the domestic workers in Namibia are ‘single women aged 21 to 40 with at least a junior secondary certificate and have children and a number of dependants.’²⁵⁶

²⁵¹ Ibid at 28.

²⁵² Ibid.

²⁵³ ILO, *Effective Protection of Domestic Workers* op cit note 2 at 4.

²⁵⁴ Ibid.

²⁵⁵ Hilma Shindondola-Mote *The Plights of Namibia’s Domestic workers* (2008) Labour Resource and Research Institute(LARRI), 1.

²⁵⁶ Ibid; Maria Namukwambi & Hilma Sindondola-Mote ‘The Plight of Domestic Workers in Namibia’ available at <http://www.dwrp.org.za/index.php/research/by-title-and-abstract/article/39-plight-of-namibian-domestic-workers> accessed on 30 November 2012. Based on 621 face-to-face interviews with domestic workers it was discovered that ‘out of those interviewed, 92 per cent have no employment contracts and those that have contracts don’t understand its content. Although most of them work for one employer, a few have more than one employer. While 38 per cent of the respondents work for five days a week, 23 per cent work seven days a week from 7am up to 5pm for most. Annual or maternity leave is not allowed and, if taken, it is not paid out... Domestic workers hardly receive salary increments and few of those who work overtime get paid for it. Mistreatment in the form of verbal, physical and sexual abuse by employers is one of the major complaints alongside exposure to occupational health hazards as a result of the use of chemicals. Only 30.6 per cent of the workers are registered with the social security commission and only 3 per cent of domestic workers are union members.’

Regulation of this sector is basically covered by the Constitution and the Labour Act (LA).²⁵⁷ Other legislations that pertain to domestic work include:

1. Regulations relating to the Health and Safety of Employees at work, Regulation 156 of 1997.
2. The Social Security Act, No. 34 of 1994. (SSA)
3. The Employment Service Act, No. 8 of 2011. (ESA)

It is important to note that Namibian Law has no piece of legislation that specifically takes into account the nature of domestic work and regulates the domestic work sector alone. The term ‘domestic worker’ is also not defined by any Namibian labour legislation. However, the LA defines the term ‘employee’ as ‘an individual, other than an independent contractor, who-

(a) works for another person and who receives, or is entitled to receive, remuneration for that work; or

(b) in any manner assists in carrying on or conducting the business of an employer;’²⁵⁸

The LA also applies to domestic workers as they are not specifically excluded from its sections²⁵⁹ and its definition of the term ‘employee’ covers domestic workers. Subsequent definitions of the term ‘employee’ in the SSA²⁶⁰ and the ESA²⁶¹ are also inclusive of domestic workers. On the other hand, Regulation 156 neither has definitions for the terms ‘employee’ or ‘domestic worker’. However being that its regulations are applied to give effect to the LA, the domestic work sector is included in its application.

²⁵⁷ Act No 11 of 2007.

²⁵⁸ Section 1(1), LA.

²⁵⁹ Section 2(2), LA.

²⁶⁰ Section 1, SSA. This section states as follows –

"employee" means any person younger than 65 years, who -

(a) is employed by or working for any employer; or

(b) in any manner assists in the carrying on or the conducting of the business of an employer, for more than two days in any week, and who is receiving or is entitled to receive any remuneration in respect thereof, and includes, in the case of an employer who carries on or conducts business mainly within Namibia, any such natural person so employed by, or working for, such employer outside Namibia or assisting such employer in the carrying on or conducting of such business outside Namibia, if such person is a Namibian citizen or lawfully admitted to Namibia for permanent residence therein, and "employed" and "employment" shall have corresponding meanings;’

²⁶¹ Section 1 of the ESA states that “‘employee’ or ‘employer’ means an employee or an employer as defined in section 1 of the Labour Act, 2007;’

While it is acknowledged that there is no ‘single correct approach for the regulation of domestic work,’²⁶² this model that includes domestic workers within the scope of generally applicable national labour laws does not take into cognizance the specific characteristics of domestic work.²⁶³ The disadvantage of this model of regulation means that even though the legislation applies to domestic workers, they remain obscured from the benefits of such regulation. This sort of obscurity from labour regulation is directly linked with the ‘location of the workplace’ (a part of its specific characteristic) which is a preceding consideration in the drafting of legislations that regulate the domestic work sector.

Freedom of Association for Namibia’s domestic workers is regulated in the same manner as it is regulated for other workers by the Constitution and Labour Act (LA). While the Constitution creates a framework wherein every citizen is afforded the right to form and join associations and unions, the LA delineates and prescribes the application of the right in the labour sector. It achieves this by prohibiting past, present or anticipated prejudice towards an employee or a job-seeker as a result of their exercise of rights relating to freedom of association and collective bargaining.²⁶⁴ These provisions have given life to the unionization aspirations of Namibian domestic workers and the correlative right to collective bargaining. It also serves as a shield against discrimination based on union activities. This has led to the emergence of the Namibia Domestic and Allied Workers Union (NDAWU)²⁶⁵ and the Employers of Domestic Workers of Namibia Organization (EDWONO).²⁶⁶ While meeting the aspirations of domestic workers and their employers, it is important to note that these provisions also comply with Article 3(2)(a) and Article 3(3) of C189. As Namibian law respects, promotes and seeks to realize and protect the right to freedom of association and collective bargaining for domestic workers and their employers alike.

²⁶²ILO, *Effective Protection of Domestic Workers* op cit note 2 at 10.

²⁶³Ibid at 9.

²⁶⁴Section 6, LA.

²⁶⁵The NDAWU was formed in April 1990. See Herbert Jauch *Trade Unions in Namibia: Defining new role?* (2004) Labour Resource and Research Institute (LARRI), 26 available on <http://www.gurn.info/en/topics/Wages%20and%20Collective%20Bargaining/africa/namibia-1/trade-unions-in-namibia-defining-a-new-role-larri-jun-04> accessed on 30 November 2012.

²⁶⁶This organization was proposed in February 2012 in order to comply with C189; See Namibian Employers’ Federation (NEF) ‘Proposed Employers of Domestic Worker Organization’ available at <http://www.nef.com.na/newsDomestic.php> accessed on 1 December 2012. See also Catherine Sasman ‘Namibia: Domestic Workers Employers’ Organization proposed’ in *The Namibian* of 17 February 2012 available at http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=93699&no_cache=1 accessed on 1 December 2012.

Child Labour is prohibited under Namibian labour law and it applies to the domestic work sector. The Constitution expressly protects children under the age of 16 from economic exploitation or employment which is hazardous, interferes with their education, or is harmful to their health or physical, mental, spiritual, moral or social development.²⁶⁷ On the other hand, the LA contains detailed employment restrictions for children based on age limits and other factors.²⁶⁸ It expressly prohibits the employment of children under the age of 14.²⁶⁹ Children between the ages of 14 and under the age of 16 can be employed in the domestic work sector except:

- a.) such employment contravenes Article 15(2) of the Namibian Constitution;
- b.) the minister prohibits their employment for domestic work by a regulation or
- c.) their terms of employment in a household entails night work.²⁷⁰

Children aged between 16 and 18 can be employed for domestic work, except such employment is prohibited by Ministerial regulation, involves night work or violates Article 15(2) of the Constitution.²⁷¹ The LA also imposes a fine of N\$20000²⁷² and a term of imprisonment not exceeding four years as penalty for the contravention of its provisions regulating child labour.²⁷³ These provisions comply with the requirements of C189 as they effectively comply with the Minimum Age Convention, 1973 (No. 138), and Worst Forms of Child Labour Convention, 1999 (No. 182). It also ensures that domestic workers under that age of 18 are afforded a reasonable level of education.²⁷⁴

In a similar manner, the prohibition of Forced labour and slavery under Namibian labour law by the Constitution and the Labour Act applies to domestic work. Article 9 of the Constitution outlaws forced labour, slavery and servitude of any kind. However, it fails to define the term 'forced labour'. The LA cures this definition deficiency. It prohibits the direct or indirect imposition of forced labour and specifies that forced labour includes 'any sort of involuntary work or service performed under threat of any penalty, punishment or other harm to be imposed on an individual upon their refusal to perform the work or render the service, work performed by an employee's child under the age of 18 subject to terms agreed upon between the

²⁶⁷Article 15(2), Constitution of the Republic of Namibia.

