

Not 'Work Like Any Other': Towards a Framework for the Reformulation of Domestic Workers' Rights (2011) 32 ILJ 1

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'[W]hile the state's efforts [at regulating domestic work] assumed paid domestic work is a form of work like any other, and could therefore be formalized and depersonalized like any other, domestic workers are *not* workers like any other. Domestic workers' workplaces are not impersonal organizations that can be easily regulated through a depersonalized industrial relations system. Instead, domestic workers' workplaces are the intimate spaces of family life, and with their work goes all the close, personal contact, emotions, experiences and intimacy that is the fabric of families and households.'¹

Introduction

On 15 June 2010 the 99th session of the International Labour Conference (ILC) adopted proposals for a convention, supplemented by a recommendation, on decent work for domestic workers. From this has emanated a draft convention and recommendation, to be debated by member states and representative organizations of employers and workers around the world, from which proposed amendments will emerge. Once adopted by the ILC in 2011, a convention will require ratifying member states to formulate and implement laws or other measures to provide domestic workers with the stipulated protection.

This marks a historic moment. Domestic work remains excluded

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from the ambit of employment legislation in many countries.² The rationale for such exclusion tends to be the 'private' nature of domestic work, supposedly rendering it inappropriate for legal regulation. At the same time domestic workers in many countries have suffered, and continue to suffer, extreme forms of exploitation and abuse.³ Domestic work, the ILO Report notes, 'is rooted in the global history of slavery, colonialism and other forms of servitude'.⁴ In general it is 'undervalued and poorly regulated, and many domestic workers remain overworked, underpaid and unprotected. Accounts of maltreatment and abuse, especially of live-in and migrant domestic workers, are regularly denounced in the media. In many countries, domestic work is very largely performed by child labourers'.⁵

Within the privacy of the home, however, it is possible for such practices to be carried on undetected and undisturbed by the intrusion of labour inspectors.

Migrant domestic workers, the ILO Report adds, are particularly vulnerable to 'forced labour, slavery and slave-like conditions, and human trafficking'.⁶ The danger of abuse increases exponentially where women are driven by poverty or persecution to seek employment in other countries despite being unable to satisfy immigration requirements - in other words, as undocumented or 'illegal' migrants.⁷ Their undocumented status may disqualify or discourage

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them from seeking legal protection, thus allowing their abuse to continue unabated.

A second defining feature of domestic work is the fact that it is done overwhelmingly by women. For millions of women it is practically the only port of entry to the world of paid employment. However, it also exposes them to all the forms of discrimination, including harassment, to which women workers in general (especially in small or isolated workplaces) are exposed. In many countries, moreover, inequality on lines of class (that is, between employer and employee) and gender is further reinforced by racial hierarchy. Not surprisingly, this was starkly pronounced in apartheid South Africa where white 'madams' and black 'maids' inhabited different worlds and the domestic employment relationship, while liberating for the (e) employer, frequently involved the oppression of the (e) worker.⁸ Though apartheid has been gone for the better part of two decades, its legacy of inequality has yet to be overcome.⁹

And yet, despite the subordinate status assigned to it, domestic work is essential to the functioning of the global economy in that it enables millions of (mainly female) employees and self-employed persons, who might otherwise have been prevented by domestic responsibilities from doing so, to participate in the formal economy. The ILO Report observes:

'In contemporary society, care work at home is vital for the economy outside the household to function. In the past two decades demand for care work has been on the rise everywhere. The massive incorporation of women in the labour force, the ageing of societies, the intensification of work and the frequent lack or inadequacy of policy measures to facilitate the reconciliation of family life and work underpin this trend.'¹⁰

The final sentence hints at a more fundamental question underlying the issue of paid domestic work. In South Africa, as in much of the

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world, 'responsibility for, and provision of, care is deferred to families and - because of the private patriarchies within households - to women'.¹¹ In the debate surrounding this deeply ingrained form of gender inequality, a case has been made out for the 'socialization' of domestic care¹² as a paradigm for policy development. The present article will not attempt to enter this debate, except in assuming that any new policies or legislation that may be formulated to address the conditions of domestic workers in South Africa or internationally should not proceed from the assumption that domestic work must remain 'women's work', whether paid or unpaid. On the contrary, it is assumed that, certainly in South Africa, the time has come to start exploring ways in which the constitutional responsibilities of government and the state - inter alia, to provide access to 'social security' and 'appropriate social assistance'¹³ - can be deployed in overcoming barriers to emancipation in this sector.

The Right to Equality

In constitutional terms, it is submitted, the starting-point in conceptualizing the regulation of domestic work is not simply the right to fair labour practices¹⁴ but, more fundamentally, the right to equality.¹⁵ This is not to assert a disjuncture between these two rights; equality is a foundational value which suffuses the Bill of Rights, in accordance with which all basic rights, including the right to fair labour practices, must be understood.

¹⁶ The argument is rather that the exploitation and abuse experienced by workers in this sector do not have their origin merely in shortcomings in the legislation by which the right

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to fair labour practices is regulated. ¹⁷ Although such shortcomings do exist - as discussed below - they form part of a ubiquitous range of deficiencies experienced by domestic workers in the implementation of various basic rights ¹⁸ which, taken together, call into question their enjoyment of the right to equality itself.

