

Domestic workers and Informality: Compliance with Decent Work for Domestic Workers as a Transgression
to the Asymmetrical Law of the Home Workplace*

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Introduction: Framing the Research Questions on Informality through Invisibility and the need to Transgress the Asymmetrical Law of the Home Workplace

Domestic work has historically been rendered invisible, although with 67 million workers worldwide, it is ubiquitous. By turning attention to domestic work, we turn attention to the fundamental insight that informality is not synonymous with a lack of order,¹ or, I would add, a lack of law.

Labour law is a field that recognizes sources of law other than state-made law. A host of accepted social norms govern workplaces, whether those workplaces are factories or farms, ships or households. Both within classic “employment relationships” and a broad range of work relationships in the formal and informal economy of the global South and global North, inequality of bargaining power remains a foundational acknowledgement, through which “management rights” to govern flow.²

The law that governs the household as a workplace – the law of the home workplace - is not new law. It has its roots in global histories of slavery and colonialism. Those global histories help to explain the remarkable consistency in persisting understandings of domestic workers’ status and subordinated social location across a range of places in the global North and the global South. They intersect with racial hierarchies and patriarchal norms to render domestic workers, and their work, invisible.

Nor is the law of the home workplace family law, as it is often framed through the use of the colloquial expression, “like one of the family”. The centrality of household economies at various historical moments does not make the domestic worker the “substitute” for the woman of the patriarchal household. The fact that the word for a “domestic” in so many parts of the world is synonymous with “slave” should be taken seriously as a shorthand for the place of the worker in the family, and the deeply asymmetrical relationship that has become so ubiquitous that its laws become invisible.

In formalizing the informal in domestic work, it is important not simply to adopt the asymmetrical law of the home workplace that perpetuates domestic workers’ substantive inequality and structural invisibility. In other words, becoming visible does not simply mean becoming a subject of state law. Regulatory frameworks will fail to formalize domestic work – and will be unenforceable - if they are not attentive to the existing norms that order the relationship, in highly inequitable ways. The task is instead to render visible and deliberately transgress the asymmetrical law of the home workplace. Becoming visible means ensuring that domestic workers are meaningfully included in an alternative –

* These reflections are drawn from my forthcoming book, *Everyday Transgressions: Domestic Workers’ Transnational Challenge to Labour Law* (Cornell University Press, 2018).

¹ Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom, eds., *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford University Press, 2007).

² See e.g. Jim Atleson, *Values and Assumptions in American Labor Law* (1983).

and invariably transnational³ – regulatory framework that ensures their meaningful incorporation into the corpus of a labour law that fosters equality. This is what international standard setting on decent work for domestic workers sought to accomplish, through the claim of a human right to meaningful inclusion in labour law.

Should existing enforcement systems treat domestic work the same as other sectors, or should special systems/rules/mechanisms be developed for the domestic sector?

There is a need for a mix of both special and general enforcement systems to address domestic work. Moreover, attention should be turned to the broader notion of “compliance” with law that is adapted to domestic work, to facilitate implementation.

As in my past writing on this topic, the ILO *Law and Practice Report* makes the case for specific regulation of decent work for domestic workers. The specificity was framed in terms of a deliberate juxtaposition: “work like any other” and “work like no other”⁴. The juxtaposition of the two ideas was widely cited in the academic community⁵ as some scholars sought to assess whether we should embrace one or the other. My position has consistently been that both are necessary. It is not enough to say that domestic work is work like any other, and delete the words in an international labour convention or a national law that list “domestic workers” amongst the exclusions. Keeping both is a way to acknowledge that it is necessary to name and dislodge the fundamentally asymmetrical law of the home workplace, that enables domestic workers’ exploitation and assures their *de facto* exclusion, even when *de jure* they are included. The juxtaposition refocuses attention on the compliance enhancing mechanisms necessary to promote a change in power relationships as well as a shift of paradigm (“aha” moments).

The *Law and Practice Report* recognized that a mix of approaches to foster compliance is necessary:

[m]ere tinkering with informal rules in formal legislation is not enough. ... a complementary mix of carrots and sticks – capacity building for domestic workers, implementation incentives for employers and robust enforcement by governments – is needed if the objective is to be achieved. ... well-crafted regulatory mechanisms with a suitable enforcement machinery make an important difference in the everyday lives of domestic workers – and they convey the message that domestic workers are indeed workers who deserve both rights and respect.⁶

³ Decent work for domestic workers is transnational at very least in the sense understood by Jessup: “to include all law which regulates actions or events that transcend national frontiers.” Philip C. Jessup, *Transnational Law* (1956) at 2. Shaffer and Halliday go further, and frame the notion of transnational legal ordering to mean “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.” Terrence C. Halliday & Gregory Shaffer, eds. *Transnational Legal Orders* (Cambridge University Press, 2014) at 11.

⁴ International Labour Conference, *Report IV(1) on Decent Work for Domestic Workers* (2010) (*Law and Practice Report*), paras. 45-47.