²⁶⁸Section 3, LA.

²⁶⁹Section 3(2), LA.

²⁷⁰Section 3(3), LA.

²⁷¹Section 3(4), LA.

²⁷²N\$20000 (Twenty thousand Namibian dollars) is the equivalent of \$2251 (US Dollars).

²⁷³Section 3(6), LA.

²⁷⁴Article 4, C189.

employer an employee²⁷⁵, and any work performed by any individual because that individual is for any reason subject to the control, supervision or jurisdiction of a traditional leader in that leader's capacity as traditional leader.²⁷⁶ A penalty of an imprisonment term not exceeding four years or a fine of N\$20000 or both is also imposed on defaulters of this prohibition.²⁷⁷ The manner in the LA and constitution prohibit forced labour prevents its use in the Namibian domestic work sector. The specific prohibition of the use of employee's underage children under any employment arrangement²⁷⁸ is also important for domestic work regulation. Therefore this complies with Article 3(2)(b) of C189.

Another core ILO principle that is protected by Namibian legislation is Equality and Non-discrimination. The Constitution provides equality before the law as well as non-discrimination irrespective of sex, race, colour, ethnic origin, religion, creed or social or economic status.²⁷⁹ The LA prohibits direct or indirect discrimination in employment decisions based on race, colour, or ethnic origin, sex, marital status or family responsibilities, religion, creed or political opinion, social or economic status, degree of physical or mental disability, AIDS or HIV status; or previous, current or future pregnancy.²⁸⁰ The LA also tackles wage discrimination which can occur in domestic work like other forms of employment. It achieves this by regarding employment decisions that entail differentiation without justification of between employees that perform 'work of equal value'²⁸¹ as a form of discrimination.²⁸² By this provision, we can reasonably infer that 'employment decisions' that involve wages are included in the ambit of Section 5(3) of the LA. Another important aspect of Section 5

²⁷⁵ 'The Living and Working Conditions of Domestic Workers in Namibia' available on <http://www.lac.org.na/projects/grap/Pdf/livingandworking.pdf> accessed on 30 November 2012. This research conducted by the Legal Assistance Centre (LAC) in 1996 reports that domestic workers in rural areas are concentrated in regions with high numbers of commercial farms and may have their dependants living with them in. This creates an avenue for underage children to work and be exploited on the farms based on arrangements between the employers and their parents or guardians. Thus, this provision forestalls such arrangements.

²⁷⁶ Section 4(2), LA.

²⁷⁷ Section 4(3), LA.

²⁷⁸ Section 4(2)(b), LA.

²⁷⁹ Article 10, Constitution of the Republic of Namibia.

²⁸⁰ Section 5(2), LA.

²⁸¹ Section 5(1)(g)(ii) of the LA defines 'work of equal value' as work that requires skills, abilities, responsibilities, working environment or other requirements which are of equal value to employees belonging to any sex.

²⁸² Section 5(3), LA.

of the LA is the summation of criteria for the determination of acts of discrimination.²⁸³ It also puts the burden of proof for an allegation of discrimination on the respondent.²⁸⁴

Sexual harassment is also dealt with by Section 5 of the LA.²⁸⁵ It defines sexual harassment as ‘unwarranted conduct of a sexual nature towards an employee which constitutes a barrier to equality in employment’.²⁸⁶ It prohibits sexual harassment and construes an employee’s resignation as a result of sexual harassment as a constructive dismissal which is a form of unfair dismissal dealt with under Section 33.²⁸⁷

The manner in which equality and non-discrimination is protected under the LA to a reasonable extent reflects a convergence with the protection against abuse, harassment and violence as it applies to domestic work. Therefore, abuses that arise out of wage, ethnic, religious and sexual discrimination, sexual harassment are catered for under the law. Despite this convergence, there are no provisions that expressly cater for protection against abuse, violence and harassment of domestic workers under Namibian labour law in the manner prescribed by C189.²⁸⁸ This entails the establishment of accessible complaint mechanisms for the investigation and prosecution of cases where domestic workers are abused, violated or harassed. Programmes for the relocation of domestic workers from abusive households are also recommended by the ILO.²⁸⁹ The only complaint mechanism available for domestic workers is a referral of their dispute in writing to the Labour Commissioner for arbitration or conciliation or the Labour court for an enforcement of their rights and protection.²⁹⁰ While this may be a sufficient mechanism for other sectors of the economy, it is inadequate for domestic workers as most domestic workers do not know their rights.²⁹¹

An important section of the LA which affects the lives of domestic workers is the regulation of accommodation arrangements in PART E. Section 28(2) of the LA states that “If²⁹² an employee is required to live at the place of employment or to

²⁸³ Section 5(4), LA.

²⁸⁴ Section 5(5), LA.

²⁸⁵ Section 5(7)-(10), LA.

²⁸⁶ Section (5)(7)(b), LA.

²⁸⁷ Section (5)(9-10), LA.

²⁸⁸ Article 5, ILO Convention 189; Article 7, ILO Recommendation 201 of 2011.

²⁸⁹ Ibid.

²⁹⁰ Section 7, LA.

²⁹¹ US Department of State ‘2011 Human Rights Reports: Namibia’ *Bureau of Democracy, Human Rights, and Labor* May 24, 2012 at Section 7: Workers’ Rights available at <http://www.state.gov/j/drl/rls/hrrpt/2011/af/186225.htm> accessed on 1 December 2012.

²⁹² Emphasis mine.

reside on any premises owned or leased by the employer, that employer must provide the employee with adequate housing including sanitary and water facilities'. This section is drafted in a way that complies with the requirements of Article 9 of C189.²⁹³ Article 9 requires the live-in option for a domestic worker to be voluntary and subject to agreement. In a similar manner, the word 'if' in Section 28(2) of the LA reflects the voluntary nature of the live-in relationship for domestic workers in Namibia. The section also makes the provision of sanitary and water facilities imperative on the employer. Other provisions of Section 28 state that where a live-in domestic worker resides on agricultural land, the employer must either permit the domestic worker to keep livestock and cultivate land to meet the domestic worker's needs or in terms of an agreement provide sufficient food for or pay an additional amount for feeding where food is not provided. On termination of live-in domestic workers' employment, they are entitled to a three-month written notice to vacate the premises if they reside on agricultural land or a one-month written notice for other domestic workers.²⁹⁴ It also protects the domestic worker against being forcible ejection where a dispute with or complaint against the employer has been referred to the Labour Commissioner.²⁹⁵

The LA takes into cognizance the specifics of domestic work sector in its accommodation provisions. It achieves this by recognizing the plight of domestic workers in rural areas and farms as well as those in urban areas in Namibia.²⁹⁶ It also caters for live-in domestic workers' feeding and the plausible co-habitation of dependants. However, it does not properly state the nature of accommodation as sanitary and water facilities are not all a 'decent living condition' entails. The accommodation regulation also does not contain adequate provisions that safeguard the domestic workers privacy.²⁹⁷ Another serious area of concern that Section 28 of the LA fails to tackle is the confiscation of identity and travel documents of live-in domestic

²⁹³ Article 9 states as follows-- Each Member shall take measures to ensure that domestic workers: (a) are free to reach agreement with their employer or potential employer on whether to reside in the household;(b) who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave; and(c) are entitled to keep in their possession their travel and identity documents

²⁹⁴ Section 28(4)(a)-(b), LA.

²⁹⁵ Section 28(5), LA.

²⁹⁶ The Living and Working Conditions of Domestic Workers in Namibia op cit., at note 119. At the time of the research was done, about 43 per cent of domestic workers live in rural areas while 53 per cent live and work in urban areas. Domestic workers in rural areas were concentrated in regions with high numbers of commercial farms. A small but significant number were also present in towns and villages in rural communal areas where civil servants are the principal employers.

