

Difficulties Beleaguering Labour Law in Regulating Domestic Work in Zimbabwe

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ABSTRACT

This article examines the regulatory challenges presented by using labour law to regulate domestic work. The article presents analyse the Zimbabwe domestic worker regulations and the challenges in enforcing them. The article points to the ILO Convention 189 as an inspiration for regulating domestic work. It calls for innovation in domestic work regulation in order to match the unique nature of the sector. The discrepancy between the realities of the world of work and the socio-economic assumption that constitute the fundamentals of labour laws are highlighted. The article concludes by calling for a rethinking of the application of labour law in domestic work in order to make labour rights a reality for domestic workers.

1. INTRODUCTION

Domestic work has been defined as work that makes other work possible¹, particularly for women wanting to pursue a career outside the home. It enables female employers of domestic workers to participate in the economy outside the home. Adelle Blackett calls it a market enabling function.² In this light, domestic workers are to be viewed as an important part of the economy and not just helpers of private families.

It is also an important sector for women employment in many economies around the globe.³ The ILO estimates that domestic work accounts for 11.8% of

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- 1 Anne-Marie Slaughter, 'The Work that Makes Work Possible', *The Atlantic*, Washington D.C., 26 March 2016 < <https://www.equaltimes.org/c189-the-work-that-makes-all-work#.Yf5AncpByUK> > accessed 5 February 2022. The statement is originally attributed to the founder and president of the American National Domestic Workers Alliance (NDWA) Poo who said that theirs is the work that makes all the other work possible because without it many professionals could not go to their jobs. Listen to Ai-jen Poo 'The work that makes all other work possible' (November 2018) < https://www.ted.com/talks/ai_jen_poo_the_work_that_makes_all_other_work_possible?language=en > accessed 4 September 2021.
- 2 Adelle Blackett, 'Introduction: Regulating Decent Work for Domestic Workers' (2011) 23 (1) Canadian Journal of Women & the Law, 1-45.
- 3 The African Union's first session of the specialized technical committee on social development, labour

employed women in Asia, 13.6% in Africa and 26.6% in Latin America. ⁴These statistics indicate that this sector is crucial for unlocking employment for most females who would otherwise be unemployed. Domestic work is a common occupation for women with little or no skills in Africa and is a vestige of the colonialism.⁵

Domestic work has recently received a fair share of attention from a number of disciplines including the legal fraternity.⁶ It is a sector that is riddled with contradictions and ambiguities. It is important to clearly define and conceptualise domestic work given the uncertain nature of its tasks due to the different needs of households. Questions arise such as is a domestic worker one of the family or an employee? Can one be a relative and a worker with full statutory rights at the same time? The employers of domestic work are not a homogenous group coming from different social classes of society as well as racial groups.

Ally crystallises this impression as follows:

“While the state’s effort [at regulating domestic work] assumed paid domestic work is a form of work like any other, and could therefore be formalised and depersonalised like any other, domestic workers are *not* workers like any other. Domestic workers’ workplaces are not impersonal organisations that can be easily regulated through a

and employment (STC-SDLE-1) recognized that domestic work is more common in Southern Africa, notably in Botswana, Lesotho, Namibia, South Africa and Zimbabwe compared to other parts of the continent. Other African countries such as Mali, Ghana and Senegal also have a significant workforce in the domestic worker sector. See African Union, First Session of the Specialised Technical Committee on Social Development, Labour and employment (STV-SDLE-1), Addis Ababa, Ethiopia, 20-24 April 2015 (Special Session on Domestic Workers) available at < [https://au.int/sites/default/files/pages/33794-file-special_initiative_on_domestic_workers-1st_sdle-2015_rev.1- tc-english.docx](https://au.int/sites/default/files/pages/33794-file-special_initiative_on_domestic_workers-1st_sdle-2015_rev.1-tc-english.docx) > accessed September 2021.

- 4 International Labour Office(ILO) *Decent Work for Domestic Workers* Report (IV) (1) (ILO 2010) , International Labour Conference, 99th Session, , Geneva, First edition 2010 (Hereafter ‘‘the ILO Report’’) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_104700.pdf> accessed 14 June 2014 . The 2009 South Africa Labour Force Survey statistical release provides that 18.7% of all women employees were in domestic work signalling the importance of this sector for women employment.
- 5 While most people employed within the domestic work sector are women, men are also present in this sector. Historically in Southern Africa men used to dominate this sector working as gardeners and cooks in the houses of while colonialists. For a detailed discussion on this see Karen Transberg Hansen, *Distant Companions: Servants and Employers in Zambia, 1900-1985*, (1st Edition Cornell University Press 1989).
- 6 Ena Jansen, *Like Family: Domestic Workers in South African History and Literature*, (1st edn NYU Press 2019), Bridget Anderson, *Doing the Dirty Work: The Global Politics of Domestic Labour* (1st edn Bloomsbury Publishing 2000), N Neetha (Ed), *Working at Others’ Homes: The Specifics and Challenges of Paid Domestic Work*, (1st edn Tulika Books, 2018) and Michael Bourdillon, *Child Domestic Work in Zimbabwe* (Weaver Press 2006)

depersonalised industrial relations system. Instead, domestic workers' workplaces are 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"⁷

The above sentiment highlights the unique nature of domestic work as a form of employment and the challenges that its legal regulation brings. How this work is defined in international instruments and national laws will elucidate our understanding of this unique sector.

This article discusses the difficulties that labour law encounters in the regulation of domestic work. The difficulties being compounded by the challenges being faced by the global labour regulation regime emanating from the increase in non-standard forms of work.⁸ This article will also examine the extent to which international law through the ILO Convention has attempted to deal with the challenges of regulating domestic work. The current approach of applying the industrial model of regulation in domestic work is challenged while an approach that realises the particular characteristics of this work is promoted in this article. Section 2 defines domestic work and domestic workers, while section 3 focuses on international standards governing domestic work, section 4 centres on the Zimbabwean regulatory framework of domestic work and its enforcement while section 5 implores a rethink of labour law regulations of domestic work. The conclusion is given in section 6.

2. DEFINITION OF DOMESTIC WORK AND DOMESTIC WORKERS

The ILO Convention on Domestic Work (Convention 189)⁹ defines domestic work as work performed in or for a household.¹⁰ This definition highlights the workplace, being a private household. The definition however can be interpreted to mean work done outside the home as long as it is done for the household. According to the Oxford dictionary, a household refers to a house and its

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

8 Darcy du Toit, 'Situating domestic work in a changing global labour market' in Darcy duToit (ed), *Exploited, undervalued and essential: Domestic workers and the realisation of their rights* (Pretoria University Law Press 2013) 1.

9 Domestic Workers Convention, 2011 (No.189) (adopted 16 June 2011, entered into force 5 September 2013)

Here after Domestic Worker Convention.

10 ILO Convention on Domestic Work (Convention 189)

occupants regarded as a unit.¹¹ If an individual works in and for a household, providing personal and household care they are regarded as a domestic worker. The ILO definition covers work done for more than one household as long as it is done within the confines of an employment relationship. A person working part time, full time or on an hourly basis and may or may not live at the employer's premises is considered a domestic worker under this definition.

The ILO gives a broad definition with full description of who may be defined as a domestic worker. It emphasizes tasks carried out as well as the workplace which is the household. The definition however excluded those who work occasionally or sporadically. This exclusion presents a problem in that it may provide a leeway for exploitative employers to misclassify their workers with a view to dodge their responsibility as employer. It also excludes self-employed persons or independent contractors. This is in line with the definition of an employment relationship which case law has confirmed excludes independent contractors.¹² Section 12 (1) of the Zimbabwe Labour Act¹³ states:

Every person who is employed by or working for any other person and receiving or entitled to receive any remuneration in respect of such employment or work shall be deemed to be under a contract of employment with that other person whether such contract is reduced to writing or not.