⁵ Peggie Smith, “Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers”, *Employee Rights and Employment Policy Journal*, Vol. 51, No. 157, 2011, Hila Shamir & Guy Mundlak, “Bringing Together or Drifting Apart? Targeting Care Work as ‘Work Like No Other’” *Canadian Journal of Women and the Law*, Vol. 23, p. 289, 2011, Einat Albin, “From Domestic Servant to Domestic Worker” in Judy Fudge et al., *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012).

⁶ *Law and Practice Report, op. cit.*, paras. 40 & 325.

Convention No. 189 and Recommendation No. 201 do some of this work, by turning attention to specific features of the domestic work relationship that need to change. For example, the new international labour standards challenge the presumption that only the employer's needs should determine whether a domestic worker "lives in" (Article 9 of Convention No. 189), and call out the practice of assuming that when the household is on vacation, so too is the accompanying domestic worker (Article 13 of Recommendation No. 201). But how can these be enforced?

The new international labour standards provide most compliance assistance on simple, smart and supportive measures to ensure wage payment and social protection. The simplification mechanisms have been prevalent in a number of countries in the global North – including France, Belgium, Switzerland and to a more limited extent, Canada (Quebec) - and more comprehensive measures have been the source of experimentation in the global South, notably in Brazil but also in Argentina. Enforcement mechanisms - in South Africa, France and Côte d'Ivoire – are accessible to workers generally, but have decision-makers who are attentive to the specificity of domestic work and able to apply law that has been adapted to challenge the asymmetrical law of the home workplace.

Using domestic work as a lens on globalization—how might labour law interact with other legal regimes, such as international law and immigration law (the latter in the case of migrant domestic workers)?

The approach to regulating "decent work for domestic workers" has helped to shift the meaning of decent work from a minimalist to a more fulsome, labour law driven, frame. That fulsome vision should be marshalled to rethink transnational labour law - and the role of international labour standards within it - for globalization. This includes rethinking representation to make sure that historically marginalized workers can participate fully in building the law – state and non-state – that governs them. Domestic workers' social movements are a reminder that a broad range of actors – alongside traditional trade unions and employers' organizations – can be marshalled.⁷ WIEGO's pivotal enabling role to the International Domestic Workers' Network (and now Federation) is an example of the kind of collaboration necessary to strengthen transnational labour law. Some important commentators in the field understandably worry that domestic workers may have sought inclusion in a sinking labour law ship.⁸ Domestic workers actively reinvigorating labour law might respond that reports of its death have been greatly exaggerated. Clearly though, a narrow approach to the field of labour law that excludes those on its margins can no longer – if it ever could - be afforded...

Legal regimes are interconnected. The governance of domestic work in the context of globalization increasingly shows that the borders between international law and immigration law are porous. Both fields are intimately related to labour law in a global economy. Emerging transnational legal orders – including on the trafficking of domestic work and "contemporary forms of slavery" – have the benefit of unequivocally naming exploitation and abuse. However, as with many approaches that privilege criminalization, they extend the arm of the punitive state without necessarily working on underlying, structural conditions that make particular forms of work organization pervasive. They run the risk of supplanting rather than enhancing a transnational labour law approach to domestic work, which is essentially an approach that takes development seriously, and sees labour law *as* development. Those

⁷ Karin Pape, "ILO Convention C189—a good start for the protection of domestic workers: An insider's view" *Progress in Development Studies* 16, 2 (2016) 189 at 194.

⁸ D'Arcy du Toit et al., ed., *Exploited, Undervalued and Essential: Domestic Workers and the Realisation of their Rights* (Pretoria University Press, 2013). The Social Law Project's important current work on cooperatives warrants close attention.

who work carefully on informality and in the global South have generally cultivated a vision of the Third World that is more attune to legal change than some of the literature on legal transplantation suggests. Time permitting, I will explore one example – via a juxtaposition of the *Siliadin v. France*⁹ case before the European Court of Human Rights and my research on regulatory innovation on decent work for domestic workers in Côte d’Ivoire – during my conference presentation. The labour law vision flowing through Convention No. 189 and Recommendation No. 201 takes law – state law and pluralist law – seriously, and seeks to “formalize” by introducing a new transnational legal order built on equality. It works hard to shift the social consensus, and promote compliance. It also means that regulatory responses and their enforcement are not expected, either, to be exclusively national.

Current trends in extending enforcement systems to cover domestic workers, both in developed and developing countries?