²⁹⁷ Article 6, ILO C189.

workers. This creates an avenue for servitude, physical and psychological abuse as well as harassment for domestic workers, especially migrants.

Another essential aspect in the regulation of domestic work is the formalization of the employment relationship. In this regard, Namibian Labour Law has no express provision that imposes or makes compulsory 'written contracts of employment' for domestic workers. A written contract of employment covers vital areas such as the name of employer, commencement and duration of employment, job description, calculation of remuneration and basic wages, mode of payment, working hours, leave and rest periods, termination conditions and notices etc. Being that this is an essential foundation upon which terms and condition of employment are regulated, the absence of a legislative provision or a compulsory framework to this effect leaves opportunity for the exploitation of domestic workers. Section 9(2) of the LA contains the following phrase 'A basic condition of employment constitutes a term of any contract of Employment...' This means that the LA sets the minimum standard of employment terms for contracts except where an individual's contract or a collective agreement is more favourable to the employee. However, where there is no contract of employment, terms and conditions of employment and other employee rights become clouded in the informal arrangement.

As far as minimum wage is concerned, the LA does not set a benchmark for employee earnings. However, Namibian domestic workers have agitated for minimum wage regulations in recent years. This has led to the establishment of a 'Wages Commission for Domestic Workers'.²⁹⁸ The Namibian Wages Commission for Domestic Workers intends to provide a minimum wage benchmark through tripartite consultation before Convention 189 is ratified by the Namibian government.²⁹⁹ Other positive aspects of remuneration provisions contained in the LA include its regulation of payments-in-kind; sets out the calculation of hourly, daily, weekly and monthly wages,

²⁹⁸ It was inaugurated in May 2012 and chaired by Dr. Libertina Amathila. It and has held hearings and consultative meetings across Namibia which commenced on 25 June 2012 in the Erongo region. See <http://www.namibiaatwork.gov.na/index.php/partners/27-home/fp-news/113-minimum-wage-for-domestic-workers-coming> accessed on 1 December 2012. See also <http://www.inamibia.co.na/news/local/item/16351-namibia-domestic-workers-wages-commission-inaugurated.html> accessed on 1 December 2012.

²⁹⁹ This is in line with the provisions of Section 13 of the LA. Section 13 states as follows: 'After considering a report and recommendations of the Wages Commission, the Minister may make a wage order determining remuneration and other conditions of employment for employees in any industry and area'.

the manner in remuneration should be paid and permissible deductions from an employee's wage.

Payments in kind cannot be made to an employee except by agreement between the employer and the employee or in terms of a collective agreement.³⁰⁰ Aside setting a standard calculation of basic wage formula that applies to all employees,³⁰¹ the LA requires wages to be paid not later than one hour after the completion on ordinary hours of work on the normal pay day.³⁰² Such payments should be made in cash or cheque to the employee or by direct deposit into an account designated in writing by the employee. Where the payment is made directly to the employee, the cash or cheque must be in a sealed envelope.³⁰³ Wage payments as prescribed by the LA must be accompanied by a written statement of particulars and they apply to workers whose employment is terminated before pay day.³⁰⁴ These provisions comply with Article 12 of C189 as well as Articles 14 and 15 of Recommendation 201 of 2011. Permissible deductions from an employee's wages are as follows: deductions permitted in terms of a court order or any law, deductions under any collective agreement or arbitration award; both deductions must not in aggregate exceed one-third of the employee's remuneration.³⁰⁵ Other deductions which are subject to agreement include payment for: rent in respect of accommodation supplied by the employer, goods sold by the employer, loans advanced by the employer, contributions to employee benefit funds, or subscriptions or levies to a registered trade union.³⁰⁶ Based on the wide and extensive nature of remuneration related sections of the LA, it is safe to say they are favourable for the regulation of domestic work in Namibia.

Ordinary hours of work not exceeding 45 hours per week are prescribed for employees; and this applies to domestic workers.³⁰⁷ The LA also requires overtime work to not exceed three hours daily or 10 hours weekly.³⁰⁸ Domestic workers are entitled to be paid double their basic hourly wage for work done overtime on Sundays

³⁰⁰ Section 8(2), LA.

³⁰¹ Section 10, LA.

³⁰² Section 11(1)(a), LA.

³⁰³ Section 11(b) and (c), LA.

³⁰⁴ Section 11(3), LA.

³⁰⁵ Section 12(1)(a), (b)(i) and 12(2), LA.

³⁰⁶ Section 12(3), LA.

³⁰⁷ Section 16, LA.

³⁰⁸ Section 17(1), LA.

and public holidays.³⁰⁹ Other compulsory regulations pertaining to hours of work include meal intervals that range between 30 minutes to one hour for domestic workers that work continuously for more than five hours,³¹⁰ regulations concerning performance and remuneration for night work³¹¹ as well as requirements for daily and weekly rest periods.³¹² Other than for employees involved in urgent work, the minimum rest period per week for an employee is 36 consecutive hours of rest.³¹³ Domestic workers are part of a select group of workers that can work on Sundays and public holidays. However, this is subject to an agreement by the domestic worker to undertake such work; which agreement is subject to the approval of the Permanent Secretary. The permanent Secretary may stipulate in writing the nature of work to which the approval may apply and any other conditions he deems fit.³¹⁴

The LA provides for the following kinds of leave for employees: Annual leave³¹⁵, Sick leave,³¹⁶ Compassionate leave,³¹⁷ Maternity leave³¹⁸ and extended maternity leave.³¹⁹ In Section 23(2), it provides a table that expressly reflects how annual leave entitlements should be calculated. It also specifically stipulates how employees on leave should be remunerated. In the same manner, it regulates, when and how other forms of leave should be taken. The sections of the LA that regulate hours of work and leave and rest periods are extensive enough and can ensure decent work for Namibian domestic workers if applied wholesale to the sector. They comply with the general provisions of Article 10 of Convention 189. This is evident as the provisions take into consideration the nature of domestic work despite the wide coverage range of sectors the LA regulates. The minimum weekly rest period for employees specified by the LA, which is 36 consecutive hours of rest exceeds the 24 hours provide for in Article 10(3) of C189.

³⁰⁹ Section 17(2), LA.

³¹⁰ Section 18, LA.

³¹¹ Section 19, LA.

³¹² Section 20, LA.

³¹³ Section 20(2), LA.

³¹⁴ Section 21 and 22, LA.

³¹⁵ Section 23, LA.

³¹⁶ Section 24, LA.

³¹⁷ Section 25, LA.

³¹⁸ Section 26, LA.

³¹⁹ Section 27, LA.

Termination of employment is adequately regulated for the domestic work sector under the LA. Termination provisions cover key areas such as notice of termination,³²⁰ payment instead of notice,³²¹ automatic termination,³²² unfair dismissals,³²³ redundancy or operational requirements dismissals,³²⁴ Severance pay,³²⁵ and payments on termination and certificates of employment.³²⁶ The comprehensive provisions require notices of termination to be in writing and contain reasons for termination.³²⁷ While parties to a contract of employment can agree to waive the notice provisions contained in the LA,³²⁸ notices must not be issued during an employee's period of leave where such rights are not waived.³²⁹ The LA also prescribes that 'period of notice must be not less one day, if the employee has been employed for four weeks or less; one week, if the employee has been employed for more than four weeks but not more than one year; and one month, if the employee has been employed for more than one year.'³³⁰ Other prescriptions of the LA impose a duty on parties to pay remuneration where they default on the issuance of notice³³¹ as well as employees being 'preferent creditors' in respect of remuneration due on the insolvency and death of their employer.³³²

Section 33 which regulates unfair dismissals requires reasons for dismissal to be valid and fair or to have followed the procedure entrenched in Section 34 of the LA in cases of redundancy or operational requirements dismissals. Section 33 also categorizes the following dismissals as unfair: dismissals based on an employee's disclosure of information, dismissal as a result of participation in trade union activities, or discriminatory dismissals based on sex, race, colour, ethnic origin, religion, creed or social or economic status, political opinion or marital status. Namibian domestic workers are entitled to severance pay in the event of their dismissal, death, resignation or retirement on reaching the age of 65years. However, a minimum requirement of

³²⁰ Section 30, LA.