Independent contractors as the name suggests, are not under the control of the employer, for it is 'subordination that distinguishes the contract of employment from other relationships where services are rendered and remuneration paid in return'¹⁴

In Zimbabwe, the Domestic Worker Regulations of 1992 carries the definition of domestic worker. It states that, "domestic worker" means a person employed in any private household to render services as a yard/garden worker, cook/housekeeper, child minder, qualified sick persons-minder or disabled/

11 Oxford Advanced Learner's Dictionary, ><https://www.oxfordlearnersdictionaries.com/definition/english/household#:~:text=%2F%CB%88ha%CA%8Ash%C9%99%CA%8A1d%2F-%2F%CB%88ha%CA%8Ash%C9%99%CA%8A1d%2F,in%20a%20house%20or%20flat>

12 See for example *Colonial Mutual Life Assurance Society Ltd v Macdonald* [1931] AD 412 and also *Smit v Workmen's compensation Commissioner* 1979 (1) SA 51 A. See also *Southampton Assurance Company of Zimbabwe Ltd v Mutuma and Anor* 1990 (1) ZLR in which an insurance agent who had control over his time and received no remuneration but a commission was held not to be an employee but rather an independent contractor.

13 Labour Act Chapter 28:01 section 12 (1)

14 Lovemore Madhuku, *Labour Law in Zimbabwe*, (1st edn Weaver Press 2015) p38.

aged-minder, irrespective of whether or not the place of employment is in an urban or rural area'¹⁵

The regulations further define the different categories of domestic work as follows:

- “child-minder “means a domestic worker whose responsibilities include in any way and to any extent taking care of, or watching over, any child under the age of eleven years, regardless of whether or not the domestic worker is also employed as a garden worker and additionally, or alternatively, as a cook/housekeeper;
- “cook/housekeeper” means any domestic worker whose main responsibilities include or involve housekeeping, house-cleaning, laundry, ironing, cooking, dish-washing, food-preparation or food-service, regardless of whether or not that person also acts as a garden worker but does not include any worker whose responsibilities include those of a child minder and additionally, or alternatively a disabled/aged-minder;
- “disabled/aged-minder” means a domestic worker whose responsibilities include in any way and to any extent taking care of , or watching over, any person who is so disabled as to be unable to take normal care of himself, regardless of whether the disability is physical, mental or related to advanced age.¹⁶

The Zimbabwean definition of domestic worker is quite detailed and elaborate and makes a useful guide for both would be employees and employers on who is a domestic worker. It also excludes those who do domestic work as a past time and not as employment. It also excludes security guards who are governed by a different legislation.

3. INTERNATIONAL LAW AND STANDARDS GOVERNING DOMESTIC WORKERS: CONVENTION 189

The ILO Domestic Workers Convention, 2011 (No. 189) is a landmark instrument setting standards at international level on how domestic workers should be treated at work. The instrument upholds that domestic workers are

¹⁵ Labour Relations Domestic Workers Employment Regulations 1992 (SI 377 of 1992), s3.

¹⁶ Ibid s3 for interpretation.

real workers deserving of statutory protection. Mauritius and South Africa are among one of the few African countries to ratify the Convention in 2012. Zimbabwe is yet to ratify this Convention.¹⁷

The ILO was created in 1919 by the Treaty of Versailles¹⁸ and it became a specialized agency of the United Nations in 1946. The preamble of the ILO Constitution emphasizes the importance of social justice for world peace. It also emphasizes the need for international cooperation for labour rights, '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'.¹⁹ These words from the ILO constitution highlight the importance of ratification of ILO Conventions by member states, affirming their membership to the community of nations and commitment to the ideals of social justice.

The ILO has developed a body of statutes for the protection of rights and workers through Conventions and Recommendations.²⁰ These are known as International Labour Standards. The ILO encourages adherence to these standards by member states because work 'is crucial to a person's dignity, wellbeing and development as a human being' These standards exist to protect fundamental human rights of workers at work²¹.

The 16th of June 2011 marks an important date in the domestic worker movement. This is the day when representatives of government, employers and workers came together and enacted the Domestic worker convention under the ILO banner. This was after years of lobbying by trade unions and domestic worker organizations. A Convention is an important political statement of recognition of Domestic workers' rights and places a duty on governments to protect and promote the rights of domestic workers.

Member states of the ILO are expected to ratify this convention 189. If a member state ratifies a convention, it becomes legally bound to implement the obligations therein. The ILO has in place a regular international supervision of

17 The ILO reports that only 35 countries have ratified this convention to date. See Ratifications of C189-Domestic Workers Convention, 2011 (No.189)< https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460> accessed 5 February 2022.

18 The ILO was created as part XIII of the Treaty of Versailles for the reason of regulating labour conditions through international cooperation as a means of maintaining world peace.

19 International Labour Organisation (ILO), Constitution of the International Labour Organisation (ILO) (Adopted 1 April 1919)

20 ILO Conventions have equal value to other United Nations Conventions and they provide a basis for elaborating national legislation.

21 There are a number of Conventions which are primarily on protection of rights such as the one on Freedom of Association, Child Labour, Migrants, forced labour and domestic workers.

the way obligations contained in the convention are observed. Recommendations are normally accompanied by Recommendations. These recommendations do not give rise to binding obligations but rather provide guidelines for policy and action. The Convention 189 comes with its own Recommendation 201. Whose provisions supplement those of the Convention.²²

The preamble to the Convention clearly spells out why it became necessary for the ILO to come up with the convention. In the words of the preamble:

Recognising the significant contribution of domestic workers to the global economy, which includes increasing paid job opportunities for women and men workers with family responsibilities, greater scope for caring for ageing populations, children and persons with disability, and substantial income transfers within and between countries, and Considering that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights.²³

The Convention protects rights at work for domestic workers. Article 3-places a positive duty on ILO member states to take measures to effectively protect, promote and respect and realize the human rights of all domestic workers. Article 5 of the Convention 189 requires member states to put in place effective protection against all forms of abuse, harassment and violence. This is in recognition of the fact that domestic workers due to the intimacy that emanate from their workspace are at risk of abuse. Article 6 requires member states “to ensure that domestic workers, like workers generally, enjoy fair terms of employment such as decent working conditions” and article requires 10 requires ‘equal treatment as well as decent working conditions for all domestic workers

Article 4 age at which domestic work may be done. Domestic workers under the age of 18 years should not be deprived to their right to basic education. This section deals with a perennial problem in domestic work, that of child labour. Child labour exploits children especially girl children and steal their

22 R201- Domestic Workers Recommendation, 2011 (No.201)available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R201

23 (n26) preamble.

youth and potential. This provision is supplanted by The ILO Recommendation 201 also provides in section 5(1) that member states need to compile a list of types of domestic work that are likely to harm the health, safety and morality of children. 5 (2) adds that domestic workers under the age of 18 years must not perform night work, and must be given adequate resting time as well as education and training, leisure activity and family contact.

The Convention also deals particularly with the issue of working hours in Section 10 and paragraphs 8-13 of the Recommendations. This is one problematic issue in domestic work especially affecting live-in domestic workers whose presence at the workplace all the time exposes them to overworking. The intimacy they share with their employers sometimes exposes them to receiving requests to work outside their working time “as part of the family”.

Article 9 provides that domestic workers have a choice whether to live-in or to live outside of the work household. If they live in they have the freedom to leave the premises during periods of daily or weekly rest or annual leave. Article 6 provides that domestic workers who live on the employer’s premises should be provided with decent and private living conditions The ILO recommends that domestic workers accommodation provided by employer must be in a separate private room that is adequately furnished that is lockable, the accommodation should also have decent sanitary facilities that could either be shared or private. The room must also have adequate lighting and that a domestic worker must be given adequate notice before being asked to vacate the accommodation. In countries where the issue of access to housing is a huge problem, the challenge is compounded for domestic workers who in most cases have to sleep in lounges or corners in a room leaving them susceptible to sexual abuse.

Article 13 provides for a healthy and safe working environment and a progressive increase in the occupational safety of domestic workers. This section is important because it points out the importance of paying attention to domestic work occupational hazards. This is an area that calls for further research so as to ensure healthy and safety of these workers. Article 14 employ member states to ensure progressive enjoyment of social security protection-including maternity benefits not less favourable than that applicable to other class of workers. In Zimbabwe Domestic workers are excluded from Social

Protection provisions and this is an area where the government need to seriously reconsider in light of the Convention when it ratifies. The South African Constitutional court has recently ruled that excluding domestic workers and their beneficiaries from compensation from injury at work is a serious form of discrimination.²⁴ This position which should inspire all countries in the region is in line with the provisions of the Convention 189.

Domestic work in Zimbabwe is littered with a number of decent work deficits. The Domestic worker convention recognizes domestic work as work which should be subjected to all international labour standards and national labour laws of member states. It also however recognizes that domestic work is different from the work carried out industrial setting because of the context of the home as workplace. It therefore provides for the much needed specificity of laws targeting domestic workers to ensure substantive equality among workers.

