



INTERNATIONAL
LAWYERS ASSISTING
WORKERS NETWORK



Mapping Domestic Work and Discrimination in Africa

A Study of Global and African Regional Norms, with case studies on Ethiopia, Kenya, Nigeria, Malawi, Ghana, South Africa, Uganda, Mauritius and Lesotho.

March 2023



Dedicated to the memory of Myrtle Witbooi (1947 - 2023) who founded and led the South African Domestic Service and Allied Workers Union (SADSAWU) with grit and with grace for over 50 years;

and

In recognition of the work of Pinky Mashiane, president of the Union of Domestic Workers of South Africa (UDWOSA) in bringing South African domestic workers out of the home and into the Constitutional Court in the case of Mahlangu v Minister of Compensation.

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1. Introduction

Domestic workers, most of whom are women, form a significant proportion of the global workforce.¹ The International Labour Organisation (ILO) estimates that there are approximately 67 million domestic workers worldwide² and that this number is growing steadily in both developed and developing countries. According to 2013 statistics of the ILO, Africa is the third-largest employer of domestic workers, after Asia and Latin America, with approximately 5.2 million domestic workers.³ Women domestic workers represent 13.6% of all female paid employees across the continent. These counts were likely far higher than reported due to inadequate statistical databases and other methodological challenges in counting domestic workers. Furthermore, it is highly likely that these figures have grown considerably in line with the global trend of increased demand for domestic work.

Domestic work is also circumstance-driven, and workers are from socio-economically disadvantaged communities.⁴ While domestic work is undervalued and often invisible, it is comparatively easy for disadvantaged women to gain entry to this employment sector, where there is little competition from men to perform what is socially and culturally regarded as “women’s work.” Moreover, domestic work is often the only option, especially for women in developing countries, since other employment opportunities may be scarce, and access to education and skills development is low due to poverty.

The COVID-19 global pandemic highlighted just how much domestic workers contribute to the functioning of households and labour markets. They play a crucial role in ensuring the health and safety of the families and households for which they work, from basic cleaning to

personal care for children, the sick, and the elderly.⁵ The pandemic deepened pre-existing gendered inequalities, as the intermittent lockdowns aggravated the burden of care work and impacted deleteriously the domestic work sector, who were largely not considered essential workers. It exposed the fact that domestic workers remain among the most vulnerable groups of workers.⁶

This research paper is born out of two historic milestones in the recognition of domestic work. The first is the tenth anniversary of the passage of the ILO Convention 189 (C. 189),⁷ which in its preamble recognizes that “domestic work continues to be undervalued 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.”

The second is the groundbreaking judgment of the South African Constitutional Court in the case of *Mahlangu v. Minister of Labour*⁸, where the Court found that the exclusion of domestic workers from compensation in cases of illness or injury at or related to work amounted to an irrational differentiation, which constituted direct discrimination. The Court went further to find that since domestic workers are predominantly black women, the exclusion also amounted to intersectional indirect discrimination on the basis of race, class and gender, which was not only presumptively unfair, but “aggravated.” The Court sourced its analyses in South African constitutional law, but also drew on international human rights conventions and norms, including the Sustainable Development Goals.⁹ One commentator, Shreya Atrey, observes no court has “accomplished the task of naming and applying intersectionality theory to a case of indirect discrimination as the

¹ International Labour Organization (ILO), *Who are Domestic Workers*, DOMESTIC WORKERS, <https://www.ilo.org/global/topics/domestic-workers/who/lang-en/index.htm> (last visited Oct. 27, 2022).

² This figure excludes child domestic workers and is a conservative estimate based on national labour force and employment surveys, which do not reach many domestic workers.

³ ILO, DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL STATISTICS AND THE EXTENT OF LEGAL PROTECTION 33 (2013), https://www.ilo.org/travail/Whatsnew/WCMS_173363/lang-en/index.htm.

⁴ Women in Informal Employment: Globalizing and Organizing (WIEGO), *Domestic Workers*, INFORMAL ECONOMY: OCCUPATIONAL GROUPS, <https://www.wiego.org/informal-economy/occupational-groups/domestic-workers> [<https://perma.cc/SG8V-N69Q>] (last visited Oct. 27, 2022).

⁵ ILO, DECENT WORK FOR DOMESTIC WORKERS: CONVENTION 189 AND RECOMMENDATION 201 at a Glance 6 (2011).

⁶ ILO, DECENT WORK FOR DOMESTIC WORKERS: MOVING THE AGENDA FORWARD 11 (2016).

⁷ Convention (No. 189) Concerning Decent Work for Domestic Workers, June 16, 2011, 2955 U.N.T.S. 407 [hereafter C. 189].

⁸ *Mahlangu v. Minister of Lab.* 2020 (2) SA 54 (CC) (S. Afr.) [hereinafter *Mahlangu*].

⁹ See Dept. of Econ. and Soc. Affs., U.N., Sustainable Development Goals, <https://sdgs.un.org/goals> (last visited Nov. 5, 2022).

court in *Mahlangu* did.¹⁰

The question this paper seeks to answer is what the impact of these legal advances—legislative and judicial—has been or could be on the regulation of domestic workers in Africa. It looks at the social and historic construction of domestic work, and the ways in which it has been excluded from regulation both doctrinally and institutionally. This paper also considers the extent to which constitutional frameworks in Africa adopt a substantive approach to equality, which could enable effective judicial responses to intersectional discrimination and domestic work.

1.1 Non-Discrimination and Intersectional Analysis: Who are Domestic Workers?

The term “intersectionality” was coined in 1989 by Professor Kimberlé Crenshaw to describe how race, class, gender, and other individual characteristics “intersect” with one another and overlap.¹¹ It can be used as an analytical framework for understanding how multiple aspects of a person’s social and political identities combine to either compound vulnerability to discrimination and exploitation or heighten privilege and insulate a person from discrimination and exploitation.

Intersectional analysis is a particularly useful lens through which to examine normative frameworks applicable to domestic workers, since it produces a more nuanced understanding of the unique vulnerabilities of domestic workers, which in turn leads to more effective identification of normative gaps, and more strategic and impactful recommendations on addressing such gaps.