³²¹ Section 31, LA.

³²² Section 32, LA.

³²³ Section 33, LA.

³²⁴ Section 34, LA.

³²⁵ Section 35, LA.

³²⁶ Section 37, LA.

³²⁷ Section 30(3), LA.

³²⁸ Section 30(7), LA.

³²⁹ Section 30(5), LA.

³³⁰ Section 30(1), LA.

³³¹ Section 31, LA.

³³² Section 32(3), LA.

12 months of continuous service is required for the enjoyment of this right.³³³ In a similar manner, with provisions relating to hours of work, termination provisions in the LA take into cognisance the unique nature of domestic work. Where applied strictly, it gives domestic workers a similar treatment like other workers and helps with the documentation of workers as well as their employment rights. In tandem with Article 16 of ILO Recommendation 201 ‘domestic workers enjoy conditions not less favourable than those of workers generally’ in terms of the drafting of termination provisions under the LA.

Concerning Occupational Health and Safety, Chapter four of the LA caters for such provisions. The provisions of Chapter four apply generally to all labour; as such it applies to the domestic workers. Part A of chapter four prescribes the rights and duties of employers and employees. Among which is the duty on the employer of any person in charge of premises where employees work to make sure that the working environment is safe, without risk to the health of employees and has adequate facilities and arrangements for the welfare of employees.³³⁴ Other duties are as follows:

the provision and maintenance of plant, machinery and systems of work, and work processes, that are safe and without risk to the health of employees, safe entry and exit from places of work, the provision of adequate personal protective clothing and equipment if reasonably necessary, the provision of necessary information and training to work safely and without a risk to health, ensuring that the use, handling, storage or transport of articles or substances is safe and without risk to the health of employees, giving the necessary instructions and supervision to work safely and without a risk to their health; ensuring that the organisation of work, including hours of work and mealtimes, do not adversely affect the safety or health of employees; and taking any other prescribed steps to ensure the safety, health and welfare of employees at work.³³⁵

Employers are also expected to report accidents and disease at a workplace to a labour inspector.³³⁶ Consequently, employees also have a duty to take reasonable care to

³³³ Section 35, LA.

³³⁴ Section 39(1)(a), LA.

³³⁵ Section 39(1)(b)-(i), LA.

³³⁶ Section 39(2), LA.

ensure their own safety and health in the workplace; and the safety and health of individuals who may be affected by the employee's activities at work.³³⁷ Employees are required to co-operate with the employer to enable the employer to perform any duty imposed under this Chapter four of the LA as well as leave a dangerous place of work.³³⁸ Being that a safe working environment is a right under Article 13 of ILO C189; the LA has necessary provisions that guarantee this right for domestic workers. The establishment of Health and safety Committees, representatives and labour inspectors also create a framework where safe working environments can be attained for domestic workers in Namibia.

Private Employment Agencies (PEAs) are licensed and regulated under the Employment Service Act (ESA) of 2011 and Section 128 of the LA³³⁹. As a general regulatory mechanism, the ESA creates an Employment Services Board³⁴⁰ that 'investigates and advises the Minister for Labour on the provision of employment services³⁴¹ as well as monitoring and analysing labour market developments concerning occupations and occupational segments'.³⁴² The Employment Services Board also advises the Minister on 'legislation pertaining to the provision of employment services and regulation of private employment agencies;³⁴³ and subsequent employment matters that it considers useful for the attainment of the ESAs objectives'.³⁴⁴ These functions enumerated above consist of general powers with which the Employment Services

³³⁷ Section 41(a), LA.

³³⁸ Section 42, LA.

³³⁹ The Labour Amendment Act 2012 (Act No. 2 of 2012) replaced Section 128 of the LA which regarded the practice of labour hire as a crime. The Namibian Supreme Court in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others* ruled that the earlier provision was unconstitutional. Therefore, the amendment requires 'every "user enterprise" (employer) that utilizes the labour of employees placed by a private employment agency, including a labour hire agency, to assume all obligations of an employer in terms of the law with respect to these employees'

³⁴⁰ Section 3, ESA. The Board consists of the following 14 individuals, appointed by the Minister in accordance with this section -

- (a) the Chairperson;
- (b) three members to represent the interests of the State, of which at least one member is female;
- (c) two members to represent the interests of registered trade unions, of which at least one member is female;
- (d) two members to represent the interests of registered employers' organizations, of which at least one member is female;
- (e) not more than four members, who in the opinion of the Minister, possess specialised knowledge in labour and employment, immigration and education matters;
- (f) one member representing the interests of persons living with disabilities; and
- (g) one member of the National Youth Council established by section 2 of the National Youth Council Act, 2009 (Act No. 3 of 2009).

³⁴¹ Section 4(a), ESA.

³⁴² Section 4(b), ESA.

³⁴³ Section 4(c), ESA.

³⁴⁴ Section 4(g), ESA.

Board assists the Minister in regulating employment in sectors of the labour market (especially the recruitment activities and operation of PEAs). Being that PEAs are licensed subject to requirements of the ESA and other requirements and criteria,³⁴⁵ criteria not enumerated in the ESA are issued by the Minister based on advice and consultation with the Employment Services Board.

Specific regulation of PEAs by the ESA cover charging of fees, confidentiality of data collected, and obligations concerning referral of prospective employees.³⁴⁶ Concerning charging of fees, section 24³⁴⁷ requires a PEA to not charge fees for the use of their service in any manner to individuals placed with an employer or a prospective employer. It also prohibits a ‘user enterprise’³⁴⁸ from deducting or withholding an employee’s remuneration based on obtaining an equivalent sum for its payment to a PEA for the acquisition of the employee’s services. In a bid to protect employees, Section 26 of the ESA imposes prohibits discrimination in advertisement for positions by PEAs.³⁴⁹ The ESA also prohibits referral of prospective employees to employers with outstanding compliance orders issued pursuant to the LA and bad reputation with respect to social security contributions.³⁵⁰ Other measures of equality and decent work imposed on PEAs by the ESA include their duty not to place individuals with employers without an undertaking by the employer to employ such an individual on terms and condition not less favourable than those applicable to ‘incumbent employees who perform the same or similar work or work of equal value, terms provided for in a collective agreement in that industry or those prevailing for similar work in the industry and region in which the employees are employed; or those prevailing in the nearest appropriate region, if similar work is not performed in the region’.³⁵¹

The regulation of PEAs as it concerns the domestic work sector is reasonably adequate. When compared to standards set by Article 15 of C189, the ESA

³⁴⁵ Section 19(1)(b), ESA.

³⁴⁶ Section 24-26, ESA.

³⁴⁷ As amended by Section 9, Labour Amendment Act 2012.

³⁴⁸ This means a legal or natural person with whom a private employment agency places individuals. See Section 128(1) of the ESA (as amended by Section 6, Labour Amendment Act 2012).

³⁴⁹ Subsection 1(a) prohibits discrimination on the following grounds race, colour, or ethnic origin, sex, marital status or family responsibilities; religion, creed or political opinion; social or economic status; degree of physical or mental disability; AIDS or HIV status; or previous, current or future pregnancy.

³⁵⁰ Section 26(1)(b), ESA.

³⁵¹ Section 26(2)(a), ESA (as amended by Section 10, Labour Amendment Act 2012).

appropriately regulates charging of fees by PEAs,³⁵² and their operation, licensing and placement procedures.³⁵³ The appointment and functions of Labour Inspectors under Part F of the LA³⁵⁴ as well as penalties imposed under Section 26(3) of the ESA also reasonably complies with the Article 15 of Convention 189. However, Namibian labour law fails to adequately address transnational recruitment of domestic workers by PEAs. The conclusion of bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices in the domestic work sector has not been adequately addressed as required by Article 15(d) of C189.