According to Du Toit the decent work paradigm fronted by C189 is the best model for the promotion and protection of domestic worker rights:

There is an intuition that South Africa has done more towards, the legal regulation of domestic work than most other jurisdictions. The constitutional right of domestic workers to fair labour practices appears to be fully entrenched and protected through extensive labour legislation. In spite of this fact, little has changed on the ground as far as the plight of domestic workers is concerned. This suggest that the attempt to use discourse of labour rights to effect an important change in society has failed. While it might be possible to overcome this failure, there is also the nagging doubt that this failure might be inevitable, as long as the tradition leftist critiques of the liberal right discourse has argued...Here was a radical idea of law as a means of subverting, dislocating and transforming the status quo which would give a rights based approach to the liberation of domestic workers like other marginalized groups, a prospect of success.

du Toit's assertion is also supported by Albin and Mantouvalou who assert that,

24 See the case of *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020). In this case the court ruled in favour of the Applicant Ms Mahlangu whose mother, a domestic worker, had died during the course of duty. She had been denied access to occupational health compensation because domestic workers were excluded from the Compensation for Occupational Injuries and diseases Act 130 of 1993. The court found this exclusion unconstitutional and found that the order of invalidity takes retrospective effect from 27 April 1994 to date.

The methodology of the ILO that ties a human rights approach in the regulation of domestic labour to concrete principles that target the problems of a specific sector has significant advantages. The human rights approach recognizes the universality, and the moral weight and urgency of domestic workers' claims. The sectoral approach enables to view domestic work as, 'work like no other', and at the same time addresses it as 'work like any other'. This is because it offers a focus on the particular challenges that workers in the sector face. In this way it makes the general human rights principles more subtle and precise. Human rights and sectionalism complement each other, and offer an adequate way to deal with the sectoral disadvantage of domestic workers.

The Convention may have its shortcomings such as limited scope in defining domestic work as well as the issue of minimum wage which fails to take into account the fact that most domestic workers are paid in kind. It is however a good template to follow in regulating domestic work. It deals with important aspects such as labour inspection, collective bargaining as well as supporting organizing. The realization of the gendered nature of domestic work brings in an interesting perspective that recognizes the unique nature of this sector and the need for interventions that addresses gender discrimination.

The ILO Convention 189 is situated within the ILO Decent Work²⁵ paradigm which allows workers to 'pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'²⁶ Decent work has gender equality as a cross cutting theme.²⁷This is an important framework within which to regulate domestic work which is still riddled by the legacy of colonialism of inequality and discrimination.

What the ILO Convention C189 managed to achieve so far is to catch the

25 According to the ILO the decent work agenda is, 'a strategic goal for development that acknowledges the central role of work in people's lives. This includes work that is productive and delivers a fair income; provides security in the workplace and social protection for families; and offers better prospects for personal development and social integration.' Available at <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> <accessed 14 January 2016>.

26 G MacNaughton and D.F Frey 'Decent Work for All: A holistic rights approach' (2011) 26 *American University International Law Review* 441.

27 See ILO, Gender Equality at the heart of Decent Work, Report (iv), (ILO 2009) < https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_105119.pdf > accessed 16 June 2017.

attention of players in the labour market, which is workers' representatives, employers' representatives and governments. The challenges of domestic work and workers caught the attention of the world. The domestic workers, whose issues seemed in the past not to interest anybody were brought to the fore, thereby pulling domestic workers out of obscurity.

4. REGULATION OF DOMESTIC WORKERS IN ZIMBABWE

Domestic workers in Zimbabwe enjoy the protection of the law just like any other formally employed worker. This section discusses the regulatory framework of domestic workers in Zimbabwe which include the Constitution²⁸, the Labour Act²⁹ and the Statutory Instrument 377 of 1992. The regulatory framework will be measured against the international labour standards contained in the ILO Convention 189.

4.1 The Constitution

Section 65 of the 2013 Constitution provides for specific extensive labour rights giving the framework for all workers in Zimbabwe. It provides for the following specific rights:

- Right of every person to fair and safe labour practices and standards and to be paid a fair and reasonable wage³⁰
- Right of every person to join a trade union³¹
- Right to just equitable and satisfactory conditions of work³²Rights of women employees to paid maternity leave of at least 3 months³³

It is also important to note that the constitution provides that no one should be subjected to slavery or servitude as well as freedom from compulsory and forced labour³⁴. Also critical for domestic work is Section 56 which provides for the right to equality and non-discrimination. This section provides most

28 Constitution of Zimbabwe Amendment (No.20) Act, 2013.

29 Labour Act Chapter [28:01].

30 Section 65 (1).of the 2013 Constitution.

31 Section 65 (2).

32 Section 65 (4).

33 Section 65 of the Zimbabwe Constitution provides for 10 labour rights which include the right to strike, to join a trade union and right to equal remuneration for equal pay among others cited above.

34 Section 54 and 55 of the 2013 Constitution.

importantly for equality before the law³⁵, equality between man and women including right to equal protection and benefit of the law as well as the right not be unfairly treated on grounds of economic or social status, class or gender.³⁶

While the Constitution because of its wide application does not mention domestic workers the rights it provides above apply to domestic workers just as they apply to any other worker or person in Zimbabwe. The constitution of Zimbabwe by giving these rights clearly shows its leaning towards social justice. It is important to note that the constitution does not even say worker but refers to ‘every person’ which incorporates all citizens.

4.2 The Labour Act

The Labour Act gives specific rights to workers in Zimbabwe including domestic workers. Its main purpose is stated as:

‘ to declare and define the fundamental rights of employees, to give effect to the international obligations of the Republic of Zimbabwe as a member of the International Labour Organisation and as a member or party to any other international organisation or governing conditions of employment and other related matters; to provide for the formation, registration and functions of trade unions, employers’ organisations and employment councils, to regulate negotiation, scope and enforcement of collective bargaining agreements; to provide for the establishment and function of the labour court, to provide for the prevention of trade disputes and unfair labour practices, to regulate and control collective job action, to regulate and control employment agencies and to provide for all matters connected with or incidental to the foregoing.’³⁷

Section 6 of the Labour Act provides for protection of employee against unfair labour standards. It provides for rights such as working hours³⁸ minimum wage, health and safety, as well as access to legal recourse in case of a dispute³⁹. The rights of workers rights to democracy in the workplace is provided for section. The Act in section 8 elaborately defines unfair labour practises by

35 Section 56 (1).

36 Section 56(3).

37 Labour Act Preamble.

38 Section 6 (1)(a-e). (of what act?)

39 Section 6 (2).

employers. The Act also provides for an elaborate dispute settlement mechanism which is as well applicable to domestic workers.⁴⁰

The Labour Act gives the Minister of labour the power to approve, register and publish Collective Bargaining Agreements⁴¹. Collective bargaining agreements are reached between trade unions and workers organisation at the sector level, National Employment Councils. The Collective Bargaining agreement contains agreements on conditions of employment and wages.

The Labour Act gives the minister power to make subsidiary law to govern other matters⁴². In this case the Minister of Labour in 1982 made the Statutory Instrument 925 to regulate domestic work. The regulations have been amended and are now known as Labour (Domestic Workers) Employment Regulations, 1992. Statutory Instrument 377 of 1992 (hereafter referred to as Domestic Worker Regulations). Domestic work is specifically governed through the domestic worker regulations which were instituted according to the Act. There are however certain aspects of domestic work that is directly governed by the Labour Act such as dispute resolution.

4.3 Labour Relations (Domestic worker) Employment Regulations: Rights and Conditions of Service

The regulations make provisions for a number of rights and conditions applicable to those working in the domestic service sector. These will be discussed in detail below.

The Domestic Workers regulations were the first piece of legislation that introduced workplace rights to domestic workers soon after independence in 1981⁴³. The introduction of the Domestic Worker Regulations brought with it a great sense of anticipation in the domestic worker sector.⁴⁴It however remains

40 See section 46-49.

41 See Sections 25, 79, 80 and 81 of the Labour Act.

42 These regulations are made in terms of Section 17 as read with subsection (2) of section 77 of the Labour Act [Chapter 28:01].

43 Prior to independence domestic workers were governed by the Master and Servants Act which among other things criminalised an act of insubordination.