In *Mahlangu*,¹² the South African Constitutional Court explained that intersectional analysis

in relation to discrimination is an indispensable legal methodology and, using the intersectionality framework as a legal tool, leads to *more substantive protection of equality*. Adopting intersectionality as an interpretative criterion enables courts to

consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination.¹³

The Court viewed the distinction between domestic workers and other categories of workers to be a form of indirect discrimination because domestic workers are “predominantly black women” and acknowledged that “discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at hand.”¹⁴

Consequently, a crucial dimension to intersectional analyses in the *Mahlangu* decision was the role of history, and the generational impact of apartheid and colonialism on black women. In this regard, the court finds that intersectionality requires an examination of the context of the individual or group at issue, their history, as well as the social and legal history of society’s treatment of that group.¹⁵ Historically, black women in South Africa were at the bottom of the social hierarchy; oppressed both by apartheid laws and a patriarchal form of customary law and norms, which rendered them perpetual minors.¹⁶ The Court finds that to ensure that the *vestiges* of South Africa’s racist past are eradicated, “requires an exploration of the lingering gendered implications of apartheid’s racist system” which restricted the ability of women to gain employment and created a recognizable gendered system of poverty.¹⁷ The judgment emphasizes the extent to which the marginalisation that domestic workers currently face is historical: “During apartheid, domestic workers had a tenuous form of employment which was excluded from fair labour standards....Their employment conditions were not formalised and their lives were often based on the whims of their White employers.”¹⁸ This marginalization persists to this day since “they are a category that have lamentably been left out and rendered invisible; their experience unrecognized.”¹⁹ It is circumstance-driven employment; they remain shackled by poverty.

¹⁰ On February 24, 2022, the Court of Justice of the European Union (CJEU) issued its first judgment on domestic workers. In this case the CJEU held that the exclusion of the category of domestic workers from access to social security benefits constitutes indirect discrimination on the ground of sex, since it affects almost exclusively women. See Case C-389/20, CJ v. Tesorería General de la Seguridad Social (TGSS), ECLI:EU:C:2021:777 (Sept 30, 2021).

¹¹ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

¹² *Mahlangu* 2020 (2) SA 54 (CC).

¹³ *Id.* at 79.

¹⁴ *Id.* at 76.

¹⁵ *Id.* at 95.

¹⁶ *Id.* at 96.

¹⁷ *Id.* at 98.

¹⁸ *Id.* at 100.

¹⁹ *Id.* at 103.

1.2 Domestic Workers in Africa: Letting History in

Not dissimilar from South Africa, the majority of domestic workers in Africa have been subjected to the intergenerational impact of colonialism and poverty, which brought about other layers of adversities including racial inequalities and toxic patriarchal systems. During colonial rule by the British, black people, particularly women, were prohibited from taking part in certain work and careers. Black women, in particular, were also victims of patriarchal notions that women's roles were to be in the confinement of the home to serve the family. Writers, such as Brenda Grant put forward an argument that the continuous vulnerability of women in the domestic sector has its foundations in colonial and racial oppression.²⁰ Indeed many Basotho women, particularly black women, were denied the right to education and have had limited opportunities to seek employment outside of the domestic work sector.²¹

Writing on post-coloniality and how it affected the identity formation of migrant domestic workers prior to the 1980s, Sabrina Marchetti²² contends that

the entrance of post-colonial women in the niche of paid domestic work is therefore crucially conditioned by the colonial past, not only in structuring personal contacts and networks that facilitate their entrance into the niche but also in affecting the representation of those skills that are considered necessary to access the labour sector. It is interesting to notice that the "ethnicisation" of domestic skills, a phenomenon that takes place through the "relegation" of paid domestic labour to being a job for black and migrant women, allows workers to see the performance of these jobs as a feature of migratory success, and to produce a positive representation of their role in the host society. Such a positive self-representation, however, remains intrinsically ambivalent as far as it is based on the reproduction of colonial

legacies as far as the hierarchies between Europeans and black migrants are concerned.²³

1.3 Outline of Paper

The paper is divided into two sections. The first section provides a broad overview of global human rights norms on domestic work, particularly ILO Domestic Work Convention, C. 189.²⁴ C. 189 is the only instrument that addresses the specificities of domestic work and, as such, is the most comprehensive standard on domestic work. However, C. 189 has been ratified by only 31 states. Of these, only five are African states.²⁵ Of the nine case studies conducted in this paper, South Africa and Mauritius are the only countries to have ratified C. 189.

In contrast, the core UN human rights conventions,²⁶ including the International Covenant on Civil and Political Rights (ICCPR)²⁷, the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁸ the Convention on Elimination of all Forms of Discrimination against Women (CEDAW),²⁹ the International Covenant on the Elimination of Racial Discrimination (ICERD)³⁰ and the Convention on the Rights of the Child (CRC),³¹ have been widely ratified, and adopt substantive approaches to interpreting treaty rights to non-discrimination. The UN human rights treaty bodies have increasingly addressed discrete human rights violations of domestic workers in concluding observations. These concluding observations can be understood as an emerging normative consensus on domestic work as a significant site of human rights violation.

The African Charter on Human and Peoples' Rights (Banjul

²³ *Id.*

²⁴ C. 189, *supra* note 7

²⁵ ILO, *Ratifications of C. 189—Domestic Workers Convention, 2011*, NORMLEX, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:1300:P11300_INSTRUMENT_ID:2551460 (last visited Oct. 30, 2022).

²⁶ Off. of the High Comm'r. on Hum. Rts., U.N., *The Core International Human Rights Instruments and Their Monitoring Bodies*, <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies> (last visited Nov. 5, 2022).

²⁷ International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 175 [hereinafter ICCPR].

²⁸ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

²⁹ Convention on Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 1 [hereinafter CEDAW].

³⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD].

³¹ Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

²⁰ Brenda Grant, *Domestic Workers: Employees or Servants?* 13 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 61 (1997).

²¹ Mantuna Makoro, *The Construction of Illegality: Basotho Migrant Domestic Workers' Experiences* (Mar. 2015) (M.A. thesis, University of the Witwatersrand), <https://oa.mg/work/2299499591> [<https://perma.cc/NDL6-R5EX>].