The Social Security Act (SSA)³⁵⁵ provides social benefits for Namibian employees. These benefits are: Maternity leave, Sick leave and Death benefit fund, Medical benefits and pension funds.³⁵⁶ Domestic workers are entitled to these benefits on registration by their employer.³⁵⁷ However, the definition of ‘employee’ in Section 1 of the SSA excludes domestic workers over the age of 65 or those who work for less than two days in a week for different employers from the benefits of the SSA.

Based on the wording of Article 14 of C189, measures should be taken ‘with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity’. While the definition of employee might be favourable to other workers, the unique nature of domestic work makes room the creation of a unique class of workers that might be in active employment when they are over the age of 65 or those who work for different employers every day of the week. Therefore, social coverage for domestic workers within this unique category should be provided. An important ambit of the SSA to ensure compliance with its provisions concerning registration of employees by their employers and payment of contributions is the imposition of penalties on defaulters by Section 23.³⁵⁸

³⁵² Article 15(1)(e) requires members to take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers.

³⁵³ Article 15(1)(a) requires members to determine the conditions governing the operation of private employment agencies recruiting or placing domestic workers, in accordance with national laws, regulations and practice

³⁵⁴ Section 123-127, LA.

³⁵⁵ Act No. 34 of 1994.

³⁵⁶ Section 21, SSA.

³⁵⁷ Section 20, SSA.

³⁵⁸ Section 23, SSA also considers intent to evade the payment of contributions, false statement or false entry in a return, preparation or maintenance of any false books of account or other records or authorizes

Namibian domestic workers are entitled to every dispute resolution mechanisms provided for other employees under labour legislation. This generally includes conciliation, arbitration with the Labour commissioner, private arbitration and adjudication in the Labour Court; all provided under Chapter 8 of the LA. While these rights are similar to those enjoyed by other workers and comply with Article 16 of C189, the complaint mechanisms in place are not easily accessed by domestic workers because of their level of literacy, financial constraints and work conditions. Therefore, awareness on domestic worker rights should be improved by the state.

Finally, the ‘inclusion in general labour legislation’ regulatory model Namibia adopts for domestic work either work to the advantage or detriment of domestic workers. This is because while it feeds the ‘work like any other’ phrase by recognizing domestic work as a dignified form of employment, it dampens the ‘work like no other’ ambit of domestic work, by implicitly ignoring some aspects of the specific nature of domestic work in the wording of its sections. While Namibian law adequately deals with issues such as hours of work, remuneration and the four core rights entrenched in the ILO Declaration of Fundamental Principles and Rights at Work, specific issues pertaining domestic work like migrant domestic work, formalization of the employment relationship, labour inspection in a manner that would not violate a household’s right to privacy either not dealt with or insufficiently addressed by legislation. Therefore, these issues have to be adequately dealt with to ensure a pro-active regulatory framework before Namibia ratifies C189.

4.4 DOMESTIC WORK REGULATION IN INDONESIA.

Based on an ILO factsheet,³⁵⁹ Indonesia has an estimated 2,593,399 domestic workers. These large numbers of domestic workers are predominantly women from rural areas

the falsification of any books of account or other records, or the use of any fraud, art or contrivance whatsoever, or authorizes the use of such fraud, art or contrivance an offence with a liability of a fine not exceeding N\$8000 or to imprisonment for a period not exceeding two years, or both the fine and an imprisonment term.

³⁵⁹ ILO ‘Factsheet: Domestic Workers in Indonesia’ available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcm_041844.pdf accessed on 3 December 2012; See ILO-IPEC, ‘Flowers on the Rock’ (2004). As at February 2012, it has been estimated that this number has multiplied; as such an estimated 4.3 million Indonesian domestic workers are employed overseas while 10.75 million work in Indonesia. This is as a result of their indispensability in urban economies of Indonesia, Asia and the Middle East. See ILO ‘Campaign for domestic workers’ rights gathers pace’ on 29 February 2012 available at http://www.ilo.org/asia/info/public/WCMS_174685/lang--en/index.htm accessed on 3 December 2012.

with low education levels. Therefore domestic work is regarded as informal sector work, and its regulation is deeply entrenched with cultural attitudes³⁶⁰ reflected by the government's current interpretation of national labour law which excludes domestic workers from its coverage.³⁶¹ Domestic workers are implicitly excluded from the coverage because they are mainly referred to a *pembantu* (which means 'helpers') rather than *pekerja* ('workers') in general parlance. Therefore, Article 1(3) of the Manpower Act (MPA) of 2003³⁶² states that 'a worker (*pekerja*) / labourer (*buruh*) is every person who works for a wage or other forms of remuneration'. Despite the fact that domestic workers (*pembantu*) work for remuneration, their absence or omission from Article 1 of the MPA reinforces their exclusion from its provisions.

Another issue that creates a framework of general omission of domestic workers from the MPA is its interpretation of the term 'employer'. Two categories of 'employers' are interpreted by the MPA; *pemberi kerja* and *pengusaha*. A *pemberi kerja* (employer) refers to 'individuals, entrepreneurs, legal entities, or other bodies that employ manpower by paying them wages or other forms of remuneration'³⁶³ while a *pengusaha* (entrepreneur) is 'an individual [proprietor], a partnership or a legal body that runs an enterprise that he or she or it owns or employed to run'.³⁶⁴ Thus, the MPA generally ascribes the rights of an employment relationship under its provisions to an entrepreneur (*pengusaha*) and Article 35 of the MPA imposes an obligation on employers (*pemberi kerja*) to 'provide their workers with protection for their welfare, safety and health, both mental and physical'. Consequently, the government states that a domestic workers employer is a *pemberi kerja* as such domestic workers cannot be afforded the rights due to employees of a *pengusaha* provided for under the MPA.³⁶⁵ This excludes domestic workers from essential rights like a formal employment relationship accompanied by a contract of employment, the regulation of minimum wage, their hours of work, leave and rest periods, remuneration and termination terms and procedure and dispute resolution.

³⁶⁰ ILO, 'The Regulation of Domestic Workers in Indonesia; Current Laws, International Standards and Best Practices' (2006) 9.

³⁶¹ Protection of Indonesian Domestic Workers: Awareness Raising at National and Local Level available at http://www.ilo.org/jakarta/whatwedo/eventsandmeetings/WCMS_122355/lang--en/index.htm accessed on 2 February 2013.

³⁶² Act No 13 of 2003.

³⁶³ Article 1(4), MPA.

³⁶⁴ Article 1(5), MPA.

³⁶⁵ ILO, 'The Regulation of Domestic Workers in Indonesia op cit., note 360 at 10.

Being that the MPA implicitly excludes domestic work regulation from its regulatory ambit, other legislations afford a level of protection for domestic workers to some extent. These legislations are:

1. the Constitution of the Republic of Indonesia, 1945 (The Constitution),
2. the Penal Code,
3. Elimination of Domestic Violence Act No. 23 of 2004,
4. Child Protection Act No. 23 of 2002,
5. National Education System Act No. 20 of 2003; and
6. Human Rights Act No. 39 of 1999
7. Trade Unions Act No. 21 of 2000.

Apart from National legislations that regulate all aspects of life, the Sub-National Governance Law of 1999³⁶⁶ grants regulatory power to provincial and local governments for the regulation of all sectors excluding security and defence, foreign policy, monetary and fiscal matters, justice, and religious affairs.³⁶⁷ This has led to the enactment of ordinances to regulate domestic work in provinces like DKI Jakarta. Jakarta provincial ordinances which regulate domestic work are:

- a.) Local Ordinance No. 6 of 1993 on Improving the Welfare of Domestic Workers; and
- b.) Local Ordinance No. 6 of 2004 on Manpower.³⁶⁸

Both ordinances reflect a giant forward stride made by the provincial government in the protection of domestic workers. They both recognize the contribution of domestic work and the Local Ordinance No. 6 of 1993 on Improving the Welfare of Domestic Workers specifically regulates recruitment and placement agencies and formalizes the employment relationship by providing for written contracts of employment. It also regulates issues of pay, food, drink, annual leave, accommodation, humane treatment and registration with the *Lurah* (urban district) Head, or the Jakarta Manpower Office. It provides for a Domestic Worker Dispute Resolution Team appointed by the office of the Governor of Jakarta as well as penalties for violations. In a similar manner, Chapter

³⁶⁶ Law No. 22 of 1999.