44 A letter to one of the daily newspapers of the time captured the mood aptly, 'Xmas day 198 saw the end of yet another relic of the colonial era in this part of Africa...For the century which preceded this great event, the position of domestic worker was left gloriously (for the employer) untrammelled by the requirements of the law entirely in the province of the moral conscience of those who could afford to keep 'servants'...Mercifully we are long rid of the 'cook boy' and traces of colonialism will finally vanish when we find some of the less educated or ambitious whites actually going into domestic service for black

to be seen, over forty years later whether this sense of expectancy still persist in the domestic worker sector.

4.3.1 Right to fair labour practices- Informed conditions of employment

The domestic workers regulations make it mandatory that any person employing a domestic worker provides such domestic worker with a written contract.⁴⁵ The contract should clearly spell out the nature of the contract that is whether its fixed term contract and if so for how long or it's a permanent contract and so on. The contract should also specify the grade in which this particular domestic worker falls. The grades will help clarify whether this particular worker is coming to work as a gardener or housekeeper, or child-minder. The contract should also provide for the rate of pay and the intervals at which it will be paid.⁴⁶ Other issues such as the free use of water, accommodation, transport and lights provision as well as sick and annual leave should be provided therein. Another important aspect to be included in the contract are the hours of work.⁴⁷

While the domestic workers regulation provides for a written contract section 12 of the Labour Act states that the contract of employment can be a verbal one⁴⁸. It is however important that the regulations make a written contract mandatory for domestic work in Zimbabwe where the employment relationship is many time entangled by personal relationships.

This provision is in sync with the provision of Convention 189 and the accompanying recommendations, which provide comprehensive guidance for domestic work regulation. Article 7 of the Convention provides that ‘each member shall take measures to ensure that domestic workers are informed of their terms and condition of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts...’

The Convention provides for other conditions missing in the Zimbabwe

employers? Letter to the Herald Editor 6 January 1982.

45 Section 16 of the Domestic Workers Regulations the Labour Act however also recognises verbal employment contracts.

46 Section 16 (1) (b).

47 Section 16 (1) (e).

48 Section 12 (1) Every person who is employed by or working for any other person and receiving or entitled to receive any remuneration in respect of such employment or work shall be deemed to be under a contract of employment with that other person, whether such a contract is reduced to writing or not.

regulations such as the period of probation, provision of accommodation and food. The Recommendation further add that the contract should be accompanied by a job description.⁴⁹ The Job description is a very useful addition because it clarifies for the domestic worker what exactly they will be doing instead of having everything happening in the house piled on them. The Recommendations also suggest the establishment of a model contract for use by both employers and employees. Zimbabwe regulations could be improved to incorporate the above mentioned provisions as suggested by the Convention and the Recommendations.

It is of significance at law that the law provides for mandatory drawing up of a contract between domestic workers and their employers. This is mostly important because it distinguishes between paid and unpaid housework. The Supreme Court have already emphasised in *Kundai Magodora vs Care International*⁵⁰ that the contract of employment between two parties is binding and shows that parties have voluntarily agreed to its terms and conditions.

4.3.2 Right to a minimum wage

The Constitution of Zimbabwe grants every worker the right to a fair and reasonable wage⁵¹. The Labour Act also provides that “No employer shall pay any employee a wage which is lower than that to fair labour standard specified for such employee by law or by agreement”⁵². This right is granted to every person when they work for a wage.⁵³ This right is also enshrined in the Universal Declaration of Human Rights 1948, in article 23 (3) which provides thus: ‘Everyone who works has the right to just and favourable remuneration ensuring for himself and herself existence worthy of human dignity...’. This provision brings more clarity to this right by reference to not to just ‘everyone’ but rather ‘everyone who works’. The Charter of Fundamental Social Rights in SADC, 2003 provides that: ‘Workers are provided with fair opportunities to receive wages, which provide a decent standard of living...’⁵⁴ The Domestic

49 Recommendation R201, Article 6.

50 *Kundai Magodora vs Care International Zimbabwe* (SC191/13) [2014] ZWSC 24.

51 Constitution Section 65 (1).

52 Labour Act Section 6 (1).

53 Section 65 (1) provides that Every person has the right to fair and safe labour practises and standards and to be paid a fair and reasonable wage.

54 Section 14 (b) of the The Charter of Fundamental Social Rights in SADC, 2003 available at <https://www.sadc.int/documents-publications/show/837> (accessed 3 November 2019).

Worker Convention 189 also provides in its Article 11 for the establishment of a minimum wage for domestic workers and Article 12 provides that the wages be paid at regular intervals once a month at minimum.

The Zimbabwe regulations also provides for payment of a minimum wage and classify domestic workers into different grades of employment.⁵⁵ Payment of wages is done according to the employee's grade. Each employer '...shall pay a wage of at least the amount prescribed therein for the domestic worker's grade and no employee shall accept any amount less than the prescribed in respect of his grade'

Other allowances are also payable on top of the wage. Section 6 of the domestic worker regulations provide that, 'every domestic worker shall be entitled to either free lodging, free transportation to and from work, free lights, free fuel for cooking and free water.' Live-out domestic workers receive allowances in monetary form for cooking fuel, electricity and transport. According to the law these allowances are not in-kind payment but rather constitute the domestic worker's wages. While the law doesn't not make it mandatory for a domestic worker employer to provide accommodation for the domestic worker it makes provision for allowances that ensures that the domestic lives comfortably in their own accommodation and can get to work.

Section 10 of the regulations provides for the manner in which wages and allowances shall be paid. The wages may be paid weekly or monthly according to the agreement of the parties but any such payment is to be done within three days of the due date. This provision is important for domestic work in that it curbs unnecessary delays in the payment of wages for this vulnerable group of workers. The same section also states that upon termination of domestic worker services all remuneration due shall be made within twenty-four hours of the termination of service. This is to curb the tendency by some employers who summarily dismiss their domestic workers only to advise them to come back for their wages month end.

The Domestic workers' regulations provides that all remuneration of domestic worker wages should be paid in cash or cheque.⁵⁶ The specific provision here is that wages are to be paid in cash. There is, however, no

55 Labour (Domestic Workers) Employment (Amendment) Regulations, 2020 (No.19).

56 Section 10 (2) Domestic Workers regulations.

direct prohibition of payment in kind.⁵⁷ Payment in kind refers to paying for labour using other items other than money or legal tender.⁵⁸ The Labour Act in Zimbabwe does not prohibit payment of wages in kind but restricts such payments⁵⁹ to industries where payment in kind is customary. However even if such payment is customary it can only be a portion and the rest in monetary terms. The in-kind payment must be appropriate for the employee and his or her family⁶⁰.

This provision is important for domestic work where employers are in the habit of unloading unwanted clothes and household items to domestic workers some of which may not be useful to them. The challenge with in-kind payment is the fact that the domestic worker may not be able to use the payment for what she would normally do with money. If a domestic worker receives old clothes for instance, she may not be able to buy medication or food with such. It is therefore important to limit by law the percentage of in-kind payment for domestic work so as to ensure that domestic workers receive a certain level of freedom and satisfaction on using their wages.⁶¹

57 The Plurinational State of Bolivia's Domestic Workers Act provides that domestic workers must be paid in legal tender and not in kind. See ILO, Effective Protection for Domestic Workers: A guide to designing Labour Laws available at https://www.ilo.org/public/libdoc/ilo/2012/112B09_102_engl.pdf

58 In the early times of the development of industry wages were paid in kind. This was known as the truck system. In Zimbabwe payment of wages using the truck system through the 'Tommy Shop' system was prevalent in the farms where farmers owned shops where an account was kept for each employee where they bought overpriced goods of inferior quality which kept them in perpetual debt bordering on slavery. This system originated in countries such as England and was probably imported to Rhodesia by the British on colonisation. The British government curbed this system through the introduction of the English Truck Acts, the earliest of which bears the date of the year 1464 which prohibited payment of wages in any other form except the currency or coin. Most domestic workers' employers find themselves in this ancient mentality of keeping the domestic worker hooked to them by paying in kind or selling things to domestic workers and keeping them in debt. Since most domestic workers in Zimbabwe have a strong rural background employer may take advantage of their ignorance to abuse and avoid paying living wages but rather use payment in kind in the form of old clothes, lotions and chap perfumes while keeping the domestic worker hooked to them for food and accommodation. For a full discussion on this subject see ILO, **General Survey of the reports concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949** <<https://www.ilo.org/public/english/standards/reim/ilc/ilc91/rep-iii-1b.htm>> p 65-153.