This statement needs to be unpacked. It should be recalled that, in South Africa, the right to equality is formulated in a substantive and not merely in a formal sense. Section 9(1) and (2) of the Constitution read as follows:

- '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- '(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' ¹⁹

Labour law is ultimately about the right to substantive equality. It is premised on the fact that, while all citizens formally enjoy the same rights and freedoms in a democratic state, workers and employers are typically in an unequal relationship. This is captured in Kahn-Freund's famous statement that -

'the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment"'. ²⁰

To the extent that a contractual relationship implies a bargain struck between equals, in other words, the traditional conceptualization of the employment relationship as one based on contract is misleading. Although - like contracts in general - it is determined by bargaining power, the limited bargaining power of most workers historically meant that terms and conditions of employment were, in general, dictated by employers. Since paid employment is the basis of survival for most people in modern society, the power imbalance in employment relations readily translated into socio-economic inequality, often in the form of extremes of poverty and wealth. Against this background, according to Kahn-Freund, the role of labour law is to create 'equilibrium' between employers and workers. It does so, first and

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foremost, by seeking to '[ensure] the effective operation of a voluntary system of collective bargaining'; this is said to be its 'central purpose'. ²¹ What workers cannot accomplish individually, in other words, they may accomplish collectively. Freedom of association and trade union organization should therefore place them in a stronger bargaining position vis-à-vis employers and secure their socio-economic position as citizens of democratic states.

In practice, as we know, it has never been that simple. For one thing, trade union organization could never match the socio-economic power of employers, particularly as they evolved into transnational corporations; ²² rather, it might be said, the consequences of inequality were brought within bounds that were considered permissible in societies based on private enterprise and the private acquisition of wealth. No less important for present purposes is the extent to which labour law, while formally treating all workers equally, also takes account of differences among different sections of the workforce. This question will be

considered more fully below. The point to note here is that collective bargaining presupposes certain levels of trade union organization which, in practice, have mainly proved attainable by workers in 'standard' employment ²³ and, in particular, by those employed in larger workplaces. ²⁴ For this reason, given the de facto exclusion of workers in unorganized sectors from collective bargaining (at least in its traditional forms), labour law has furthermore recognized the need for the enactment of minimum conditions of employment to protect these more vulnerable categories of workers. Taken together, these measures may be seen as a step in the direction of substantive equality: to counter inequality, workers are provided with certain rights that are not applicable to employers. But do they go far enough?

The remainder of the article will focus on the way in which these questions present themselves in South Africa and, more specifically, in relation to domestic workers. The Constitutional Court has reiterated that 'collective bargaining is based on the need for individual workers

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to act in combination to provide them collectively with sufficient power to bargain effectively with employers'. ²⁵ In respect of unorganized workers, the BCEA - amplified by SD7 in relation to domestic workers - creates a 'floor of rights' which employers are not permitted to undercut even if they have the power to do so. Labour law, it might be said, has done everything that is conventionally expected of it. The question, then, is why such vast substantive inequality between domestic workers and their employers continues to exist.

Monitoring Legal Compliance in the Domestic Worker Sector

In practice, the greatest single challenge to the effectiveness of protective legislation is the difficulty of monitoring compliance by employers. In South Africa, despite significant levels of compliance with key requirements of SD7, ²⁶ levels of non-compliance have remained unacceptably high. ²⁷ In a recent 'blitz' of 576 employers of domestic workers in the Western Cape, for example, the Department of Labour found that only 42% complied with all relevant requirements. ²⁸ The picture appears to be that, while significant numbers of employers do comply with the law to a greater or lesser degree, many are able to disregard it with relative impunity.

Although the factors influencing compliance and non-compliance are complex, ²⁹ part of the problem may lie in the extent to which 'compliance' is equated with 'enforcement'. The principal mechanism for promoting compliance in terms of the BCEA and SD7 is inspection of workplaces by labour inspectors with extensive powers of investigation and enforcement, including the power to issue compliance orders. ³⁰ Given that the workplace of a domestic worker is also

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the employer's residence, however, inspectors may only enter with the consent of the owner or occupier or if authorized by the Labour Court. ³¹ Much criticism has been directed at this limitation of the power of entry, which is seen as a barrier to the enforcement of compliance with SD7. ³² In fact, there is no clear evidence of this. ³³ Even with

untrammelled powers of entry, moreover, it would be physically impossible for fewer than a thousand labour inspectors countrywide ³⁴ to keep an adequate check on approximately one million residences where domestic workers are employed ³⁵ in addition to monitoring compliance with some 20 other pieces of employment and labour legislation. These facts alone illustrate that inspection, while suited to a complaints-driven role, is hardly appropriate for creating a climate of compliance in a sector such as this.

However, it is not only a question of logistics. Even in the formal sector, with relatively large and accessible workplaces, inspection does not serve as a general means of enforcement. In general, a trade union presence in the workplace is a far more effective mechanism for monitoring legal compliance and, if necessary, invoking enforcement procedures. ³⁶ In the domestic sector the picture is infinitely more problematic. Even though it is certainly possible for domestic workers to be mobilized and organized, ³⁷ the nature of the sector does not lend

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itself to trade union organization in its traditional forms. In particular, there is little possibility of establishing an effective trade union presence to monitor compliance at household level. To a far greater extent than in the formal sector, monitoring compliance by employers cannot be separated from the empowerment of individual domestic workers, not only in terms of knowledge of their legal rights but also in terms of ability to take appropriate action in the event of non-compliance.

This proposition takes us back to the issue of equality. Inequality translates into disempowerment, while the realization of substantive equality is difficult to separate from empowerment and greater ability to engage with employers. In this sense, extending the reach of labour law in the sector through the empowerment of domestic workers is integral to giving substance to their right to equality, and vice versa. Ensuring compliance cannot succeed as a project driven by external actors, whether in the shape of the Department of Labour or organizations not rooted among domestic workers themselves. ³⁸ It is inseparable from the participation of the workers as independent actors.

Two practical examples will help to illustrate the distinction that is being drawn.