³⁶⁷ ³⁶⁷ ILO, 'The Regulation of Domestic Workers in Indonesia, op cit., note 360 at 16.

³⁶⁸ Ibid at 16-17.

11 of the Local Ordinance No. 6 of 2004 on Manpower is entirely drafted for the regulation of domestic workers; ensuring their possession of written contracts and registration with the Governor's office.³⁶⁹

Freedom of association in the labour sector is regulated under Indonesian law by the Trade Unions Act (TUA) of 2000 and the Constitution. Article 28E(3) of the Constitution affords every citizen the 'freedom to associate, to assemble and to express opinions' while the definition of a worker/labourer as 'any person who works for a wage or other forms of remunerative exchange' by Article 1(6) of the TUA implicitly includes domestic workers and gives them the right to unionize. This has led to the formation of advocacy groups for domestic workers such as the National Network for Domestic Workers Advocacy (Jala PRT)³⁷⁰ and unions like the Tunas Mulia Domestic Workers Union Yogyakarta,³⁷¹ and Semarang Independent Domestic Workers Union, Semarang.³⁷² Despite the recent efforts at organizing domestic workers, they have not been able to reap the entire benefits of the right to freedom of association and collective bargaining as prescribed by the relevant ILO Conventions as a result of the absence of a comprehensive legislative and structural framework.

The prohibition of Child Labour in the Indonesian domestic work sector is regulated by the Constitution, Child Protection Act No. 23 of 2002, National Education System Act No. 20 of 2003, and the Human Rights Act (HRA) No. 39 of 1999. Combinations of different articles in these legislations ensure education for children³⁷³, protection from all forms of exploitation³⁷⁴ and hazardous work³⁷⁵. These articles ensure that children between the ages of seven and fifteen years have a right to compulsory education, a right to protection from economic and sexual exploitation, dangerous work, kidnapping, trafficking and vices that may interrupt their education,

³⁶⁹ Ibid.

³⁷⁰ This was established in 2004 by Lita Anggraini. It educates domestic workers; raising public awareness of the issues that affect them, advocating state recognition and protection a better situation for domestic workers and their relationship with employers. Available at <http://www.ashoka.org/fellow/lita-anggraini> accessed on 15 December 2012.

³⁷¹ This domestic workers union was established in 2003. See <http://domesticworkerrights.wordpress.com/2011/08/26/tunas-mulia-domestic-workers-union-yogyakarta-indonesia/> accessed on 15 December 2012.

³⁷² International Domestic Workers Network (IDWN) 'IDWN News' September 2012 available at <http://www.idwn.info/sites/default/files/publications/IDWN%20newsletter%20SEP%202012%20final%20LR.pdf> accessed on 15 December 2012. For a list of domestic worker unions in Indonesia, see <http://idwn.info/regions/asia-pacific> accessed on 15 December 2012.

³⁷³ Article 6, 7 and 11, National Education System Act No. 20 of 2003; Article 11, 12 and 60, HRA.

³⁷⁴ Article 59, Child Protection Act No. 23 of 2002; Article 58 and 65, HRA.

³⁷⁵ Article 59, Child Protection Act No. 23 of 2002; Article 64, HRA.

physical health, morality, social life and mental or spiritual wellbeing, as well as legal protection from mental, physical and sexual abuse.

In a similar manner, Forced labour is regulated by a couple of legislations such as the Human Rights Act (HRA) No. 39 of 1999 and the Penal Code. The HRA prohibits forced labour by prescribing that citizens have a right to:

- a.) freely choose their employment and such employment should be under fair conditions,³⁷⁶
- b.) fair wages, in accordance with the standard of work completed and sufficient to support his/her family,³⁷⁷ and
- c.) obtain decent work, in accordance with their talent and skills.³⁷⁸

The Penal Code criminalizes and prohibits the use of violence or the threat thereof in coercing an individual to do something against their will.³⁷⁹ Ancillary acts that may accompany forced labour such as abuse³⁸⁰, slave trading³⁸¹, trafficking of women³⁸² and kidnapping³⁸³ are also prohibited and penalties' for violations are imposed by the Penal Code. The Indonesian Constitution also contains human rights safeguards that can eradicate forced labour in the domestic work sector. An example of this safeguards is entrenched in Article 28G which gives every citizen a 'right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right...and a right to be free from torture or inhumane and degrading treatment'. Furthermore, the Constitution prohibits forced labour by giving every citizen a right to choose or leave their employment.³⁸⁴ The general application of these laws to all citizens affords a level of protection for domestic workers.

Domestic violence for live-in domestic workers is covered by the Elimination of Domestic Violence Act (EDVA) No. 23 of 2004. This vulnerable group of workers are protected from physical, psychological, and sexual suffering or any act of neglect³⁸⁵ for

³⁷⁶ Article 38(2), HRA.

³⁷⁷ Article 38(4), HRA.

³⁷⁸ Article 38(1), HRA.

³⁷⁹ Article 335, Penal Code.

³⁸⁰ Articles 351-358, Penal Code.

³⁸¹ Articles 324-327, Penal Code.

³⁸² Article 297, Penal Code.

³⁸³ Articles 328-329, Penal Code.

³⁸⁴ Article 28E(1).

³⁸⁵ Article 5, EDVA.

the duration of their service within the household by Article 2 of the EDVA.³⁸⁶ Article 1(2) charges the state with the prevention of the occurrence, protection of victims and punishment of perpetrators of domestic violence. The EDVA requires protection to entail ‘every effort intended to provide a sense of security to the victim to be provided by the family, an advocate, a social institution, the police, district attorney office, a court, or another party either temporarily or based on ruling of a court.’³⁸⁷ Article 15 also creates an obligation on anyone with knowledge of the occurrence of domestic violence to make reasonable efforts within their capability to ‘prevent the continuation of the crime, provide protection to the victim, provide emergency assistance; and assist in the process of submission of application for protection ruling’

For domestic workers that do not reside in the workplace, rape and sexual assault in the workplace can be prosecuted under Articles 285-291 of the Penal Code while abuse which borders on maltreatment, maltreatment that result in physical injury and assault can be prosecuted under Article 351-358 of the Penal Code. While this provisions for are not all-embracing every aspect of domestic work, they can be used to achieve the intent of Article 5 of C189 to a reasonable extent, if thoroughly enforced.

The first legislation that ensures equality and non-discrimination for Indonesian domestic workers is the Constitution. Article 28D of the Constitution provides that ‘every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law...and the right to work and to receive fair and proper remuneration and treatment in employment.’³⁸⁸ In a similar manner, the Constitution prohibits discriminative treatment against individuals based on any ground provides a right to protection from such discriminative treatment.³⁸⁹ To properly protect most rights entrenched, every individual has a ‘duty to respect the human rights of others’³⁹⁰

Social Security benefits can also be extended to domestic workers by virtue of Article 28H(2) and (3) of the Constitution. These sub-articles provide as follows: ‘Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness...[and] the

³⁸⁶ Article 2(1)(c) states that the scope of household in this Law shall include the individual working to assist the household and living in the household.

³⁸⁷ Article 1(4), EDVA.

³⁸⁸ Article 28D(1)-(2).

³⁸⁹ Article 28I(2).

³⁹⁰ Article 28J(1).

right to social security in order to develop oneself fully as a dignified human being.’ While this is provided by the Constitution, the framework for its extension to domestic workers is non-existent in any legislation or in the MPA as a result of their exclusion.