²² Sabrina Marchetti, *BLACK GIRLS: MIGRANT DOMESTIC WORKERS AND COLONIAL LEGACIES* (2014).

Charter)³² is also widely ratified on the African continent. While it has not directly addressed domestic workers issues, it has laid a conceptual framework that could address the intersectionality of domestic work in the form of its emerging jurisprudence on non-discrimination, and its soft law recognition of women's economic rights and the impacts of gendered poverty. These African Charter norms are increasingly being domesticized by national judiciaries, which use regional as well as international law, in interpreting national laws and constitutions.

The second section of this paper consists of nine country case studies. While the majority of countries surveyed in this paper have not ratified ILO C. 189,³³ all have entrenched constitutional rights to equality and non-discrimination. The primary focus of this section is to map the regulation of domestic work through an overall analysis of general constitutional provision and the legal framework regulating domestic work, as well as relevant country level precedents that adopt a substantive equality approach. The question of the way in which international human rights treaties are incorporated into domestic law is a critical source of legal norms on domestic work. In some countries, judges have incorporated unratified international human rights conventions into the law through their judgments.

The following case studies can be categorized into three broad approaches:

1. The exclusion of domestic workers from labour law regulation, either entirely (as in Ethiopia) or partly (as in Lesotho and Uganda, where “domestic workers” as a category are explicitly excluded from key labour protections).
2. The inclusion of domestic workers in general labour laws, but exclusion from critical provisions requiring a threshold number of employees for particular protections to apply. In Nigeria and Malawi, core protections only apply to workplaces employing a threshold number of employees, which structurally exclude domestic workers from protection.
3. The third approach consists of countries which have included domestic workers within general labour law protection and have gone further to pass specific regulations addressing the particularities of domestic work and creating a floor for minimum protection in the sector. In this group

are countries, such as South Africa, Mauritius, and Ghana.

The form legal exclusions take in a particular jurisdiction would determine whether they might amount to instances of direct or indirect discrimination. In some countries, the absence of any rational relation between the exclusion and the reason proffered might amount to direct discrimination. In others, the exclusions might raise the issue of indirect intersectional discrimination, where a neutral policy operates to exclude or disadvantage a vulnerable group. It is important to note, that in all nine studies, and regardless of the regulative approach adopted, there remain almost ubiquitous challenges around enforcement of labour rights in the sector.

³² Banjul Charter, *infra* note 132.

³³ C. 189, *supra* note 7.

2. International Legal Norms For Domestic Work: ILO, UN and African Regional Human Rights Norms

2.1 The International Labour Organisation: Domestic Workers Convention No. 189

Over the last 10 years, the ILO has made significant strides in recording, assessing, and combatting the unique challenges faced by domestic workers in the quest for decent work. Significantly, the ILO acknowledges the intersectional vulnerability of domestic workers:

At present, domestic workers often face very low wages, excessively long hours, have no guaranteed weekly day of rest and at times are vulnerable to physical, mental and sexual abuse or restrictions on freedom of movement. Exploitation of domestic workers can partly be attributed to gaps in national labour and employment legislation, and often reflects discrimination along the lines of sex, race, and caste.³⁴

It is important to note that all existing international labour standards also apply to domestic workers, unless expressly stated otherwise. However, at its 100th Session in June 2011, the ILO took the landmark step of adopting the Domestic Workers Convention No. 189 (C. 189), and the corresponding supplementary Recommendation No. 201 (R. 201).³⁵ This was the first time that the ILO formulated international labour standards dedicated to domestic workers, signaling a strong international recognition of the economic and social value of domestic work and its gendered nature.³⁶

³⁴ ILO, *supra* note 1.

³⁵ C. 189, *supra* note 7; R. 201, *infra* note 61; C. 189 sets specific international labour standards for domestic work. Its companion R102 is a non-binding instrument that provides member states with practical guidance on improving national laws and policies that are relevant to domestic work.

³⁶ These instruments were followed later in the same year by the ILO's

The preamble of C. 189 specifically recalls the relevance of multiple international human rights instruments,³⁷ which form part of the legal framework for domestic work and recognizes "the special conditions under which domestic work is carried out that make it desirable to supplement the general standards with standards specific to domestic workers so as to enable them to enjoy their rights fully."

C. 189 defines domestic work as: "work performed in or for a household or households."³⁸ This is distinct from "homework," which is dealt with under its own international labour standards.³⁹ A domestic worker is defined as "any person engaged in domestic work within an employment

Strategy for Action Towards Making Decent Work a Reality for Domestic Workers Worldwide. The strategy was discussed by the ILO Governing Body at its 312th Session in November 2011 and is intended to guide the International Labour Office on supporting ILO constituents. ILO STRATEGY FOR ACTION TOWARDS MAKING DECENT WORK A REALITY FOR DOMESTIC WORKERS WORLDWIDE (2011), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/generic-document/wcms_210412.pdf.

³⁷ Specifically, the Universal Declaration of Human Rights, (Dec. 10, 1948); G.A. Res. 2200A (XXI); the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Mar. 7, 1966, 660 U.N.T.S. 195; the Convention on Elimination of all Forms of Discrimination against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 1; the U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209, and in particular its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 55/25, Annex I, U.N. Doc. A/55/383 (Nov. 15, 2000), and its Protocol Against the Smuggling of Migrants by Land, Sea and Air, Jan. 28, 2004, 2241 U.N.T.S. 507; the Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Dec. 18, 1990, 2220 U.N.T.S. 3.

³⁸ Convention (No. 189) Concerning Decent Work for Domestic Workers, June 16, 2011, 2955 U.N.T.S. 407 (hereafter C. 189).

³⁹ "Home Work" is done by workers in their own home rather than a workplace. Convention (No. 177) Concerning Home Work, June 20, 1996, 2108 U.N.T.S. 161 (hereafter C. 177).

entitlements.⁵¹ Furthermore, member states must make it easy to pay social security contributions in general and more specifically for workers who have more than one employer.⁵²

5. Protection Against Discrimination, Harassment and Violence. Member states must provide effective protection against all forms of abuse, harassment, and violence,⁵³ which should include the establishment of complaints and other mechanisms.