The drafting of sectoral determinations and the review of minimum wages

Prior to the promulgation of a sectoral determination, the Director-General of Labour is required to carry out an investigation of the sector in question and submit a report to the Employment Conditions Commission, which must then make recommendations to the Minister of Labour on 'the matters which should be included in a sectoral determination for the relevant sector and area'. ³⁹ The minister may, but is not obliged to, '[invite] written representations by members of the public'. ⁴⁰ In the case of SD7, in fact, an extensive consultative exercise took place, involving 64 public hearings, 114 written representations, two surveys covering over 300 employers and 4,000 domestic workers, a study of the international context and an economic analysis. ⁴¹ Despite this, trade unionists representing domestic workers insist that domestic workers were insufficiently involved in the process and that the outcomes - especially the legislated minimum wage levels - were disappointing.

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Though at first sight the criticism may appear surprising, it will be noted that the views of domestic workers were solicited as part of an information gathering process, together with the views of other interested parties and of the public in general, rather than a dialogue involving workers and employers as the parties directly concerned. The final decisions, moreover, were taken by the Department of Labour without further reference to the parties. Domestic workers had no greater ownership of the process than did any other section of the public, and it did little to empower them. Whatever the merits of SD7, an opportunity to make domestic workers custodians of their own rights, and thereby reinforce their right to equality, was lost.

For as long as there are no sufficiently representative trade unions and employers' organizations in the domestic worker sector capable of engaging in collective bargaining, it must be accepted that sectoral determinations and annual revisions thereof will remain necessary for regulating minimum conditions of employment. Nothing, however, prevents the Department of Labour from more actively seeking to involve representatives of domestic workers, especially trade unions, together with organizations representing the interests of employers, in a process of negotiation to help shape amendments to SD7. The domestic worker forums currently being established by the Department of Labour on a provincial basis create a framework within which dialogue of this nature could potentially be launched.

⁴² Though the outcome of such dialogue would not be a collective agreement, would have no legal consequences and would not preclude the minister from seeking the views of other roleplayers, it would provide a clearer indication of terms and conditions which organizations articulating views of workers and employers could agree on and advocate among their constituencies. Above all, it would give domestic workers greater ownership of the outcomes and, by engaging workers on a basis of equality with their employers, is likely to be an empowering experience.

Involving domestic workers in labour inspections

Section 68(1) of the BCEA states that a labour inspector may set the enforcement process in motion if he or she has 'reasonable grounds to believe that an employer has not complied with any provision of this

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Act'. This implies that an objective investigation must take place which, according to the rules of natural justice, requires both the employer and the worker to be heard. Yet, surprisingly, there appear to be cases where labour inspectors seek information only from employers when carrying out random inspections, or 'blitzes', at households where domestic workers are employed. ⁴³ This can only be seen as privileging the employer as a source of information on issues where, in terms of the purposes of BCEA and SD7, the worker's interests should be paramount. It may also lead workers to believe that, should they lodge a complaint, it may likewise result in a conversation between the inspector and the employer from which the worker is excluded and where the employer's version of events will be accepted as the truth. ⁴⁴

In an approach prioritizing the empowerment of domestic workers, it is submitted, inspectors should in all cases seek to involve domestic workers as far as possible. This seems implicit in their primary function of seeking to 'promote' (rather than 'enforce') compliance, in the first place by 'advising employees and employers of their rights and obligations'. ⁴⁵ The obvious objection - that workers may be reluctant to speak out in the presence of their employers - should be seen as reinforcing the need for such an approach rather than contradicting it; for, if workers are indeed reluctant, it should serve as a

warning signal that they fear victimization⁴⁶ or, at best, that the relationship between employer and workers is not conducive to compliance. The delicate balance between legal and personal dimensions that presents itself here will be discussed below. Suffice it to suggest that, in such cases, inspectors could play a constructive role in 'mediating' between the parties with a view to promoting a mutual understanding of what the law requires and, very importantly, its objective of supporting the development of their relationship in line with constitutional values rather than 'dictating' what they must do. Such a process would provide a basis for the parties to find their own solutions to any problems there may be while, at the same time, narrowing the gulf of inequality between them.

Significantly, the Western Cape Provincial Report⁴⁷ accepts that '[t]he majority of the employers regard the employment relationship as very informal and conditions of employment are normally based on

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verbal discussions and agreements which [are] based on trust and honesty'. If this is so, there is no reason to assume that compliance with the letter and spirit of the law, properly understood, would necessarily be resisted. Indeed, respect for domestic workers' right to equality, dignity and fair labour practices would be enormously conducive to genuine 'trust' between the parties. Encouraging the development of such respect, it is submitted, is at the very core of the functions of labour inspectors.

Implications of the 'Intimate' Nature of Domestic Work

Most commentaries on domestic work note its 'private' or 'intimate' nature and, correctly, see this as crucial in explaining the exploitative treatment to which domestic workers are frequently exposed. As Shireen Ally's study shows, however, there is more to it than this.⁴⁸ A clue is provided by the fact that not all domestic employment relationships are exploitative; even though domestic workers have limited access to legal protection, some have managed to negotiate working conditions which they themselves consider satisfactory or good. To ascribe this simply to the benevolence of the employer would be misleading; in many cases the workers' own management of the relationship has much to do with it. The 'vulnerable' nature of domestic employment, in other words, does not translate simply into 'victimhood'. Domestic workers are persons who, like others, develop coping mechanisms and strategies for managing difficult circumstances. The absence of trade union organization in the workplace, combined with the de facto absence of effective mechanisms of day-to-day protection by the state,⁴⁹ compels them to rely on their own informal networks and resources in protecting themselves and, in so doing, asserting their right to equality and dignity.