The regulation of private job placement agencies is abysmally regulated by the MPA. Aside its prohibition of inequality and discrimination in recruitment,³⁹¹ the MPA requires fee for recruitment services to be charged to prospective employees by private job placement agencies³⁹² and hardly regulates their operation. Consequently, there has been a rapid rise in the exploitation and abuse of Indonesian domestic workers at home and abroad. Evidence of such abuse is reflected in an ILO article which states that ‘In 2011, 3070 cases of abuse, and 1,234 cases of sexual abuse of Indonesian migrant domestic workers, including rape and torture, were reported, with an additional 14,047 cases of unpaid salaries.’³⁹³ The regulation of private job placement agencies by the MPA presents a disjointed position from the requirements of Article 15 of C189. Therefore, despite the conclusion of bilateral and regional agreements by the Indonesian government geared towards protecting migrant Indonesian domestic workers, abuse is rife in the sector at home and abroad.

The Indonesian model for the regulation of domestic work is adequate within the present framework of domestic work regulation set out by the ILO. This is reflected in its omission of relevant provisions relating to domestic work within its regulatory ambit. The efficient cure for this deficiency is either specific regulation by legislation or collective agreement or an amendment of the MPA in a manner that not only includes domestic workers in its provisions but takes into account the specific nature of domestic work in the drafting of its articles. This should also be done using the general standards set by C189 for an extensive regulatory regime for domestic work in Indonesia.

4.5 CONCLUSION

This comparative analysis generally shows that the foundation of domestic work regulation is based on state recognition of the plight of domestic workers. Where a cultural attitude of stigmatization, undervaluation and discrimination of domestic workers exist, the state has a duty to curb or reverse such notions through specific

³⁹¹ Articles 31 and 32, MPA.

³⁹² Article 38(2), MPA.

³⁹³ ILO ‘Campaign for domestic workers’ rights gathers pace’ op cit., at note 359.

regulation or the drafting or amendment of existing domestic work inclusive legislations.

While there is single correct approach to regulating domestic work, this comparative analysis has shown as in the case of the South African SD7 that specific regulation provides recognition of domestic workers contribution to the economy and enables a focus on particular issues faced by domestic workers.

In a similar manner where a general legislation such as the Namibian LA applies to domestic workers, it recognizes their efforts as well and reflects the ideal that domestic workers enjoy similar rights and obligations with other workers. Therefore, domestic work is employment like any other. However the negative effect of this sort of regulation is that the nature of the workplace coupled with a situation of inadequate enforcement efforts by the state makes domestic workers to remain invisible despite the existence of a robust regulatory framework. On the other hand, the Indonesian regulatory model shows that the exclusion of domestic workers from essential labour legislation can be inimical to domestic work regulation. However, other legislations such as the Indonesian HRA, Penal Code and EDVA can regulate certain areas of domestic work. This goes to prove that the use of legislative frameworks is an important first step in domestic work regulation. A holistic approach comprising a specific legislation accompanied by ancillary legislations to reinforce certain regulatory subjects is advisable to ensure a thorough legislative paradigm for domestic work by states.

CHAPTER FIVE

CONCLUSION: THE QUEST FOR THOROUGH COMPLIANCE AND THE SUFFICIENCY OF A LEGISLATIVE FRAMEWORK

And when that good man saw how things were,
he very sensibly obeyed the promise
he had freely given.³⁹⁴

5.1 INTRODUCTION

An understanding of domestic work requires an understanding of its nature and importance, its regulatory institutions and their philosophies and international and national regulatory models adopted for its regulation. However in most academic spheres, the discourse ultimately results in regulation of the domestic work sector by a legislative framework. While acknowledging the importance of legislations and conventions and the pivotal role they play in regulation, compliance with them has always been an important factor in their regulatory effectiveness. Therefore, this chapter will analyse the drafting approach of C189 which eases the rigours of compliance associated with typical ‘hard law’ instruments. Also, the sufficiency of a legislative framework, its overall impact in the regulation of domestic work and attainment of justice for exploited domestic workers has become an important question to be considered in the discourse of labour standards regulation in this era.

Hence, this chapter concludes this dissertation by reviewing two sub-headings:

- a.) Domestic work regulation and compliance; and
- b.) The sufficiency of a legislative framework in the domestic work regulation.

³⁹⁴ Geoffrey Chaucer, *The Canterbury Tales* General Prologue

In considering these sub-headings, this chapter will highlight the human rights approach adopted by Convention 189, the role of ILO promotional principles and Decent Work Agenda in the regulation of domestic work.

5.2 DOMESTIC WORK REGULATION AND COMPLIANCE

As stated in Chapter One, domestic work is ‘undervalued’ and domestic workers are vulnerable to unequal, unfair and abusive treatment worldwide. Consequently, the regulation of domestic work in this age is entirely based on its perception as ‘work like any other, work like no other.’ This has also intricately forged a framework for compliance with C189 and attempts at domestic work regulation.

The need to classify and reinforce it as ‘work like any other’ lies in general notion that domestic work is different. As pointed out in chapter one, this is driven by its historical consideration as being a woman’s traditional responsibility³⁹⁵ and early economic theories that portray it as unproductive and non-contributory to the wealth of nations.³⁹⁶ Therefore, domestic workers have been regarded as labourers not worthy of an employment relationship and either deliberately or inadvertently excluded from labour regulation. On the other hand, ‘work like no other’ reflects the particular attention given to its specific nature, which leaves its workers vulnerable and subject to the whims and caprices of their employers. As pointed out by Albin and Mantouvalou³⁹⁷, the ‘structure and culture of the sector...impacts them in a direction of disadvantage’.

Accordingly, C189 tackles the perception challenge as it departs from a traditional view of regulating labour standards. This is achieved by its elimination of the distinction in types of work and work-related distinctions in addressing domestic work issues.³⁹⁸ An example of this is its inclusive definition of domestic work in Article 1, which applies to every worker employed in the household. In doing this, it eliminates the ‘woman’s traditional responsibility’ element and applies to male dominated domestic work detail such as chauffeurs, gardeners and private security personnel.

³⁹⁵ ILO, *Decent Work for Domestic Workers*, op cit note 2 at 5.

³⁹⁶ Adam Smith, *The Wealth of Nations, Books I-III* (1986) 429-49, and 133-40; Karl Marx, *Capital Volume 1*, (1990,)1043-45.

³⁹⁷ Einat Albin & Virginia Mantouvalou ‘The ILO Convention on Domestic Workers: From the Shadows to the Light’ 12 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963104 accessed on 7 December 2012; also available at (2012) 41(1) *Industrial Law Journal* 67-78.

³⁹⁸ *Ibid.*

Equally, it focuses on the general requirement of a remuneration-based employment relationship and addresses issues related to the specific nature of domestic work like hours of work, PEAs and migrant workers.³⁹⁹

The methodology adopted by the ILO in drafting C189 reflects a human rights approach. This makes compliance reasonably achievable by states. Despite being a hard law instrument, C189 focuses on implementation and measures that align with development, social dialogue and enterprise. These are hallmarks of the ILO Decent Work Agenda; a soft law approach. Credence is also given to International Human Rights Instruments such as the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) in its preamble. Furthermore, C189 states in Article 3(1) that ‘member states shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in this Convention’. Article 3(2) expresses the importance of freedom of association, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination and the appropriateness of states’ intervention in their enforcement. This merger of civil rights, labour rights and social rights presents an integrated or holistic approach that consumes the traditional divisions between civil, social and labour rights.⁴⁰⁰ Therefore, the universality of the integrated approach presents an easy compliance paradigm for member states that ratify C189.

Additionally, the question of compliance with C189 and domestic work regulation can be considered from the ‘creation of rights’ viewpoint. As expressed in Chapter four, neither the ILO nor C189 imposes a strict model for domestic work regulation. Likewise, no new right is created. Rather C189 extends existing rights and standards provided and guaranteed by pre-existing Conventions and legislations to a class of workers (domestic workers). Examples of rights with prior conventions and recommendations include: freedom of association, forced labour, child labour, equality and non-discrimination, Working conditions and hours, PEAs and Migrant Work. Therefore, nearly every labour standard relating to domestic work is regulated by a prior convention or by legislation in the countries compared. The crux of the discourse in most instances is either the exclusion of domestic workers from provisions or the

³⁹⁹ Ibid.