59 Labour Act, s12(A)(2).

60 Labour Act, s12(2) (e).

61 The General Survey on the reports concerning the Protection of Wages convention, 1949 (No.95), and the Protection of Wages Recommendation, 1949 (No.85), the Committee of Experts states that: Paying remuneration in the form of allowances in kind, that is to say providing goods and services instead of freely exchangeable legal tender, tends to limit the financial income of workers and is therefore a questionable practise. Even in those industries or occupations in which such a method is long-established and well received by the workers concerned, there is still a need for safeguards and legislative protection against risk of abuse'

Article 12 (2) of the domestic worker convention provides that the law on payment of wages in kind must specify certain minimum standards such as; the worker must agree to the payment in kind and the payment in kind must be beneficial to the worker and must have a fair monetary value attributed to it.

There are a few shortcomings on the regulations' provisions on wages. Firstly, the regulations do not determine the wages for different locations such differentiating between a domestic worker working in the low density suburbs and high density suburbs or in the rural or urban areas. The South African domestic worker law provides a useful example by clearly segmenting domestic worker wages according different areas of municipal areas⁶². This segmentation is important because in most cases the house sizes are different as well as the yard/plot sizes which means to workloads differ.

Secondly, regulations do not recognise and remunerate domestic workers according to different skills possessed by domestic workers. There are some qualifications such as a cookery course, sewing course, that makes one domestic worker distinct form another domestic worker who does not have such qualifications. The minimum wage grading also ignores the important factor of different levels of experience possessed by different domestic workers who may be in the same grade which should be reflected in their income levels.

Collective bargaining in Zimbabwe is done between representative bodies of employers and employees. In the case of domestic workers in Zimbabwe there is no employer body act as the negotiating counterpart. The negotiations are therefore done by the union and the government with contribution from the employers' confederation of Zimbabwe EMCOZ). This situation is not most ideal because in most instances the representatives of domestic workers are left complaining that their members are getting a raw deal.⁶³

The current set up seems to be ineffective since it is the government that has to initiate the process of wage setting. Best practises can be drawn

Recommendation 201, Article 14 also provides that

- (a) Establishing an overall limit on the proportion of the remuneration that may be paid in kind so as not to diminish unduly the remuneration necessary for the maintenance of domestic workers and their families.
- (b) Calculating the monetary value of payments in kind by reference to objective criteria such as market value, cost price or prices fixed by public authorities, as appropriate
- (c) Limiting payments in kind to those clearly appropriate for the personal use and benefit of domestic worker, such as food and accommodation;
- (d) Ensuring that, when a domestic worker is required to live in accommodation provided by the household, no deduction may be made from the remuneration with respect to that accommodation, unless otherwise agreed to by the worker;
- (e) Ensuring that items directly related to the performance of domestic work, such as uniforms, tools or protective equipment, and their cleaning and maintenance, are not considered as payment in kind and their costs is not deducted from the remuneration of the domestic worker.

62 The Basic Conditions of Employment Act and Sectoral Determination 7 (SD7), clause 3 Table 1.

63 Information retrieved from a discussion with the ZDAWU General Secretary Mr Ruyi on 28 October 2020

from other jurisdictions for instance in Uruguay, the domestic worker union advocated for a minimum wage, but had to identify an employer organisation to act as the collective bargaining counterpart. In the absence of a commercial body the government of Uruguay approached the Housewives' league to act as the negotiating partner.⁶⁴

4.3.3 Right to regulated working time

Domestic Workers regulations have defined working hours provided for Domestic workers in Zimbabwe. The law provides that domestic workers should not work for more than 49 and half hours a week.⁶⁵ This translates to five days of nine hours and a sixth day of four hours working time. A domestic worker who resides outside the premises of the employer is not permitted to work beyond 7pm.⁶⁶ Most workers in Zimbabwe work for 40 hours a week, which is 8 hours per day.⁶⁷ Article 10 (1) of the Domestic Workers' Convention implores member states to ensure that domestic workers working hours are not longer than those of other workers.

Section 5 (3) of the Domestic worker regulations provides that, '*No employer shall require or permit a domestic worker to work a continuous period of six and half hours without a meal break of at least thirty minutes, a lunch break of at least one hour and a tea break of at least fifteen minutes*'. The domestic worker is entitled to use these breaks as they please and not have the employer dictating what she could be doing for instance feeding a child while they are having their meal break.

Domestic workers in Zimbabwe are also entitled to at; least one and half days off each week at least twenty-four hours of which shall be continuous.⁶⁸ The regulations also respect the domestic worker and the employer's right to conscience and religion in that it allows respect for religious beliefs. If their religious beliefs require that a certain day be a non-working day, then they

64 Debbie Bundler, 'Workers and Collective Bargaining: Five Case Studies'; Wiego Organising Brief No.9, 2013 <<https://www.wiego.org/sites/default/files/publications/files/Budlender-Informal-Workers-Collective-Bargaining-WIEGO-OB9.pdf>> accessed 16 June 2015.

65 Domestic Worker Regulations s5 (1) provides that the ordinary hours of work for domestic workers shall be forty-nine hours per week.

66 Domestic Worker Regulations, s5 (2).

67 These hours are specified in the various collective bargaining agreements which are agreed at sector level.

68 Domestic Worker Regulations s5 (4).

have to mutually agree on how this day can be respected in the employment relationship. This is in line with the Recommendation 201 provision which states that, 'The fixed day rest should be agreed by the parties...taking into account work exigencies and the cultural, religious and social requirements of the domestic worker'⁶⁹

The Domestic Workers regulations do not make any reference to night working or standby which affect domestic workers working as caregivers to babies and the elderly or the sick. This is in contrast with the South African domestic regulation which provides for standby and night work for domestic workers. Section SD7, Clause 14 states, standby means any period between 8p.m and 6am when a domestic worker is needed to be at the workplace and is allowed to rest or sleep but must be available to work if necessary.

The Domestic worker regulation also provides that a live-out domestic worker is not permitted to work beyond seven o'clock pm and if they do it will be regarded as overtime work and is to be compensated as such.⁷⁰Section 8 of the regulations clarifies the payment of overtime. The overtime is paid at a rate of one and half times the currently hourly wage of the domestic worker in a week day, double the hourly rate on d a domestic worker's off day and public holiday.⁷¹

Domestic work involves long working hours in most instances at the behest of the employer. The working hours in this instance reflect a high degree of employer oriented flexibility rather than employee flexibility. The ILO notes that, 'Indeed one of the main difficulties of live in domestic work is that there is never a real break, specifically because as long as the domestic workers are at the workplace, they must respond to calls whenever they are made...Contributing to the problem is that many live in domestic workers face restrictions set by their employers as to when they can leave the household, and for how long. Even during their weekly rest...'⁷²

According to Munharira ⁷³a child domestic worker in the Harare suburb

69 Recommendation R201 Article 11 (2).

70 Domestic Workers regulations s5 (2) and (3).

71 Domestic Worker regulations s8(1) (2) and (3).

72 Claire Hobden, 'Working time of live in domestic workers' (ILO, February 2013) Domestic Work Policy Brief 7 < https://www.ilo.org/travail/info/publications/WCMS_230837/lang--en/index.htm> page 3, accessed 12 September 2021.

73 Nyevero D. Munharira, 'Work or Exploitation: An analysis of the plight of the Girl Child who is Employed as a Domestic Work in the Budiriro Suburb of Harare, Zimbabwe' (LLM Thesis, University of Zimbabwe) p25.

of Budiriro works between twelve and fifteen hours per day. She accounts that a normal day for a domestic worker starts at five o'clock in the morning and ends at nine o'clock in the evening. She quotes one domestic worker who narrated:

When visitors came to visit during the night I am woken up to cook for them even if I am already sleeping no matter what time of the night it would be. My employer also always insists that I do the dishes even if I cooks in the middle of the night. She does not take into consideration that I have to rest as well so that I wake up in time for the next day's errands. She does not even allow me to wake up a little bit later should I sleep late. No compensation in terms of money or extra time is given for me rest to cover up for the extra hours of work. For me every hour is work time but I am used to this.⁷⁴

This reflects that even though domestic workers working time is regulated by law, it is not implemented in practise. This is a challenge for live-in domestic workers who unfortunately form the majority of domestic workers in Zimbabwe.