To say this raises echoes of the law of contract: and it is true that, in an informal sense, domestic workers and their employers may well negotiate various terms and conditions of employment - for example, time off for personal reasons, or limits to the worker's job description - by their conduct as much as their words. Workers are, furthermore, fortified by informal networks, by the sharing of experience and the support of other workers in their vicinity. The pervasive inequality between employer and worker does, of course, place limits on what can be achieved through the subtle exercise of pressure and, in the face of

employer intransigence, is likely to prove ineffective. Such 'intimate' forms of power play do, however, form an ongoing reality

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and a possible point of support for appropriate regulation under the circumstances of this sector.

It is important to note that the informal assertion of workers' power in these ways is by no means peculiar to the domestic worker sector. Preceding collective bargaining, and continuing to exist side by side with formal rules and managerial power in most if not all workplaces, is what Clegg has termed 'worker regulation'.⁵⁰ By this is meant the numerous ways, often unique to each workplace, in which workers individually and collectively 'interpret' their rights and duties, which may come to be accepted by management, tacitly or expressly, in the shape of unwritten rules or 'custom and practice' which may or may not become incorporated in collective agreements or legislation. In this respect the domestic worker sector is fundamentally no different from any other sector; all that differs is the relative importance of informal regulation in the de facto absence of formal regulation. Here, to a greater extent than in more formal and impersonal sectors, actual regulation takes place through the exercise of employer power mediated to a limited but appreciable extent by 'worker regulation'.⁵¹ But for this, the employer's domination would be practically äcomplete.

State policy, however, takes little cognizance of this hidden dimension of the domestic employment relationship. Although there are some notable exceptions,⁵² Ally argues that state policy in general proceeds from the 'helplessness' of 'vulnerable' workers and the need to 'protect' rather than to empower them. To this extent, the duty of the state to uphold domestic workers' rights translates into a 'paternalistic' role of seeking to enforce those rights (for example, by publishing sectoral determinations or through the intervention of labour inspectors) on behalf of 'victims' who are incapable of representing themselves.⁵³ There can be no doubt that the efforts of the Department of Labour are motivated by a desire to improve the conditions of domestic workers and have had various positive outcomes, not least an increase in real wages.⁵⁴ Nevertheless, to the extent that workers are

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not involved in defending their own rights, it is problematic. In seeking to act on the workers' behalf (even though it is obliged by s 23(1) of the Constitution to strike an impartial balance between employers and workers), Ally argues, the state is substituting itself for the organization that the workers might otherwise have felt the need to build. It thus becomes a self-perpetuating dynamic: the harder it is for domestic workers to rely on labour rights designed for the standard workplace, the more the state sets out to implement those rights on their behalf. That this is ultimately disempowering rather than empowering, weakening rather than reinforcing workers in asserting their right to equality will be evident.

The state's conception of its responsibility, Ally goes on to suggest, is problematic not only in failing to recognize these tenuous manifestations of domestic workers' self-assertion but in actually, albeit inadvertently, undermining them. Bringing the blunt instrument of the law to bear on a delicately balanced relationship, in circumstances where the state is unable to ensure ongoing enforcement, could mean the destruction of the self-protection which the worker has attempted to negotiate while providing little or nothing in its place.⁵⁵ The unintended consequence may be to alienate workers from the very law that was designed to

protect them. ⁵⁶ Commenting on various instances where workers declined to make use of their rights, Ally explains it as follows:

'[C]onfronted with the irreconcilable confrontation between disembodied rights and embodied intimacy, domestic workers consciously disowned the more disabling and subjectifying aspects of democratic statecraft.'
⁵⁷

Only in one respect does the law, somewhat ironically, acknowledge the intimate nature of the domestic employment relationship: it denies trade union representatives or officials access to the workplace of a domestic worker except with the employer's consent ⁵⁸ and, as already noted, similarly restricts access by labour inspectors. ⁵⁹ It is

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suggested that this one-sided recognition should be developed into a more nuanced understanding of the relationship as a whole, with the emphasis on formulating measures for promoting compliance that will at the same time empower workers, build on their ability to manage their work situations and give content to their right to equality.

The principle of substantive rather than formal equality, as discussed above, has a practical meaning which is crucial in guiding this process. Treating domestic workers as 'workers like all others' reflects an overly formal conception of equality; the theme of this article is the need to move beyond this and find ways of promoting substantive equality in this sector. In *Botha & another v Mthiyane & another* ⁶⁰ the implication of such an approach was explained as follows:

'Equality is not simply a matter of likeness. It is, equally, a matter of difference. That those who are different should be differently treated is as vital to equality as is the requirement that those who are like are treated alike. In certain cases it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests.'

The true purpose of labour law in South Africa, it may be concluded, is to treat all workers in such a way that they are able to enjoy the rights and freedoms contemplated by the Bill of Rights as fully as possible. Where workers are differently situated, it is necessary to treat them differently in order to ensure substantively equal access to those rights and freedoms. The present exercise is essentially about identifying ways in which domestic workers need to be treated differently. The disparities between the conditions of domestic work and those of 'standard' employment thus emerge not merely as an explanation for the disadvantages suffered by domestic workers, but as indicators of the kinds of remedial measures that are called for in promoting substantive equality in this sector.