⁴⁰⁰ Ibid at 8; Virginia A. Leary, ‘The Paradox of Workers’ Rights as Human Rights’, in Compa and Diamond (eds) *Human Rights, Labor Rights and International Trade* (1996) 22 at 40.

amendment of existing provisions with regard to the specific nature of domestic work. Consequently, this extension of rights creates an easier framework for ratification and compliance by states.

Besides the ratification of C189 and its corollary supervision by the CEACR and annual reporting feature, another medium of regulation is the idea that the ILO Constitution is a treaty.⁴⁰¹ The Constitution sets out general principles that are regarded in certain respects as a direct source of law.⁴⁰² Therefore, membership creates an obligation on states to protect its labour force in the attainment of the ideals entrenched in the preamble to the Constitution. In doing this, a paradigm in which the human rights approach of C189 can be extended to domestic workers. This creates a wide coverage for the compliance mechanism for states as it ensures regulation of the domestic work sector whether or not a state ratifies C189. The only deficiency is that this mode of regulation lacks supervision. Thus, the plight of domestic workers cannot be adequately determined based on this framework.

The strength of the international standards for domestic work regulation is entrenched in the human rights approach of C189, which gives it a wide coverage that can facilitate easy compliance by states. Also important is the general approach of ILO towards regulation of labour standards; an intricately fashioned merger between hard law instruments like Conventions and a soft law framework enabled by Declarations. However, the framework for attaining compliance with regulatory initiatives for domestic work enumerated above is centred on legislative frameworks like the ILO Constitution, Conventions and national legislations. To what extent are these legislations sufficient to achieve change on the ground?

5.2 IS A LEGISLATIVE FRAMEWORK SUFFICIENT?

From the 1990s the ILO changed its approach towards the regulation of international labour standards by focusing on promotional ‘soft law’ principles.⁴⁰³ This culminated in

⁴⁰¹ Neville Rubin *Code of International Labour Law* Vol. 1 *op cit* 3-5; ILO, *Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (1996) 4th (revised) ed Geneva. Paragraph 1 states that ‘When a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of Association...’

⁴⁰² Nicolas Valticos and Geraldo W von Potobsky ‘International Labour Law’ in Roger Blanpain (ed.) *International Encyclopedia for Labour Law and Industrial Relations* 2 ed. (1995) 49 para 73.

⁴⁰³ Tony Royle ‘The ILO’s Shift to Promotional Principles and the ‘Privatization’ of Labour Rights: An Analysis of Labour Standards, Voluntary Self-regulation and Social Clauses’ in Olga Rymkevich &

a new goal for regulation called *Decent Work*⁴⁰⁴ in 1999. The Decent work ideal is based on the attainment of ‘decent and productive work for both women and men in conditions of freedom, equity, security and human dignity’.⁴⁰⁵ And the strategic objectives to achieve decent work are centred on Employment Creation, guaranteeing rights at work, providing and promoting social dialogue and ensuring social protection.⁴⁰⁶ The achievement of these objectives is based on strategic national programmes to ensure implementation and real change on the ground.

The general shift to soft law principles, adoptions and the decent work programme is a product of ILOs tripartite structure which is based on social dialogue. This reflects an acknowledgment by representatives of workers, employers and governments’ of the inadequacy of legislative frameworks in the regulation of labour standards and for the creation of a balanced work and family life. Consequently, the premise of social justice which the ILO seeks to achieve would only be realised and sustained through the use of legislative frameworks in conjunction with broader social and economic advancement initiatives. Thus, the ILO Decent Work Country programmes have been established as a follow-up to the agenda to provide support and partnership with governments, other UN Agencies, Unions and Non-Governmental Organizations (NGOs) to craft essential policy instruments and facilitate their implementation.⁴⁰⁷

While there have been arguments against the ILOs soft law approach towards regulation,⁴⁰⁸ it is important to understand that labour regulation in this era where the ‘informalisation and commercialisation of employment has resulted in the construction of work arrangements outside the scope of employment and labour protection’⁴⁰⁹ requires and intricate system where existing concepts are updated and the foundations

Michele Tiraboschi(eds) (2010)26(3) *The International Journal of Comparative Labour Law and Industrial Relations* 249-271 at 256.

⁴⁰⁴ ILO, ‘*Decent Work: Report of the Director General*’, (1999) ILO Conference, 87th Session, Geneva available at www.ilo.org/public/english/standards/relm/ilc/ilc87/rep1.htm accessed on 22 December 2012.

⁴⁰⁵ Ibid.

⁴⁰⁶ ILO, ‘Decent Work Agenda’ available at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm> accessed on 22 December 2012.

⁴⁰⁷ Ibid.

⁴⁰⁸ Tony Royle ‘The ILO’s Shift to Promotional Principles and the ‘Privatization’ of Labour Rights: An Analysis of Labour Standards, Voluntary Self-regulation and Social Clauses’ op cit., at note 403.

⁴⁰⁹ Judy Fudge ‘Blurring Legal Boundaries: Regulating for Decent Work’ 1.

of social entitlement are reinvented.⁴¹⁰ Consequently, Judy Fudge points out that it is imperative to focus on the use of ‘tools and institutions for regulating work’ that exist outside the ambit of the ‘traditional regulatory repertoire of labour law’.⁴¹¹ This is the regulatory framework on which C189 is based and which governs the regulation of domestic work in national jurisdictions.

The shift of the ILO away from the ‘traditional regulatory repertoire of labour law’ to a holistic approach where initiatives such as the Decent Work Country programmes are initiated to give impetus to Conventions, promote development and combat policies that enable of labour market flexibility and deregulation reflects the insufficiency of legislative frameworks in labour regulation in this era. While criticisms of this mode of regulation are rife, this approach creates an indirect supervision paradigm through its measurement of ‘decent work deficits’. Thus, states become unconsciously eager to support manpower development outside the legal paradigm of supervision and comments of the CEACR. As it concerns domestic work, this ideal applies in every respect. A legislative framework is insufficient in its regulation both internationally and nationally.

As expressed in chapter two, domestic work is closely related to informal employment. As such this places domestic workers outside the scope of formal employment in most cases. While this makes a legislative framework insufficient to properly regulate the sector, it simultaneously leaves domestic workers exploited. Therefore, a pivotal step in the attainment of justice for abused and exploited domestic workers lies in their ability to unionize, receive information and understand their rights. This can be achieved where their right to freedom of association embedded in C189 and other relevant conventions are extended to them and such knowledge is communicated to them through initiatives like seminars, rallies and enlightenment campaigns set up under and through the aid of developmental initiatives of the ILO, NGOs and other partners. This invariably creates a forum for enlightenment for these workers and a mechanism to seek redress where necessary. Thus, this analogy is reflective of the importance of the present framework of labour regulation under the ILO; where

⁴¹⁰ Ibid, at 3; See Guy Davidov & Brian Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) Hart Publishing, Oxford; Vosko, L, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (2010) Oxford University Press Oxford; Guy Davidov & Brian Langille (eds) *The Idea of Labour Law* (2011) Oxford University Press, Oxford.

⁴¹¹ Ibid.

Conventions and Recommendations are followed up with soft law initiatives like the Decent Work Agenda.

5.3 CONCLUSION

The regulation of domestic work transcends traditional boundaries of labour law. In considering its regulation, there has to be an intricate connection between its nature, on the ground realities and plight of domestic workers, the compliance issues that accompany international conventions and treaties and the feasibility of incorporating such international standards into national legislations and implementing their provisions. This is the challenge of domestic work regulation which accompanies most other sectors of the informal economy in the ever changing world of work. Since C189 is the most recent ILO Convention, it reinforces a model of informal economy regulation that sets the pace for other ILO conventions in this era.

In the rethinking of the purpose of labour law and labour regulation, it is important to understand as Brian Langille⁴¹² points out that the attainment of social justice is the underlining purpose of labour regulation. Therefore, an approach in which this is achieved within the framework of the ILO, irrespective of whether it is based on hard or soft law principles is imperative. This notion is the foundation for domestic work regulation, for the present and future.

⁴¹² Brian A. Langille 'What is International Labour Law for?' op cit., 47-82.

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