6. Protection of Vulnerable Groups of Domestic Workers, Such as Child Domestic Workers. C. 189 obliges states to protect especially vulnerable groups of domestic workers, including child domestic workers,⁵⁴ live-in domestic workers,⁵⁵ and migrant domestic workers,⁵⁶ including protection to those recruited or placed by private employment agencies against abusive practices.⁵⁷

Child Domestic Workers. C. 189 requires member states to set a minimum age for domestic workers consistent with the provisions of the ILO Conven-

tion 138 on Minimum Age⁵⁸ and the ILO Convention 182 on Worst Forms of Child Labour Convention,⁵⁹ and not lower than that established by national laws and regulations for workers generally.⁶⁰ Article 4(b) of C. 189 also requires members to ensure that work performed by domestic workers under the age of 18 and above the minimum age of employment does not deprive them of compulsory education or interfere with opportunities to participate in further education or vocational training. Further, ILO Recommendation 201 (R. 201) advises in line with the Forced Labour Convention, that “members should identify types of domestic work that, by their nature and circumstances in which they are carried out, are likely to harm the health, safety or morals of children, and should also prohibit and eliminate such child labour.”⁶¹ R. 201, in section 5, elaborates that when employing a domestic worker under the age of 18, but above the minimum age of employment defined by national law, states must: (a) strictly limit their hours of work to ensure adequate time for rest, education and training, leisure activities and family contacts; b) prohibiting night work; (c) placing restrictions on work that is excessively demanding, whether physically or psychologically; and (d) establishing or strengthening physical mechanisms to monitor their working and living conditions.

Live-in Domestic Workers. C. 189 also requires taking measures to ensure “decent living conditions” for live-in domestic workers. This requirement entails taking measures to ensure that domestic workers are “free to reach agreement with their employer or potential employer on whether to reside in the household ...”⁶² States must also ensure that these domestic workers are not required to stay in the accommodation during rest periods and leave, and that decent working conditions⁶³ include standards related to accommoda-

⁵¹ C. 189, *supra* note 7; R. 201, *infra* note 61, at secs. 20 and 26(2).

⁵² C. 189, *supra* note 7, at art. 14(3).

⁵³ *Id.* at art. 5; R. 201, *infra* note 61, at sec. 7; Convention Concerning the Elimination of Violence and Harassment in the World of Work, adopted June 21, 2019, 58 I.L.M. 1170 [hereinafter C. 190]; ILO, Violence and Harassment Recommendation (2019) [hereinafter R. 206], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R206.

⁵⁴ C. 189, *supra* note 7, at art. 10 read with R. 201, *infra* note 61, at sec. 5.

⁵⁵ C. 189, *supra* note 7, at arts. 6 and 9 read with R. 201, *infra* note 61, at secs. 17 and 18.

⁵⁶ C. 189, *supra* note 7, at arts. 8 and 15 read with R. 201, *infra* note 61, at sec. 20–23; Convention (No. 97) Concerning Migration for Employment (Revised 1949), adopted July 1, 1949, 120 U.N.T.S. 71; ILO, Migration for Employment Recommendation (Revised) (1949) [R. 86], https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100_O:P12100_INSTRUMENT_ID:312424; Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted June 24, 1975, 1120 U.N.T.S. 323; ILO, Migrant Workers Recommendation (1975) [hereinafter R. 151], https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312489. In this regard, member states should consider concluding bilateral, regional or multi-lateral agreements in respect of a range of issues that affect domestic workers, especially migrant domestic workers.

⁵⁷ C. 189, *supra* note 7, at art. 15. This should include the promotion of good practices by private employment agencies, and cooperation at bilateral, regional and global levels to monitor the activities of such agencies. R. 201, *infra* note 61, at sec. 23 and 26. This obligation should be read with ILO conventions applicable to private employment agencies.

⁵⁸ Convention (No. 138) Concerning Minimum Age for Admission to Employment, adopted June 26, 1973, 1015 U.N.T.S. 297 [hereinafter C. 138].

⁵⁹ Convention (No. 182) concerning the prohibition and immediate action for the elimination of the worst forms of child labour, June 17, 1999, 2133 U.N.T.S. 161 [hereinafter C. 182].

⁶⁰ C. 189, *supra* note 7, at art. 4(1).

⁶¹ ILO, DOMESTIC WORKERS RECOMMENDATION Sec. 3(a)–(c) (2011) [hereinafter R. 201], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:R201:NO.

⁶² C. 189, *supra* note 7, at art. 9.

⁶³ C. 189, *supra* note 7, at art. 6.

tion and food, where this is provided,⁶⁴ and to take measures to ensure that domestic workers who reside in the households where they are employed have decent living conditions that respect their privacy.⁶⁵

7. **Migrant Domestic Workers.** C. 189 puts two obligations on member states in relation to migrant domestic workers. Firstly, migrant domestic workers must have a written contract or job offer before they travel out. Secondly, their host country and country of origin must work together to protect their rights.
8. **Collective Bargaining for Domestic Workers.** C. 189 obliges member states to respect, promote, and realize the right to freedom of association and the effective right to collective bargaining.⁶⁶
9. **Enforcement.** C. 189 requires establishing enforcement mechanisms and penalties generally. States must also take measures to ensure that all domestic workers have effective access to courts, tribunals, or other dispute resolution mechanisms, and establish effective complaint mechanisms.⁶⁷ Under article 17, each member “shall develop and implement measures for labour inspection, enforcement and penalties, with due regard for the special characteristics of domestic work, in accordance with national laws and regulations.” Further, 17(3) sets out that “in so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due regard to privacy.”⁶⁸ Significantly, article 19 stipu-

lates that C. 189 does not affect more favorable provisions applicable to domestic workers under international labour protections.

2.2 The United Nations: Piecemeal Protection Under General Human Rights Instruments

Although none of the international human rights instruments or bodies of the United Nations (UN) is dedicated exclusively to domestic work, they all contain general non-discrimination provisions, as well as other work-related rights. There is increasing awareness among these bodies of the vulnerability of domestic workers and the unique barriers to the full enjoyment of their basic human rights. This awareness can be seen in the jurisprudence of UN charter- and treaty-based bodies, as well as special mechanisms, tasked with monitoring states’ human rights situations. Indeed, C. 189 specifically draws on multiple international human rights instruments for domestic workers, positioning domestic work as a thematic issue that cuts across labour rights, human rights, and women’s rights.