Conclusion

South Africa has gone further than in many other states in protecting the rights of workers. In the case of domestic workers, the rights extended by the various labour statutes and by SD7 go beyond the minimum which an ILO convention is likely to call for. This article does not question the purposes of these statutes nor the determination of the Department of Labour to implement them. Rather, it suggests that the steps that have been taken from formal equality (treating all workers alike) towards substantive equality (taking account of the unique circumstances of domestic work) do not go far enough. The argument is that the

focus of all law regulating domestic work, as well as policy measures deployed in the sector (for example, training

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programmes), should be to reduce the degree of inequality between domestic workers and their employers. To this end the forms in which various rights are extended to domestic workers should be critically re-examined and, if necessary, reformulated with a view to ensuring the full enjoyment of those rights. Throughout this process the aim should be to empower domestic workers in the actual situation in which they find themselves - that is, seeking to assert their rights and negotiate conditions in a one-to-one relationship with more powerful employers. ⁶¹ For, it has been argued, it is only when employers come to see domestic workers as persons possessing an equal right to dignity that the right to fair labour practices in all its legal forms will be placed on firm foundations.

In pursuing these objectives, a number of propositions emerging expressly or implicitly from the discussion thus far are put forward for consideration:

- (a) The organization of domestic workers is not only possible but essential in order to share experience and knowledge, provide collective support, exercise collective pressure and, generally, fortify workers in asserting their right to equal treatment and fair labour practices. Given that domestic workers are not concentrated in large workplaces, however, organization cannot take the form of traditional trade unionism but is likely to be more viable in forms referred to as 'social movement' unionism - that is, combining organization in the workplace or around workplace issues with organization around broader social issues relevant to workers' conditions of employment. ⁶²
- (b) Collective bargaining in the domestic worker sector will be dependent on the emergence of organizations representative of employers as well as workers. This, however, should not prevent the involvement of organizations of domestic workers in negotiating the content of sectoral determinations applicable to the sector and annual minimum wage revisions - a process which

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could be empowering while also narrowing the distance between domestic workers and workers in organized sectors.

- (c) The impossibility of policing up to a million domestic workplaces by means of inspection calls for greater emphasis by the Department of Labour on promoting rather than enforcing compliance - that is, by developing strategies for engaging with workers and employers more broadly with a view to developing a common understanding of legal requirements, mediating differences and encouraging parties to arrive at their own arrangements for compliance with the law. Provincial domestic worker forums offer a platform for launching such processes as well as (informal) negotiations around annual minimum wage revisions.
- (d) A model contract of employment could be designed, taking into account the unique realities of the domestic employment relationship and creating space for self-regulation - for example, to accommodate the requirements of the worker's family life. The current duty placed on the employer to provide the worker with written particulars of employment, ⁶³ while intended to curb the arbitrary exercise of power by employers, does not prevent the employer from determining

those conditions unilaterally. It is suggested that the current 'Sample of written particulars' provided by the Department of Labour ⁶⁴ should be revised to embody an *agreement* between the parties along the lines proposed above. ⁶⁵

- (e) The promotion of domestic workers' right to equality implies giving recognition to their individuality and personal achievements, inter alia, by replacing the existing uniform minimum wage, premised on a universal lack of skill, with appropriate wage differentials based on differences in education, skill and experience. Skills development and training, including the development of generic skills that would enable domestic workers to

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find employment in other sectors, should be systematically undertaken and linked to appropriate levels of remuneration comparable to those in other sectors. ⁶⁶ Inequality between workers and employers is likely to be narrowed if their skills are formally and appropriately acknowledged.

- (f) The fundamental argument has been that the burden of inequality experienced by domestic workers creates an insuperable barrier to the 'full enjoyment' of their rights. Such inequality, however, is not confined to shortcomings in the implementation of the right to fair labour practices. The re-examination of laws applicable to domestic workers should therefore not be limited to SD7 and other pieces of labour legislation. To address the right to equality in all its dimensions it will be necessary to interrogate the impact of all relevant legal provisions, including relevant provisions of private and public law, to ensure that the disadvantages imposed on domestic workers are removed to the greatest possible extent.

Similar questions, it is submitted, should be considered in relation to other spheres of informal or non-standard employment where existing labour law may find limited application.

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¹ Shireen Ally *From Servants to Workers: South African Domestic Workers and the Democratic State* (University of KwaZulu-Natal Press 2010) at 95.

² As was the case in South Africa, in terms of the Labour Relations Act 28 of 1956 until its repeal in 1996 and the Basic Conditions of Employment Act 3 of 1983 until 1994. No fewer than ten conventions of the International Labour Organization (ILO) permit the exclusion of domestic workers from their scope: ILO *Decent Work for Domestic Workers* Report IV(1) International Labour Conference 99th Session 2010 Geneva First edition 2010 (hereafter 'the ILO Report') at http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_104700.pdf (accessed 11 October 2010) table II.2 at 22.

³ In a recent and particularly horrifying incident, it is reported that '[d]octors in Sri Lanka on August 27, 2010, operated on Lahadapurage Daneris Ariyawathie, 49, to remove nails and metal objects she said her Saudi employers had hammered into her body after she complained of being overworked': Human Rights Watch *Saudi Arabia: Domestic Worker Brutalized* 2 September 2010, available at <http://www.hrw.org/en/news/2010/09/02/saudi-arabia-domestic-worker-brutalized> (accessed 29

September 2010). Christoph Wilcke, senior Middle East researcher at Human Rights Watch, comments that '[t]he abuse suffered by this woman is not an isolated incident, but one of countless cases of abuse and exploitation of migrant domestic workers'.

⁴ ILO Report para 2.

⁵ para 3.

⁶ para 225. Even relatively sheltered au pairs are vulnerable to abuse. According to the Council of Europe, cases have included 'a girl from Romania who committed suicide after having been forced to work like a slave for €1 a day, a Russian girl forced to sleep on a mattress in the attic, and a Slovakian girl left with huge debts after having been hospitalized without health insurance': Report of the Committee on Equal Opportunities for Women and Men (2004), (cited in ILO Report Box III.2 at 34).