In domestic work it has been reported that one difficulty arises in distinguishing between working time, standby and rest periods. The Convention 189 states that standby periods should be treated as working time. The Zimbabwean regulations do not quite make this distinction. While the South African clearly makes provision for stand by and defines it and provides for its compensation.⁷⁵ This lack of distinction is problematic because live-in domestic workers may find themselves on standby in perpetuity. In this instance it may be argued that the Zimbabwe provisions on hours of work fail to meet the basic standards required by the Convention, 189.

⁷⁴ *Ibid* p26.

⁷⁵ Basic Conditions of Employment ACT, NO 75 OF 1997 Sectoral Determination 7: Domestic Worker Sector 7 s14 provides as follows:

- (1) For the purposes of this clause, 'standby' means any period between 20:00 and 06:00 the next day when a domestic worker is required to be at the workplace and is permitted to rest or sleep but must be available to work if necessary
- (2) An employer may only require or permit a domestic worker to be on standby if it is agreed in writing and if the domestic worker is compensated by the payment of at least R20 per shift
- (3) An employer may not require or permit a domestic worker to be a domestic to be a on standby more than five times per month or 50 times a year
- (4) An employer may only require or permit a domestic worker to perform work which is required to be done without delay
- (5) An employer must pay a domestic worker for any time worked in excess of three hours during any period of stand-by at -:
 - (a) the domestic worker's overtime rate calculated in terms of clause 12 (1) or
 - (b) grant the domestic worker paid time off in terms of clauses 12 (2) and 3

4.3.4 Right to Leave

Domestic workers in Zimbabwe are entitled to vacation leave, sick leave and maternity leave. In the absence of a national health scheme domestic workers' employers carry the burden of taking a sick domestic worker to the hospital an expense most employers are willing to take.

Female domestic workers are entitled to maternity leave regardless of their marital status. The right to maternity leave is provided for constitutionally.⁷⁶ The Domestic worker regulations defer directly to section 18 of the Labour Act which comprehensively deals with the specific of maternity leave⁷⁷. The Labour Act provides that the maternity leave period is 98 days on full pay and that the obligation to pay for maternity leave lies with the employer.⁷⁸ The law also grants an employee who has given birth a right to nursing time which is one hour during working time daily for a maximum of 6 month.⁷⁹

The challenge with the Zimbabwe provision on maternity leave is the fact that it places the obligation to pay for maternity leave on the employer. The ILO problematizes employer liability schemes citing that they are costly and risky for employers. The burden of meeting maternity leave costs may be too much for a single household employer. This is even worse in an environment where the macro-economic environment is negatively affecting incomes for everyone. Non-compliance tend to be high in situations where an individual who is not even a profit making entity is required to pay maternity leave wage of their domestic worker.

The ILO Conventions No. 3⁸⁰ and No. 103⁸¹ explicitly state that employers should not be individually liable for the cost of maternity benefits payable to women in their employment. These two Conventions recommend that maternity benefits should be provided through an insurance scheme which both men and women should contribute to.⁸²

76 Zimbabwe Constitution s65 (7).

77 Domestic worker regulations Fourth Schedule (s21).

78 Labour Act s18 (1).

79 Labour Act s18 (8), (11).

80 ILO, Maternity Protection Convention, 1919, No.3 (adopted 1919, entered into force June 1921).

81 ILO, Maternity Protection Convention, 2000, No.183 (adopted 2000, entered into force February 2002). See also Maternity Protection Recommendation, 2000 No.191 (adopted 2000 entered into force 2002).

82 See Article 4 of the ILO Convention 103. ILO Recommendation 191 also recommends and emphasises the need for both men and women to contribute to maternity benefit schemes for the sake of gender equality.

The Zimbabwe regulations need to add certain important aspects missing but provided for in the Convention 189. The issue of sexual harassment is missing in the regulations yet it is reported to be rampant in the domestic worker sector.⁸³ The ILO Recommendation 201 provides that:

Members should consider establishing a mechanism to protect domestic workers from abuse, harassment and violence, such as:

- a) Establishing accessible complaint mechanisms for domestic workers to report cases of abuse, harassment and violence
- b) Ensuring that all complaints of abuse, harassment and violence are investigated, and prosecuted, as appropriate; ..

The regulations should also provide more specific provisions on the quality of food and accommodation for live-in domestic workers. It is in the area of accommodation that most domestic workers experience poor living conditions that expose them to sexual abuse and violation of privacy. The law does not prohibit people with houses that are not equipped to provide a domestic worker with decent accommodation from employing a domestic worker.⁸⁴ The quality of the accommodation should be specified either as a separate room or a shared room with a person of the same sex, well equipped and ventilated with suitable sanitary facilities

The Zimbabwe domestic worker regulations are silent on the quality of food for domestic workers. The Mauritian Domestic worker regulations provide that a domestic worker must receive ‘meals of good quality, adapted to the cultural and religious requirements, if any of the domestic worker’⁸⁵ The Uruguay domestic regulations provide that food must be of good quality and healthy and be provided in sufficient quantities. It specifies that the employer must provide breakfast, lunch and supper as a minimum.

The R201 provides that accommodation for domestic workers should be well ventilated and be lockable with adequate lighting in keeping with prevailing conditions of the household. The meals should be sufficient and of

83 Celeste Sacoomano, ‘Sexual Harassment in the Informal economy: Farmers and Domestic Workers’, United Nations Entity for Equality and the Empowerment of Women (UN Women) (2020) < <https://www.unwomen.org/en/digital-library/publications/2020/09/discussion-paper-sexual-harassment-in-the-informal-economy-farmworkers-and-domestic-workers> > accessed 12 September 2022.

84 During the colonial era in Zimbabwe, domestic workers lived in what were called *Khayas*, a small house of inferior quality at the backyard of the employer. This has planted the seed in the minds of most people that that domestic workers deserved less in terms of living space and comfort.

85 Domestic Workers (Remuneration) Regulations 2010 (GN233 of 2010).

a good quality and considerate to the cultural and religious requirements of the domestic worker.⁸⁶ The Domestic Workers regulation makes a small nod towards safety and health of domestic workers by providing for the provision of uniforms and suitable protective clothing for a domestic worker whose work exposes them to elements of the weather.⁸⁷

There is need for explicitly making a provision for protection of health and safety for domestic workers in the legal regulations. The law needs to be very specific in providing for practises that are common in the home that could harm a worker and prohibit them. The Convention provide guidance providing thus:

Every domestic worker has the right to a safe and healthy working environment. Each member shall take, in accordance with national laws and regulations and practise, effective measures with due regard for specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers.⁸⁸

Domestic workers are specifically excluded from social protection cover⁸⁹. The position of clear exclusion suffered by domestic workers in Zimbabwe is not just peculiar to Zimbabwe. According to the ILO report⁹⁰ on social protection coverage for domestic workers in about 163 countries there is a serious lack of protection for domestic workers the world over

This exclusion puts domestic workers in a position of legislative precariousness. Virginia Mantouvalou defines legislative precariousness as a specific expression of precariousness which is created by legislation. This situation arises when legislation offers no protection or lesser level of protection to specific workers. She puts forward the argument that:

Legislative precariousness leads to special vulnerability. It places domestic workers at a disadvantage if compared to other groups of workers, and reinforces the relationship of submission and subordination that typically characterises the employment relation.⁹¹

⁸⁶ Recommendation 201 Article 17.

⁸⁷ s19 (1) provides that, 'An employer shall supply, free of charge, uniforms or other suitable protective clothing to a domestic worker who, in the course of his duties, is habitually exposed to inclement weather.'

⁸⁸ Domestic Workers Convention, Article 13.

⁸⁹ The SI 68/1990 established and administers the Accident Prevention and Workers Compensation Scheme which administers such compensation fund excludes domestic workers from the definition of employee.

⁹⁰ ILO, 'Social protection for domestic workers: Key Policy Trends and statistics' (ILO, 2016) <https://www.ilo.org/secsoc/information-resources/publications-and-tools/policy-papers/WCMS_458933/lang-en/index.htm> accessed 16 June 2017.

⁹¹ Virginia Mantouvalou, "Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour", (2012) Vol 34 Comparative Labour Law and Policy Journal,133.