2.2.1 Charter-Based Bodies

In September 2018, Urmila Bhoola, the special rapporteur on contemporary forms of slavery, including its causes and consequences, submitted a report to the Human Rights Council, on “the impact of slavery and servitude on marginalized migrant women workers in the global economy.” The report recounts that “over the past years treaty bodies have expressed concern regarding forced labour and domestic servitude of women and children in all geographic regions.”⁶⁹ She argues that domestic work operates on a continuum: On the one end, it includes slavery-like practices and forced labour, while on the other end of the continuum, it is characterized by decent work.⁷⁰ She argues that domestic work that is compliant with fundamental rights is “the antidote to slavery and all forms of labour exploitation and human rights violations at work for domes-

estic workers, ahead of taking certain of the measures called for in C. 189. C. 189, *supra* note 7, at arts. 2(2), 13(2), 14(2), 15(2), 18. This should include matters such as model employment contracts, hours of work, occupational health and safety, systems of inspection, the collection and publication of data and statistics, and the development of training programmes. R. 201, *supra* note 61, at secs. 6, 8, 19, 22, and 25.

⁶⁹ Urmila Bhoola, Report of the Special Rapporteur on Contemp. Forms of Slavery, Including its Causes and Consequences: Note by the Secretariat, ¶ 53, U.N. Doc. A/HRC/39/52 (July 27, 2018)..

⁷⁰ *Id.* at ¶ 15.

⁶⁴ R. 201, *supra* note 61, at sec. 7.

⁶⁵ C. 189, *supra* note 7, at art. 6 and R. 201, *supra* note 61, at sec. 17.

⁶⁶ C. 189, *supra* note 7, at art. 3(a). Furthermore, article 18 provides that each member state shall implement the provisions of this convention in consultation with the most representative employers’ and workers’ organisation through laws, regulations and collective agreements.

⁶⁷ C. 189, *supra* note 7, at arts. 16 and 17. This should include consultation with the most representative organizations of employers and workers to provide adequate and appropriate systems of inspection and adequate penalties for violations; R. 201, *supra* note 61, at secs. 7, 19, 21 and 24. Read with Convention (No. 81) Concerning Labour Inspection in Industry and Commerce, adopted July 11, 1947, 54 U.N.T.S. 3 [hereinafter C. 81]; Convention (No. 176) Concerning Safety and Health in Mines, adopted June 22, 1995, 2029 U.N.T.S. 207 [hereinafter C. 176]; ILO, Labour Inspection Recommendation (1947) [R. 81]. https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312419.

⁶⁸ They must consult with the most representative organizations of employers and workers and, where they exist, with organizations representing domestic workers and those representing employers of

tic workers.⁷¹ Her recommendations focus on “applying a human rights perspective” that adopts an intersectional approach, which recognizes that “not all women in domestic work are equally vulnerable” to slavery or servitude.⁷²



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Indeed, domestic workers have received recent attention from both the Universal Periodic Review mechanism and Special Procedures, which addressed both sides of the forced labour-decent work continuum. During the Third Cycle of the Universal Period Review, several African countries received recommendations directly relevant to domestic workers.⁷³ These recommendations dealt with issues, such as better protection of the right to freedom of association and collective bargaining, combatting human trafficking and protecting the rights of migrant workers and eliminating discrimination against domestic workers.

Special Procedures have also recently sent joint communications to at least three African member states regarding the violation of the human rights of domestic workers. These communications are illustrative of the forced-labour and slavery-like continuum of domestic work and reveal its complex links to both the global economy and the autonomous private family:

1. In November 2017, a communication was sent to Libya on the enslavement and auctioning of African migrants in markets in Libya, who are subjected to forced labour (including domestic work) through fraudulent recruitment, confiscation of identity and travel documents, withholding or

non-payment of wages, and debt bondage.⁷⁴

2. In March 2019, a communication was sent to Guinea Bissau about a 13-year-old domestic worker who was injured and severely burned by her private employers, a couple who were initially the girl's foster parents.⁷⁵
3. In July 2020, a communication was sent to Ethiopia about migrant domestic workers in Lebanon, the majority of whom were women and nationals of Ethiopia, who urgently required protection and assistance, including access to food, basic necessities, accommodation, and health care.⁷⁶ Due to the COVID-19 pandemic, many of these workers had stopped receiving salaries or had been left without employment opportunities, and were unable to return to their home country. They had re-

⁷⁴ Working Group of Experts on People of African Descent, OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, <https://www.ohchr.org/en/special-procedures/wg-african-descent> (last visited Nov. 4, 2022). Special rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; special rapporteur on minority issues; independent expert on human rights and international solidarity; special rapporteur on the human rights of migrants; special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; special rapporteur on trafficking in persons, especially women and children and special rapporteur on violence against women, its causes and consequences. Human Rights Council Res. 36/23, U.N. Doc. A/HRC/RES/36/3 (Oct. 5, 2017); Human Rights Council Res. 34/16, U.N. Doc. A/HRC/RES/34/16 (Apr. 6, 2017); Human Rights Council Res. 34/6, U.N. Doc. A/HRC/RES/34/6 (Apr. 6, 2017); Human Rights Council Res. 35/3, U.N. Doc. A/HRC/RES/35/3 (July 10, 2017); Human Rights Council Res. 34/21, U.N. Doc. A/HRC/RES/34/21 (Apr. 7, 2017); Human Rights Council Res. 34/35, U.N. Doc. A/HRC/RES/34/35 (Apr. 7, 2017); Human Rights Council Res. 24/3, U.N. Doc. A/HRC/RES/24/3 (Sept. 26 2013); Human Rights Council Res. 35/5, U.N. Doc. A/HRC/RES/35/5 (July 10, 2017); Human Rights Council Res. 32/19, U.N. Doc. A/HRC/RES/32/19 (July 19, 2016).

⁷⁵ Mandates of the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences; and the Special Rapporteur on Violence Against Women and Girls, its Causes and Consequences, in a communication dated Mar. 13, 2019 from Urmila Bhoola and Dubravka Šimonovic, addressed to Guinea-Bissau, GNB 1/2019, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24352>. The communication also indicated that reports of serious physical abuse against domestic workers in the country, as well as abusive working conditions, had been received.