⁷ In general, see Domestic Workers Research Project 'Suffering/Nurturing Globalisation: Migration and Domestic Work' (Conference report April 2010) at http://www.dwrp.org.za/images/stories/DWRP_Research/chapter_3_edited.pdf (accessed 5 October 2010). On South Africa's exclusionary immigration regime, see Dawn Norton 'In Transit: The Position of Illegal Foreign Workers and Emerging Labour Law Jurisprudence' (2009) 30 ILJ 66; Dawn Norton 'Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers' (2010) 31 ILJ 1521; Craig Bosch 'Can Unauthorized Workers Be Regarded as Employees for the Purposes of the Labour Relations Act?' (2006) 27 ILJ 1342. For an analysis from a human rights perspective, see Jonathan Klaaren 'Human Rights Protection of Foreign Nationals' (2009) 30 ILJ 82. On the treatment of refugees, see Forced Migration Studies Programme *National Survey of the Refugee Reception and Status Determination System in South Africa* (University of the Witwatersrand Research Report February 2009).

⁸ As analysed in Jacklyn Cock's seminal work, *Maids & Madams: A Study in the Politics of Exploitation* (Ravan Press 1980), republished as *Maids and Madams: Domestic Workers under Apartheid* (The Women's Press 1989). For an overview from a struggle perspective, see Ivy Matsepe-Casaburri 'On the Question of Women in the South African Struggle' (1986) 1 *African Journal of Political Economy* 40 at 44-9; available at <http://digital.lib.msu.edu/projects/africanjournals/html/itemdetail.cfm?recordID=2632> (accessed 26 September 2009).

⁹ Some go so far as to typify the situation of domestic workers in post-apartheid South Africa as 'servitude' rather than employment: see Stu Woolman & Michael Bishop 'Down on the Farm and Barefoot in the Kitchen: Farm Labour and Domestic Labour as Forms of Servitude' (2007) 24 (4) *Development Southern Africa* 595; available at [http://www.up.ac.za/dspace/bitstream/2263/4268/1/Woolman_Down\(2007\).pdf](http://www.up.ac.za/dspace/bitstream/2263/4268/1/Woolman_Down(2007).pdf) (accessed 29 September 2010).

¹⁰ ILO Report para 2.

¹¹ Ally at 190. The position has been exacerbated in recent decades by curbs on public spending in many countries, resulting in the 'privatization' of various forms of care which had previously been provided by government and which, in poorer communities, are added to the duties of women at home. An example in South Africa is the Older Persons Act 13 of 2006, in terms of which care at home is prioritized (see s 10) and, in respect of such care, the responsibility of the state is limited to providing a (small) means tested grant-in-aid in terms of the Social Assistance Act 13 of 2004 (see ss 5 and 12).

¹² ie 'through public responsibility and provision, or the equalization of responsibility for care between men and women within households': Ally at 187.

¹³ s 27(1)(c) Constitution of the Republic of South Africa 1996 (hereafter Constitution).

¹⁴ s 23 Constitution.

¹⁵ s 9 Constitution.

¹⁶ Section 7 of the Constitution states that the Bill of Rights as a whole 'affirms the democratic values of human dignity, equality and freedom'. This interconnection was expressed as follows in *Nakin v The MEC, Department of Education, Eastern Cape Province & another* (2008) 29 ILJ 1426 (E); 2008 (6) BCLR 643 (CK) para 34: '[F]airness has much to do with equality, dignity and freedom; founding values of our Constitution. To view these interlocking aspects of a public employment relationship in separate compartments of their own would deprive one of viewing the whole and complete picture of such a relationship.'

¹⁷ In particular, by the Labour Relations Act 66 of 1995 (the LRA) and the Basic Conditions of Employment Act 75 of 1997 (the BCEA), the latter being fine-tuned to the circumstances of the sector by Sectoral Determination 7, Domestic Worker Sector, South Africa (GN R1068 of 15 August 2002) (SD7).

¹⁸ Notably, the right to privacy and the right of access to adequate housing: ss 14 and 26 Constitution.

¹⁹ The implications of the second sentence of subsection (2) will be considered below.

²⁰ Davies & Freedland *Kahn-Freund's Labour and the Law* (3 ed Stevens 1983) at 18.

²¹ Davies & Freedland at 2.