The exclusion of domestic workers from compensation for injury or death at work was extensively discussed in the seminal judgment of *Sylvia Bongi Mahlangu and Anor v Minister of Labour*⁹² decided by the South African Constitutional Court. The Constitutional Court ruled that the exclusion of domestic workers from Compensation for Occupational Injuries and Diseases Act (COIDA)⁹³ infringes their right to equality, the right to human dignity as well as their right to have access to social security under sections 9,10 and 27 respectively of the South African Constitution. Article 14 of the Convention 189 implores member states to ensure that domestic workers do not enjoy less favourable conditions than those applicable to other workers in respect of social security protection.

4.3.5 Rights to Organise and bargain collectively

Domestic workers enjoy the right to join and participate in the activities of a trade union. The oldest domestic work union was formed in 1981, hence it's as old as the domestic worker regulations. The formation of ZIDAWU fell directly into the two pronged policy approach of government on the elevation of domestic workers from mere servants without rights to statutory workers with rights at law through the labour law regime.⁹⁴

Pape captured the rationale behind the formation of this union aptly:

To ensure that the legislation achieved its goal of bringing domestic workers under a legal labour relations umbrella, the government needed some means of enforcement. Given the extremely decentralised nature of domestic employment, an army of civil servant would have been necessary to do adequately investigate even a small fraction of workplaces. Rather than opting for the employment of a massive inspection force, the government chose to back the formation of a union.⁹⁵

While domestic workers can join Unions exercising collective rights such as striking seems difficult if not impossible. The right to strike while

92 CCT306/19.

93 Compensation for Occupational Injuries and Diseases Act 130 of 1993 s1 (xix) (v) excluded domestic employees employed in private households from the definition of 'employee'

94 J Pape, 'Still Serving Tea: Domestic Workers in Zimbabwe 1980-1990' p391.

95 Ibid p391.

granted to individuals it is to be exercised collectively.⁹⁶ Domestic workers work in isolated homes in most case one or two workers per household. The employer in this scenario is not an artificial persona in the form of a company but a natural person, in most cases the woman of the household. In such an environment the labour relations are different from the industrial model workplace.

Lack of consciousness amongst domestic workers also inhibit them from joining unions. Factors such as isolation of their workplace, their intimacy and dependence with their employers as well as obscurity from the public inhibit the effectiveness of organising in this sector.⁹⁷ Collective bargaining for domestic workers in Zimbabwe is rendered ineffective by the absence of a domestic worker employer organisation to bargain with.

The ILO Convention 189 on domestic work does not make any direct reference to domestic worker's right to strike. It seemed to have skirted around the issue. Its untestable in the tripartite consensus building forum of the ILO to avoid a thorny issue such as the right to strike. The closest it came to grant such a right is Article 10 which provides thus:

Each member shall take measures towards ensuring treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation.... regulations or collective agreements taking into account special characterises of domestic work.

If domestic workers under the convention have a right to collective agreements which come about as a result of the process of collective bargaining, then the right to strike which has been described as central to collective bargaining must be inferred therein.⁹⁸ The Convention makes mention of considering the special characteristics of domestic workers but does not give guidance on how that could be done. It provides for organisational rights that are more or less similar to the general workforce where trade union organising is significant.

96 The right to strike according to Madhuku is a right for an individual employee. The trade union only derives this right from its members who are employees. The right of the employee is exercised collectively with other employees in a trade union See L Madhuku, *Labour Law in Zimbabwe*, p435.

97 Darcy Du Toit and Tiement, "Do Cooperatives Offer a basic for Worker Organisation in the Domestic Sector? An Exploratory Study", (2015) 36 ILJ 1979.

98 According to Khan Freund, " There can be no equilibrium in industrial relations without a freedom to strike. In protecting that freedom, the law protects legitimate expectations of workers that they can make use of their collective power: it corresponds to the protection of the legitimate expectations of management that it can use the rights of property for the same purpose on its side..." Per Kahn Freund, quoted in R Davies and M. Freedland, *Kahn Freund's Labour and The Law*, (3rd edn Stevens & Sons, London1983) p. 292.

This area of organising and collective bargaining and associated organisational right highlight the challenges that labour law has in regulating domestic work. Apart from granting the rights on paper the law is not helpful in terms of how domestic workers can enjoy this right. The rights as currently constituted both in national legislation and the ILO Convention 189 are meant for industrial work sites with significant trade union presence.

4.3.1 Enforcement of Domestic Workers Rights in Zimbabwe

The assertion by Mandy de Waal that “writing law ... is one thing ... abiding by it and ensuring it is policed is another”⁹⁹ remains the major challenge in the regulation of domestic work in Zimbabwe.

A number of questions arise from the enforcement of and compliance with domestic workers’ regulations: How the law has managed to catapult domestic workers from a position of servitude to the full-fledged statutory workers with rights? How can lawmakers synchronise the labour regulatory framework on domestic work with the typical model of domestic work? Are the tools to enforce and promote compliance in the domestic worker sector sufficient and effective? Has the state managed to go around the informality and stereotypes that characterise domestic work to come up with an effective enforcement mechanism?

The law regulating does not carry any penalties for failure to comply neither does it have incentives for complying. Domestic workers in Zimbabwe still get a raw deal. Most domestic workers and employers profess ignorance of the law. Most domestic worker employers assume that treating their domestic workers as one of the family is good enough. a domestic worker. Media reports speak of issues of low wages, long working hours, sexual and physical abuse¹⁰⁰.

99 Mandy de Waal entitled “Still on the Fringes: Domestic Worker see No Light”, Daily *Maverick* < <https://www.dailymaverick.co.za/article/2012-06-05-still-on-the-fringes-domestic-workers-see-no-light/> > accessed 5 February 2022.

100 <https://www.youtube.com/watch?v=B2iR14mlHyc> The BBC video profiling a domestic worker in Zimbabwe. The domestic worker reports of abuse and mistreatment, low wage, she said she feels like she is treated like a slave
Herald Reporter, “Salary Blue for maids” *Herald* (Harare, 30 august 2011) ,< <https://www.herald.co.zw/salary-blues-for-maids/> > accessed 12 December 2021
Ropafadzo Mapimhidze, “Maids needs time off”, *Newsday* (Harare, 3 May 2014) <<https://www.newsday.co.zw/2014/05/maids-need-time/> > accessed 12 December 2021
Davies N. Sibanda, “Do female household workers have rights?”, *The Chronicle*, (Bulawayo,23 September 2021)< <https://www.chronicle.co.zw/do-female-house-workers-have-rights/> > accessed 12 December 2021. Yoliswa Dube, “Domestic Help: Are you being fair?” *The Chronicle*, (Bulawayo,

To the extent that these conditions still persist in domestic work it means that the existing legislation is ineffective in providing domestic workers in Zimbabwe with the intended protection.

One of the main challenges facing worker protection in the domestic worker sector is the discrepancy between the realities of the world of work and the socio-economic assumption that constitute the foundations of labour laws. Labour law is modelled around the industrial model while domestic work is not standard employment thereby creating a mismatch.¹⁰¹

While there are known difficulties in inspecting households where domestic workers ply their trade, there are other countries which are introducing innovative ways within their labour inspectorates. Labour inspectorates' absence from the sector may perpetuate assumptions that devalue domestic work as inspectors will not be informing and educating employers of domestic workers as to their rights and obligations. Inequalities in matters relating to compliance and lack of respect for domestic workers' rights may also persist in the absence of a monitoring mechanism or an effective response to cases of abuse.

The ILO has reported best practises from different parts of the world. Ghana for instance, although its Department of Labour does not have a specific labour unit or officer to deal directly with domestic workers, a Domestic Servant Policy has been introduced to monitor domestic workers' working conditions.¹⁰² Uruguay has formed a specialised section to monitor compliance with domestic worker regulation.¹⁰³ The Arab country of Jordan has established a Directorate for the Protection of Domestic Workers.¹⁰⁴ Registering domestic workers improves their visibility and assists in pointing to household for

1 May 2015)<<https://www.chronicle.co.zw/domestic-help-are-you-being-fair/> > accessed 12 December 2021

Alois Vinga "Domestic Workers Decries US \$10 monthly wage" New Zimbabwe, (Harare 29 November 2020) < <https://www.newzimbabwe.com/domestic-workers-chief-decries-us10-monthly-wage/> > accessed 12 December 2021, Newsday Reporter, "Domestic workers: Zimbabwe's forgotten workforce" *Newsday* (Harare, 2 August 2021)< <https://www.newsday.co.zw/2021/08/domestic-workers-zimbabwes-forgotten-workforce/>< accessed 12 December 2021.