⁷⁶ Mandates of the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences; the Special Rapporteur on the Human Rights of Migrants; the Special Rapporteur on Violence against Women, its Causes and Consequences; and the Working Group on Discrimination Against Women and Girls, in a communication dated July 17, 2020 from Tomoyo Obokata, Felipe González Morales, Dubravka Šimonovic, and Elizabeth Broderick, addressed to Ethiopia, ETH 02/2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25440>.

⁷¹ *Id.* at ¶ 14.

⁷² *Id.* at ¶ 80.

⁷³ Côte D'Ivoire, Democratic Republic of the Congo, Ethiopia, Ghana, Guinea, Madagascar, Mauritius, Tanzania, Uganda, and Zimbabwe.

portedly received insufficient assistance from the Ethiopian consulate in Lebanon, and many more had been left homeless due to acute deprivation, exploitation, and abuse.

2.2.2 Treaty-Based Bodies

The treaty-based bodies of the UN, which are responsible for overseeing states' compliance with core international human rights treaties, have regularly addressed issues impacting domestic workers in their jurisprudence.⁷⁷

(a) Covenant on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) monitors the implementation of the International Covenant on Economic, Social and Cultural Rights⁷⁸ and its optional protocol⁷⁹ by state parties. The CESCR has produced seven general comments that are relevant to domestic work.⁸⁰ Of these, direct references to domestic work can be found in the general comments on the right to just and favorable conditions at work,⁸¹ the right to social

security,⁸² and the equal right of men and women to the enjoyment of all economic, social, and cultural rights.⁸³ It is important to note that the Committee has in some cases been even more direct in its recommendations than what are found in C. 189 (which requires states to take measures to progressively realize social protection rights), particularly with respect to social protection and also the ability of labour inspectors to inspect homes.

For example, in 2018 it recommended to South Africa that domestic workers be included in the statute providing compensation for occupational injury and disease. It also recommended that labour inspectors carry out unannounced labour inspections in domestic settings, without a notice or a warrant.⁸⁴ In 2009, it recommended that Madagascar implement social security legislation for all domestic workers.⁸⁵

(b) Covenant on Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD), which monitors states' implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁸⁶ has made explicit reference to domestic workers in three of its general recommendations, dealing with racist hate speech,⁸⁷ discrimination against non-citizens,⁸⁸ and the gender-related dimensions of racial discrimination.⁸⁹ In recent years, the CERD has made recommendations in its concluding observations to at least two African states dealing directly with the vulnerability of domestic workers, including to

International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/23, at secs. 5, 47(f), 54 and 73 (2016).

⁸² Comm. on Econ., Soc. and Cultural Rts., General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant), U.N. Doc. E/C.12/GC/19, at sec. 31 (2008).

⁸³ Comm. on Econ., Soc. and Cultural Rts., General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), U.N. Doc. E/C.12/2005/4, at sec. 25 (2005).

⁸⁴ Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on the Initial Report of South Africa, U.N. Doc. E/C.12/ZAF/CO/1 (2018).

⁸⁵ Comm. on Econ., Soc. and Cultural Rts., Concluding observations of the Committee on Economic, Social and Cultural Rights: Madagascar, U.N. Doc. E/C.12/MDG/CO/2 (2009).

⁸⁶ Ratified by 53 African states.

⁸⁷ Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating Racist Hate Speech, U.N. Doc. CERD/C/GC/35 (2013) [hereinafter Gen. Rec. No. 35].

⁸⁸ Comm. on the Elimination of Racial Discrimination, CERD General Recommendation XXX on Discrimination Against Non-Citizens, UN Doc. CERD/C/64/Misc.11/rev.3, at ¶ 4 (2004).

⁸⁹ Gen. Rec. No. 35, *supra* note 87, at ¶ 2.

⁷⁷ The jurisprudence of the ten human rights Treaty Bodies, made up of committees of independent experts who monitor implementation of the core international human rights treaties can be found at: <https://www.ohchr.org/en/treaty-bodies>.

⁷⁸ ICESCR, *supra* note 28. The ICESCR has been ratified by 52 African states. While its concluding observations in the most recent country reports of African states do not contain a direct reference to domestic work, the HRC has produced four general comments that may be said to form part of the global normative framework on domestic work.

⁷⁹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 10, 2008, 2922 U.N.T.S. 29.

⁸⁰ Comm. on Econ., Soc. and Cultural Rts., General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/22 (2016); Comm. on Econ., Soc. and Cultural Rts., General Comment No. 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/23 (2016); Comm. on Econ., Soc. and Cultural Rts., General comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, ¶ 2, of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20 (2009); Comm. on Econ., Soc. and Cultural Rts., General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant), U.N. Doc. E/C.12/GC/19 (2008); Comm. on Econ., Soc. and Cultural Rts., General Comment No. 18: The Right to Work (Art. 6 of the Covenant), U.N. Doc. E/C.12/GC/18 (2006); Comm. on Econ., Soc. and Cultural Rts., General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), U.N. Doc. E/C.12/2005/4 (2005); Comm. on Econ., Soc. and Cultural Rts., General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, ¶ 1, of the Covenant), U.N. Doc. E/1991/23 (1990).

⁸¹ Comm. on Econ., Soc. and Cultural Rts., General Comment No. 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the

Kenya (on the vulnerability of migrant domestic workers to human trafficking and exploitation)⁹⁰ and Zambia (on the desirability of ratifying the ILO's C. 189).⁹¹

In August 2022, the CERD Committee recommended that Zimbabwe "take measures to address discrimination on intersecting grounds of race, class and gender in all areas of employment, including by raising awareness among domestic workers of their labour rights and by providing them with mechanisms to claim those rights through collective organising."⁹² It further recommended that domestic workers be included in its minimum wage regulation "at a level that guarantees a livable wage equal to other workers."⁹³