- ²² For discussion from a South African perspective, see Godfrey et al *Collective Bargaining in South Africa: Past, Present - and Future?* (Juta 2010) at 3-8.
- ²³ The term 'standard' is used here as denoting full-time, indefinite employment in workplaces where the relevant legal rules are generally applied, while 'non-standard' refers especially to part-time and temporary employees, those employed by labour brokers, and workers employed 'informally' (that is, substantially outside the framework of applicable legal rules).
- ²⁴ For critical analysis of South African labour law in this regard, see Jan Theron 'Employment Is Not What It Used To Be' (2003) 24 ILJ 1247; Clive Thompson 'The Changing Nature of Employment' (2003) 24 ILJ 1793; Paul Benjamin 'Informal Work and Labour Rights in South Africa' (2008) 29 ILJ 1579; Paul Benjamin 'Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa' (2010) 31 ILJ 845. For an analysis from a British perspective, see Paul Davies & Mark Freedland *Towards a Flexible Labour Market Labour Legislation and Regulation since the 1990s* (Oxford University Press 2007), reviewed by Carole Cooper in (2008) 29 ILJ 881.
- ²⁵ *In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 ILJ 821 (CC); [1996] 10 BCLR 1253 (CC) at para 38.
- ²⁶ Cf Tom Hertz *Have Minimum Wages Benefited South Africa's Domestic Service Workers? African Development and Poverty Reduction: The Macro-Micro Linkage: Forum Paper* (2004) at http://www.wiego.org/occupational_groups/pdfs/South%20Africa_Hertz_Minimum_Wages_for_Domestics.pdf (accessed 23 June 2009); Ally at 71-2.
- ²⁷ Cf Woolman & Bishop at 595; Thenjiwe Magwaza 'Effects of Domestic Workers Act in South Africa: A Steep Road to Recognition' 2008 *Agenda* no 78-79. For a recent study containing a wealth of information, see Debbie Budlender *Decent Work for Domestic Workers* (Community Agency for Social Enquiry May 2010).
- ²⁸ Department of Labour Provincial Office, Western Cape *Report on the Domestic Worker Sector Blitz conducted from 2-12 February 2009 and the follow-up inspections conducted 2-12 March 2009 in the Western Cape* (16 March 2009; unpublished; hereafter 'Provincial Report'). Follow-up inspections, however, saw the compliance rate increase to 81%. It may be noted that the biggest single area of non-compliance was failure by the employer to provide the worker with information concerning pay and written particulars of employment (in 158 and 154 cases respectively): at 7.
- ²⁹ For example, there are indications that compliance rates may be influenced by the socio-economic status of employers, with a greater likelihood of compliance among those who are relatively educated and better-off; cf Christel Marais 'Labour Legislation in Emfuleni's Domestic Worker Sector: Awareness and Compliance' (2009) 33 *SA Journal of Labour Relations* 65.
- ³⁰ ss 64-69 BCEA.
- ³¹ s 65(2) BCEA.
- ³² Given that police need search warrants to enter private premises when conducting criminal investigations, it is apparent that more thought needs to be given to the manner in which the power of labour inspectors to enter private premises could be reformulated.
- ³³ In the province wide 'blitz' by labour inspectors referred to above (fn 28) it was reported that '[m]ost employers were eager to meet the inspectors and were co-operative': Provincial Report at 10; non-availability of employers during the day is given as the first reason for failure by inspectors to gain access. In an earlier 'blitz' in the Sea Point area of Cape Town, the main problem in making appointments for inspection was non-availability of employers due to 'Jewish and school holidays', see Department of Labour Provincial Office, Western Cape *Report on the domestic blitz conducted from 6-8 April 2009 in the Western Cape* (14 April 2009 unpublished).
- ³⁴ The total number of labour inspectors in South Africa increased from 685 in 2000 to 706 in 2004 and 755 in 2009/10, conducting approximately 250,000 inspections per year in 2004: see Halton Cheadle & Marlea Clarke *National Studies on Workers' Protection: South Africa* Report submitted to the International Labour Organization (International Labour Office 2000); Du Toit et al *Labour Relations Law: A Comprehensive Guide* (5 ed LexisNexis Butterworths 2006) at 53; Department of Labour *Annual Report 2009/10* Presentation to the Portfolio Committee on Labour (7 September 2010) at <http://www.pmg.org.za/report/20100907-consideration-200910-annual-report-financial-statements-department-la> (accessed 6 October 2010).
- ³⁵ According to the Labour Force Survey, the number of domestic workers in South Africa fluctuated from a low of 977,000 to a high of 1,025,000 between 2000 and 2007: Statistics South Africa *Labour Force Survey: Historical Revision September Series 2000 to 2007* (Statistical Release 0210) table 4.3 at 15.
- ³⁶ Or, as Kahn-Freund put it, 'the law needs trade unions more than trade unions need the law': Davies & Freedland above. Without a trade union presence, in other words, employment legislation may well be a dead letter because individual employees may often be loath to lodge complaints against their employers.