101 Rachid Filali Meknasssi, The effectiveness of labour law and decent work aspirations in the developing countries: A framework of Analysis in Tzehainesh Tekle (ed) *Labour Law and Worker Protection in Developing Countries* (Hart Publishing 2010) p51.

102 ILO, 'Formalising Domestic Work', Domestic Work Policy Brief No.10,< https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_559854.pdf> accessed 10 December 2021.

103 *Ibid.* See also Mary R. Gold Smith, 'Collective Bargaining and Domestic Workers in Uruguay' [2013] *WIEGO*,< <https://www.wiego.org/sites/default/files/resources/files/Goldsmith-Collective-Bargaining-Uruguay-ISBN.pdf>> accessed 10 December 2021.

104 (n)108 above.

inspection. Registration of domestic workers deals with the informality that characterise their employment

Ally aptly captures the challenge of regulating the domestic work sector. She stated:

While the state's effort 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.'¹⁰⁵

5. RETHINKING LABOUR LAW REGULATIONS OF DOMESTIC WORK

This paper presented the difficulties the current labour regulatory framework faces due to special characteristics of domestic work. "Certainly the law and its enforcement mechanisms have never been geared to dealing with relations between domestic workers and employers in private homes."¹⁰⁶ The challenges of regulating domestic work emanate mainly from the vastness of the sector and the different circumstance faced by each domestic worker as they work for different households. The circumstances of these domestic workers are as varied as they the households that employ them.

The effectiveness of labour law in governing labour relations that are steeped in social relations has been questioned before. One distinguished authority put it in this manner, 'Law is a secondary force of human affairs, and especially labour relations.'¹⁰⁷ Societal attitudes play an important influencing role in human affairs. In reference to domestic work specifically Mantouvalou and Sedacca also puts across their sentiments as follows: "The social recognition of domestic work is of course a much broader endeavour.

105 Shireen Ally, *From Servants to Workers: South African Domestic Workers and the Democratic State*, (1st edn Ithaca: ILR Press 2009) p 95.

106 Darcy Du Toit, 'Constructing an integrated model for the regulation and enforcement of domestic Workers' rights' in Darcy Du Toit (ed) *Exploited, undervalued - and essential: Domestic workers and the realisation of their rights*, (PULP, 2013) p332.

107 P Davies and M Freedland, *Kahn Freund's Labour and the Law*, (Stevens and Sons. London, 1983) p13

Social attitudes towards domestic workers will not change overnight. They will not change because of a judicial ruling or legislative reform alone”¹⁰⁸

In light of the above sentiments the need for continuous engagement and research among legal scholars on the effective protection of workers in atypical employment such as domestic work remains key. The discussion should go broader and deliberate the direction of labour law and its effectiveness in the era of neoliberalism. Such a discussion is particularly important for Africa where most people eke out a living in the informal economy¹⁰⁹

The introduction of the ILO Convention 189 on domestic work is an important pointer towards the inclusion in earnest of workers who fall outside the traditional industrial model of employment in labour protections. The Convention would however need to be applied in context and home grown strategies are introduced with the inspiration of the Convention 189. Other measures such as raising awareness on domestic workers’ rights as well as providing incentives to employers who comply with the labour law for domestic workers will need to be employed. The empowerment of domestic workers through training as recommended by ILO Recommendation 201 in its Article 21 remains strategic. Such empowerment and professionalization will help in shifting attitudes that undervalue this work and dismiss it as just women’s work. The importance of empowering rather than patronising domestic workers should be priority for governments and organisations promoting their rights.

Utilising a centralized regulation framework may not be the best for regulating such a complex and diverse and severely decentralized sector. A more diverse but inclusive model is preferred. This argument is well presented by Darcy du Toit who argues; “...a regulatory framework capable of achieving the transformative objectives...need to move beyond the ‘command and control’ model ... and seek a more inclusive approach...”.¹¹⁰ While governments and policy making maybe well-meaning when they put regulatory frameworks in place, they need to realise that the involvement of domestic workers and their

108 V Montouvalou and N Sedacca, *The Human Rights of Domestic Workers: Mahlungu v Ministry of Labour and the Transformative Nature of the South African Constitution*. Available at <https://uklabourlawblog.com/2020/12/11/the-human-rights-of-domestic-workers-mahlungu-v-ministry-of-labour-and-the-transformative-nature-of-the-south-african-constitution-by-virginia-mantouvalou-and-natalie-sedacca/> accessed 10 November 2021.

109 The United Nations Economic Commission for Africa estimates that the informal sector in Africa accounts for 70% of employment in Sub-Saharan Africa <<https://www.un.org/en/ecosoc/integration/2015/pdf/eca.pdf>> accessed 12 December 2021.

110 (n112) p333.

employers is crucial. The industry players are best placed to provide solutions that are sustainable.

In light of the importance of key stakeholder involvement in domestic worker regulation their organisation and collective voice becomes key. Currently domestic workers in most countries such as Zimbabwe and South Africa organize through an industrial trade union model which has proved non-effective for enforcing their rights, which has its challenges.¹¹¹ More effective ways of organising non-typical workers need to be pursued.

Labour law in domestic work is confronted with social attitude that are as old as domestic work itself. How to navigate such attitudes remains on the dash board of labour scholars? “Labour law across a broad front will continue to be faced with great difficulties in seeking to regulate a rapidly changing forms of work, while pressures for the dismantling of existing regulatory frameworks set in motion by the financial crisis of 2007 may become irresistible.... the crisis of labour law may compel labour lawyers to confront the questions ... new and imaginative way in order to keep alive its emancipatory function.”¹¹²

The peculiar nature of domestic work calls for innovation in regulating it. It’s one thing to have domestic workers availed the same rights as other workers and another to have them enjoy those rights in reality. Can legal rules be so concrete as to be able to regulate a relationship so personalised and intimate such as the one between a domestic worker and her employer?

In Zimbabwe it is astonishing that the situation of domestic workers is deplorable but no court decision concerning domestic work is to be found among reported judgments of both the High Court or the Supreme Court. This is evidence that the current legal regime does not work for domestic workers and there is need to rethink the regulation of their work. Darcy du Toit argues; “The unique circumstances of domestic and the relative ineffectiveness of conventional forms of labour legislation in the sector suggest that a broader approach is needed”¹¹³

111 ZDAWU of Zimbabwe and SADAUWU of South Africa. There are debates on whether the trade union

112 Darcy du Toit, ‘Situating Domestic Work in a changing global labour market, in Darcy du Toit (Ed), *Exploited, Undervalued-and Essential: Domestic Workers and The Realisation of Their Rights*, (Pretoria University Law press, 2013) p28.

113 Darcy du Toit and Elsabe Hyssamen, ‘Implementing Domestic Workers’ Labour Rights in a Framework of Transformative Constitutionalism’, in Darcy du Toit (Ed), *Exploited, Undervalued-and Essential: Domestic Workers and The Realisation of Their Rights*, (Pretoria University Law press, 2013) p70.

Darcy du Toit makes an apt observation:

An abiding criticism of the regulation of domestic workers' rights is the mismatch between the unique and intimate nature of domestic work, application that govern all employment relationships.....indeed the exclusion of domestic workers from certain specific legislation provisions...underline the uniqueness of domestic work and the need for a specialised regulatory regime of a comprehensive nature.¹¹⁴

6. CONCLUSION

This paper calls for renewed impetus in reconceptualising the ‘purpose nature and content of labour law or frame work of labour law in a way that will be compatible with the unfolding realities of the global political economy’¹¹⁵ as well as the social, political and economic realities of where its applied.¹¹⁶ The call should extend to domestic work. There is indeed a need to rethink a framework that will translate paper rights to reality for domestic workers. The realisation that while most women in the workplace talk about breaking the glass ceiling there is a group of vulnerable women still trying to find their way out of the basement where societal attitudes have kept them trapped.

114 (n118) p 67.

115 *Ibid* p 17.

116 Tzehainesh Tekle ‘Labour Law and the worker protection in the South: An evolving tension between models and reality’ in Tzehainesh Tekle (ed) *Labour and Worker Protection in Developing Countries* (Hart Publishing 2010) 3.