(c) Convention on the Elimination of Discrimination Against Women

State implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁹⁴ and its optional protocol⁹⁵ is monitored by the Committee on the Elimination of Discrimination against Women (CEDAW Committee). The CEDAW Committee has considered domestic work extensively as a women's human rights issue. Express reference is made to domestic work throughout its general recommendations on women migrant workers,⁹⁶ women's access to justice,⁹⁷ gender-based violence against women,⁹⁸ the right of girls and women to education,⁹⁹ the gender-related dimensions of

disaster risk reduction in the context of climate change,¹⁰⁰ and trafficking in women and girls in the context of global migration.¹⁰¹

Similarly, in its most recent concluding observations it has made observations and recommendations to African states that are directly relevant to domestic work. For example, the Committee has expressed concern about the absence of legislation specifically protecting domestic workers and recommended the ratification of the ILO's C. 189.¹⁰² It has also addressed the prevalence of sexual harassment in domestic work and informal economy work, as well as exploitative working conditions, including the absence of equal pay, paid leave, maternity and paternity protection, maximum working hours, and exclusions from labour and social security protection.¹⁰³ It has also recommended that Zimbabwe "(e)nsure equal social protection benefits for women and men, extend health care, pension benefits and maternity protection to the informal economy and conduct regular labour inspections in the informal sector, including in private households in which women are employed as domestic workers."¹⁰⁴ It has advised states to implement awareness-raising campaigns targeted at informing domestic workers of their rights and the dangers associated with domestic work, and also ensure their ac-

Recommendation No. 36: The Right of Girls and Women to Education, U.N. Doc. CEDAW/C/GC/36, at ¶ 33 (2017).

¹⁰⁰ General recommendation No. 37: The gender-related dimensions of disaster risk reduction in the context of climate change at ¶¶ 62, 64.

¹⁰¹ Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 38: Trafficking in Women and Girls in the Context of Global Migration, U.N. Doc. CEDAW/C/GC/38, at ¶¶ 28, 112, 121 (2020).

¹⁰² Comm. on the Elimination of Discrimination Against Women, Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GHA/6-7, at paras. 34 and 35 (2014).

¹⁰³ Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Sixth Periodic Report of Zimbabwe, U.N. Doc. CEDAW/C/ZWE/6, at ¶ 38 (2020) [hereinafter Zimbabwe Report]. In 2020, the CEDAW Committee noted its concern about "(t)he prevalence of violations against women and girls working in the informal sector and in domestic work, particularly with regard to sexual harassment in the workplace and violations of the principle of equal remuneration for work of equal value, the guarantee of the minimum salary, paid leave, maternity and paternity leave and the respect of maximum working hours (for domestic workers), the lack of implementation of relevant national legislation, and the concentration of women in the informal labour market and their exclusion from labour and social protection. Similar issues were addressed regarding Kenya. See Comm. on the Elimination of Discrimination Against Women, Concluding observations on the eighth periodic report of Kenya, U.N. Doc. CEDAW/C/KEN/8, at ¶¶ 36-37 (2017).

¹⁰⁴ Zimbabwe Report, *supra* note 103.

⁹⁰ Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Fifth to Seventh Periodic Reports of Kenya, U.N. Doc. CERD/C/KEN/CO/5-7 (2017).

⁹¹ Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Periodic Reports of Zambia, U.N. Doc. CERD/C/ZMB/CO/17-19 (2017).

⁹² Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Fifth to Eleventh Reports of the Zimbabwe, U.N. Doc. CERD/C/ZWE/CO/5-11 (2022).

⁹³ *Id.*

⁹⁴ Ratified by 52 African states.

⁹⁵ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Oct. 6, 1999, 2131 U.N.T.S. 83.

⁹⁶ Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers, U.N. Doc. CEDAW/C/2009/WP.1/R (2008).

⁹⁷ Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, U.N. Doc. CEDAW/C/GC/32, at ¶ 54 (2014).

⁹⁸ Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, U.N. Doc. A/47/38, at 1 (1992).

⁹⁹ Comm. on the Elimination of Discrimination Against Women, General

cess to legal aid and complaint mechanisms.¹⁰⁵

(d) Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is responsible for monitoring states' compliance with the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹⁰⁶ There is explicit reference to domestic work in the CMW's General comment No. 2,¹⁰⁷ and its General Comment No. 1 is dedicated entirely to the rights of migrant domestic workers.¹⁰⁸ It is, therefore, no surprise that domestic work is regularly raised by the CMW in its concluding observations in country reports, including those on African states.

The CMW has recognized the ways in which discrimination, both direct and indirect, enable exploitation. For example, it recommended that Nigeria should "include a prohibition of direct and indirect discrimination on all the grounds applicable to all aspects of employment and occupation and covering all workers, including domestic workers and workers in the informal sector, in [its] bill on labour standards."¹⁰⁹

¹⁰⁵ Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Rwanda, U.N. Doc. CEDAW/C/RWA/7-9, at ¶ 37 (2017). Also, in these observations, the CEDAW Committee notes that Rwanda welcomed "measures taken to reduce child labour, including domestic work," but noted its concern that "many girls living in poverty continue to be exploited as domestic workers, a condition in which they frequently face precarious conditions, labour exploitation, sexual abuse, violence and harassment." *Id.* at ¶ 37. In 2019, the CEDAW Committee noted its concern about the "lack of adequate protection for women domestic workers, who are particularly vulnerable to abuse and exploitation" to the government of Ethiopia. Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Eighth Periodic Report of Ethiopia, U.N. Doc. CEDAW/C/ETH/8, at ¶ 35 (2019).

¹⁰⁶ Ratified by 25 African states.

¹⁰⁷ Comm. on the Protection of the Rts. of All Migrant Workers, General comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families, U.N. Doc. CMW/C/GC/2, at ¶¶ 12, 60 (2013).

¹⁰⁸ Comm. on the Protection of the Rts. of All Migrant Workers, General Comment No. 1 on Migrant Domestic Workers, U.N. Doc. CMW/C/GC/1 (2011).

¹⁰⁹ Comm. on the Protection of the Rts. of All Migrant Workers, Concluding Observations on Nigeria in the Absence of a Report, U.N. Doc. CMW/C/NGA/CO/1, at para 21(b)(2017). These observation regarding Nigeria were in keeping with its General Comment No. 1 on Migrant Domestic Workers, particularly for migrant domestic workers and children at risk of being trafficked.