- ³⁷ For a convincing refutation of the view that domestic workers are 'unorganizable', see Ally's discussion of the history of the South African Domestic Workers' Union (SADWU) at 148ff.
- ³⁸ On the unintentionally disempowering effect of state intervention aimed at protecting domestic workers' labour rights without the involvement of the workers themselves, see Ally chapter 4.
- ³⁹ s 54(4) BCEA. In general, see ss 52-55.
- ⁴⁰ s 52(3) BCEA.
- ⁴¹ South African Government Information *Media Statement by the Honourable Minister of Labour, Mr Membathisi Mdladlana, on the Release of a Report about Wages and Conditions of Employment for Domestic Workers 10 July 2001* at <http://www.info.gov.za/speeches/2001/010710410p1001.htm> (accessed 1 October 2010).
- ⁴² The first domestic worker forum (DWF) was established in uMzimvubu in the Eastern Cape with the aim of '[highlighting] the plight of workers with regard to their rights' as well as '[taking] cognisance [of] the training needs of domestic workers by allowing community representatives to play a meaningful role in identifying skills needs within their respective wards': Department of Labour press release dated 1 March 2007 at http://www.labour.gov.za/media-desk/media-statements/2007/domestic-worker-forum-established/?search_term= (accessed 1 October 2010). The DWFs currently being established are more broadly based; the DWF established in Western Cape on 2 February 2010, for example, included representatives of two domestic workers' trade unions as well as a consultancy advising employers: Minutes of Domestic Worker Forum Meeting Cape Town 15 February 2010 (unpublished).
- ⁴³ Ally, who was present at a number of inspections where labour inspectors met with employers, states: '[n]ot once was a worker ever asked or consulted': at 91.
- ⁴⁴ The Department of Labour's reports of 'blitz' inspections (fns 28 and 33 above) likewise focus on responses from employers. Although the provincial report (at 10) mentions as a 'constraint' that '[o]n night inspections the domestic employees are not available', it is unclear to what extent information provided by domestic workers was relied upon.
- ⁴⁵ s 64(1)(a) BCEA.
- ⁴⁶ This is prohibited by s 79 of the BCEA; see also s 90.
- ⁴⁷ at 10.
- ⁴⁸ Ally, especially chapter 4 and Conclusion, to which the remainder of this section is indebted.
- ⁴⁹ From the available statistics (fns 28 and 33 above) it is clear that 'blitzes' by labour inspectors, however successful in their own terms, do not and cannot affect the vast majority of domestic workers.
- ⁵⁰ H A Clegg *The System of Industrial Relations in Great Britain* (Blackwell 1972) at 4-6.
- ⁵¹ Also referred to by Ally as 'informal management': at 108.
- ⁵² In particular, the establishment of domestic worker forums by the Department of Labour (referred to above) and the Domestic Workers' Skills Development Project implemented between 2002 and 2005; see Department of Labour *Design of New Training Plan for Domestic Workers* at <http://www.info.gov.za/speeches/2000/000824410p1003.htm> (accessed 30 June 2009). For an analysis of the project and positive outcomes, see Tersia Susara Wessels *The Development Impact of the Domestic Workers Skills Development Project on its Participants* (MA thesis University of South Africa December 2006) at <http://uir.unisa.ac.za/handle/10500/1720> (accessed 14 April 2010). Needless to say, initiatives such as these will need consistent development if their full potential is to be realized.
- ⁵³ By contrast, in the social and political sphere - ie outside the employment relationship - it is taken for granted that domestic workers are citizens like all others, capable of exercising the right to vote and other rights of citizenship.
- ⁵⁴ See Hertz above.
- ⁵⁵ As one domestic worker recounts: 'The 2007 household raids were a blow for me. It put a stop on a raise I had gotten used to getting at the end of November of each year for the past four years. Following a visit by the Department of Labour's officers, my employer told me I was not going to get any raise that year as I was far too above the minimum wage. She was very angry at the process', quoted in Magwaza above.
- ⁵⁶ An important exception, as several commentators have noted, is the protection against unfair dismissal extended by chapter VIII of the LRA and enforced by the Commission for Conciliation, Mediation & Arbitration (CCMA). During 2009-2010, for example, almost 14,000 disputes (9% of all disputes) were referred to the CCMA by domestic workers: CCMA *Annual Report 2009 / 2010* (available at http://www.ccma.org.za/UploadedMedia/CCMA_2009-2010_Annual_Report.pdf) 18 (accessed 5 October 2010). This may be partly explained by the fact that, after termination of the employment relationship, domestic workers no longer have to fear reprisals by employers should they seek to exercise their rights.

- ⁵⁷ Ally at 189. 'Subjectifying' in this context refers to treating workers as subjects of state control and protection rather than as actors capable of acting on their own behalf.
- ⁵⁸ s 17 LRA.
- ⁵⁹ s 65 BCEA.
- ⁶⁰ 2002 (1) SA 289 (W) at 319, citing Chaskalson et al *Constitutional Law in SA* at 14-3.
- ⁶¹ A parallel may be drawn with a sectoral collective agreement creating an enabling framework for plant-level bargaining. The aim here is to create space for the parties to fashion their own specific solutions at a local level, subject to certain minimum standards, rather than prescribing general solutions. In a similar way, it is suggested, the law might set out to create an enabling framework for domestic workers and employers to regulate their own relationships on a footing of greater equality, subject to minimum statutory requirements.
- ⁶² An example of such organization in South Africa has been Sikhula Sonke, a movement of farmworkers which claimed 3,500 members in the Western Cape in 2009. In general, see Mazibuko K Jara *Monitoring Compliance with the Sectoral Determination for Farm Workers in 5 Western Cape Farming Districts: Report of an Exploratory Study* (Women on Farms Project 2006). In the case of domestic workers, housing is a key issue around which organization and mobilization are called for: See Anzabeth Tonkin 'The Plight of Domestic Workers: The Elusiveness of Access to Adequate Housing' (paper presented at conference of Domestic Workers Research Project Cape Town 7-8 May 2010) available at http://www.dwrp.org.za/images/stories/DWRP_Research/paper_tonkin.pdf.
- ⁶³ see s 29 BCEA.
- ⁶⁴ At <http://www.labour.gov.za/documents/forms/basic-conditions-of-employment/sample-domestic-worker-employment-contract>.
- ⁶⁵ The Proposed Conclusions with a view to a convention on decent work for domestic workers, adopted by the International Labour Conference in June 2010, deals with the conclusion of a contract of employment between an employer and a domestic worker as follows:
'Each Member should ensure that domestic workers are *informed* of their terms and conditions of employment, in an appropriate, verifiable and easily understandable manner, including, *where possible* and preferably, through written contracts in accordance with national laws and regulations . . .' (International Labour Conference *Draft Report* 99th Session Geneva June 2010) at 214-215; emphasis added. See also delegates' statements at paras 42, 356, 366, 367, 653, 702, etc.
- Among the terms and conditions of which workers should be 'informed' are the 'type of work to be performed', the 'remuneration, method of calculation and regularity of its payment', the 'normal hours of work', the 'duration of the contract' and other matters that go to the heart of the nature and quality of life that the worker will experience. It is submitted that this disempowering formulation should be revisited before the convention is finalized.
- ⁶⁶ As motivated in *SADSAWU Submission to the Department of Labour on Domestic Worker Wages and Conditions of Employment* (September 2010, unpublished). SADSAWU (the SA Domestic Services & Allied Workers Union) is the largest registered trade union of domestic workers in South Africa.