Approaches to enforcement have been multiple, and the most promising initiatives are simple, supportive and smart. For example, in some Gulf states, bilateral agreements and labour laws have been revised to require salaries to be paid electronically through bank accounts. By that simple measure, it becomes possible to verify that wages have been paid on time to the domestic worker, in a currency that respects the terms of the relevant legislation and the contract signed before migrating. Some bilateral agreements, in particular those negotiated by the Philippines Overseas Employment Agency, seek to prevent contract substitution once the domestic worker arrives in the host state. However, none of these measures is fool proof – and none overcomes the inequality that might prevent domestic workers from speaking out in the event of non-compliance, when their status is dependent on an individual employer. In the migration context – in the global South as in the global North – temporary migration systems that render domestic workers dependent on sponsorship by an individual employer entrench invisibility and allow informality to perpetuate. And my research on the Philippines and on Kenya highlights the serious collective action challenges associated with attempts to enforce domestic workers’ rights through bilateral agreements and periodic migration bans. This is an area that calls out for international solidarity to craft regulatory responses on decent work for domestic workers that are transnational.

My research has primarily focused on inspection and compliance mechanisms, as well as simplification schemes that facilitate the delivery of social protections to domestic workers. Between 2010 and 2014, I conducted interviews with labour inspectors and commissioners at the Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa,¹⁰ with labour inspectors and judges at the specialized labour tribunal in Côte d’Ivoire,¹¹ and with judges of the *Conseil du Prud’homme* in France.¹² In each of these countries I have also interviewed trade unions, employers’ organizations, and broader civil society actors. South Africa and France have specific regulation frameworks that pay close attention to changing the asymmetrical law of the home workplace on issues like working time and

⁹ Application No. 73316/1, Strasbourg, 26 October 2005.

¹⁰ Adelle Blackett & Thierry Galani Tiemeni, *Regulatory Innovation in the Governance of Decent Work for Domestic Workers in South Africa : Access to Justice and the Commission for Conciliation, Mediation and Arbitration*, 31 pages, Labour Law and Development Research Laboratory Research Paper No. 7, August 2016, Available at <https://www.mcgill.ca/ldrl/research#wps>

¹¹ Adelle Blackett & Assata Koné, *Regulatory Innovation in the Governance of Decent Work for Domestic Workers in Côte d’Ivoire : Labour Administration and the Judiciary under a Generalist Labour Code*, 30 pages, Labour Law and Development Research Laboratory Working Paper No. 6, March 2016, Available at <https://www.mcgill.ca/ldrl/research#wps>.

¹² Adelle Blackett, “Transnational labour law and collective autonomy for marginalized workers: Reflections on decent work for domestic workers” in Adelle Blackett & Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* 230-243 (Cheltenham, UK: Edward Elgar, September 2015).

other conditions of employment. In South Africa, I also engaged in participant observations of conciliation hearings at the CCMA, a mechanism that is well known and amply used by domestic workers, usually on termination of employment. Côte d'Ivoire functions with a generalist labour code, but one that emerges out of a postcolonial context in which domestic workers – at the time, mostly urban male migrants – were understood to be included. That knowledge persists, and my research collaborator Dr. Assata Kone and I unearthed practices within the labour administration that apply the labour code to domestic workers, as well as 50 written judicial decisions that recognized the domestic work relationship as a labour relationship and applied the code, on termination of employment. Yet even in that context, specific regulatory mechanisms were recognized to be necessary, because of the difficulty faced in enforcing working conditions beyond indemnities on termination. I hasten to add that this problem is far from unique to domestic work, or to countries in the global South.

In each of these examples, significant and at times surprising inroads have been made to promote enforcement of labour laws that seek to secure decent work for domestic workers. The mechanisms are simple, accessible, and in the case of France, built through a collective bargaining framework. In South Africa in particular, I witnessed the negotiation of a different “rule of law” in the home workplace being instituted through the accessible, expedition mediation of disputes at the CCMA. In my presentation to the conference, and time permitting, I expect to share some of the mediations to discuss what “enforcement” looks like, qualitatively. Each of these studies also foregrounds the limits of initiatives currently under way, particularly for the most marginalized domestic workers, (often undocumented) migrant domestic workers, and particularly on ensuring collective autonomy. But the key is that practices are evolving, and that a community of learning can be cultivated that sees formalization as a clear-eyed, counterhegemonic challenge to asymmetrical, pluralist workplace power.

Conclusion: Research Questions:

1. How might the fulsome international standard setting on decent work for domestic workers in an era of neoliberal governance help us to sharpen our understanding of the relationship between informality and historically rooted societal marginalization (invisibility)?
2. What simple, smart and supportive regulatory mechanisms can be marshalled beyond enforcement at termination of employment, to change the asymmetrical law that governs domestic work? And are some features – like the live-in requirement or binding a migrant domestic worker to an employer through immigration law – too deeply inconsistent with decent work to be tolerated? For example, does the historical and contemporary ethnographic work suggesting that domestic workers live out whenever they cannot suggest the kind of policy direction that might need to be advocated, beyond but in the spirit of Convention No. 189 and Recommendation No. 201?
3. How can research on domestic workers take seriously the need to move beyond recognition and redistribution through state law, to ensure that the emerging transnational legal order on decent work for domestic workers keeps “representation” by domestic workers? What are the prospects and perils of fostering a cooperatives-based approach to collective autonomy?