In its review of Madagascar, it recognized that limited economic opportunities compel "migrant women and girls to resort to informal activities that expose them to ill-treatment, particularly in traditionally female sectors, such as domestic work."¹¹⁰ It has noted that national legislation on migration in Madagascar contained no clear and specific provisions protecting women migrant workers from sex-based discrimination, and recommended that the state adopt and implement measures to guarantee the rights of all women migrant workers, including domestic workers, in line with its General Comment No. 1 on migrant domestic workers.

It has urged states to protect migrant workers' rights in the informal sector, particularly those employed in domestic service by, *inter alia*, ensuring that their working conditions are systematically monitored through labour inspections, taking into account General Comment No. 1 on migrant domestic workers.¹¹¹

The CMW has also recommended that Uganda develop targeted pre-departure and awareness-raising programmes, in consultation with non-governmental organizations, migrant domestic workers, and their families, and recognized recruitment agencies since "some private recruitment agencies facilitate trafficking, sexual exploitation and/or foreign employment in abusive working conditions, *inter alia*, in domestic work in the Middle East while charging excessive placement fees."¹¹² The CMW has further recommended that states implement sanctions for agencies and employment brokers that engage in unethical and illegal practices, and should adopt a code of conduct for the recruitment of migrant domestic workers.¹¹³

(e) The UN Convention on the Rights of the Child (CRC)

¹¹⁰ In 2018, the CMR expressed concern to the Republic of Madagascar about limited economic opportunities, "which compels migrant women and girls to resort to informal activities that expose them to ill-treatment, particularly in traditionally female sectors, such as domestic work." It noted that national legislation on migration contained no clear and specific provisions protecting women migrant workers from sex-based discrimination and urged the state to ratify a range of relevant conventions, including the ILO's C. 189. Comm. on the Protection of the Rts. of All Migrant Workers, U.N. Doc. CMW/C/MDG/1, at ¶¶ 11-12, 29-30 (2018).

¹¹¹ See, e.g., Concluding Observations of the Committee on the Initial Periodic Report of Rwanda, CMW/C/RWA/CO/1, at ¶ 30 (2012).

¹¹² Concluding observations on the initial report of Uganda, U.N. Doc. CMW/C/UGA/CO/1, at ¶¶ 41, 48-49 (2015).

¹¹³ Concluding Observations on the Initial Report of Uganda, CMW/C/UGA/CO/1, at ¶¶ 41, 48-49 (2015). In 2014 the CMW urged the Republic of Ghana to ratify the ILO's C. 189. Concluding observations on the initial report of Ghana, U.N. Doc. CMW/C/GHA/CO/1, at ¶¶ 10-11 (2014).

The CRC, passed in 1990, is critical to child domestic workers. It makes clear that a child is any person under the age of eighteen should be protected from work that interferes with a “child’s education or (is) harmful to the child’s health or physical mental, spiritual, moral or social development.”¹¹⁴

This Convention is particularly important for child domestic work, because it requires states to set a minimum age for domestic workers consistent with the provisions of ILO’s C. 138¹¹⁵ and C. 182¹¹⁶ and not lower than that established by national laws and regulations for workers generally.¹¹⁷ However, outside of hazardous work, these two instruments do not clearly address the dangers of child domestic work, and grant a degree of flexibility to states setting age limits in what it determines to be “light work.”

The UN Committee on the Rights of the Child has addressed the issues involved in child domestic work. For example, in consideration of Pakistan,¹¹⁸ it welcomed laws passed to prohibit the employment of children in certain hazardous occupations but expressed concern at the high number of children in hazardous and slavery-like conditions in domestic servitude and reports of abuse and torture, in some cases leading to deaths of girl domestic workers. It expressed concern at the insufficiency of mechanisms to protect child victims of forced labour, including in domestic work, and the low minimum age for hazardous work, of 14 years. It enjoined Pakistan to strengthen the labour inspectorate by equipping it with the support and expertise to effectively monitor child labour.

2.3 African Legal Norms

The approach taken by the African Union (AU), the African Commission on Human and People’s Rights (ACHPR), and the African Court on Human and Peoples Rights (AC), is crucial because its instruments are widely ratified and have regional credibility. Although it has not focused on domestic worker issues, it has addressed non-discrimination and equality issues in its jurisprudence.

This section is divided into three parts: the first outlines the human rights framework contained in the African Charter on Human and People’s Rights, the Maputo Protocol, and the African Charter on the Rights and Welfare of the Child. These instruments address rights closely related to

domestic work on the continent, including forced labour, migration, the right to social security, child labour, decent work in general, and the rights to equality and non-discrimination.¹¹⁹ They are also distinctive from their global counterparts in their commitment to the development of positive cultural norms and practices.

The second section looks at the cases being brought to the African Court, African Commission, and sub-regional courts, such as the Economic Community of West African States (ECOWAS), which address non-discrimination and gender equality. While there is not a large jurisprudence on the issue, it is an evolving jurisprudence. In the last few years, the African Court on Human Rights has demonstrated that it is willing to confront discriminatory gender norms entrenched in laws and practice, and that it will do so using both African regional instruments which impose obligations to eliminate practices or traditions that are harmful to women, as well as global human rights instruments such as CEDAW. This section also looks briefly at the communications of the African Committee of Experts on the Welfare of the Child, which has addressed domestic servitude in slavery-like circumstances and found this to be a violation of both labour rights, and also to constitute harmful traditional practices.

The third section looks at the soft law instruments of relevance to domestic work. There is a dearth of attention given to domestic work in the soft law norms of the African regional human rights system, especially when compared to international fora. None the less, the ACHPR has affirmed in its soft law instruments, its commitment to gender equality, non-discrimination and to inclusive economic development. This has created a positive enabling environment in which any future regulation specific to domestic work could be easily supported. There is also evidence that the African system recognizes the importance of an intersectional approach to the socio-economic rights of vulnerable groups, which include women, especially those working in the informal sector.

In the circumstances, the existing African human rights system has the conceptual space for a range of advocacy strategies to introduce and build momentum around domestic work, both as a critical women’s rights issue and as an emerging labour issue deserving of specific regulation, monitoring, and advocacy as the demand for domestic work grows.

¹¹⁴ CRC, *supra* note 31, at art. 32.

¹¹⁵ C. 138, *supra* note 58.

¹¹⁶ C. 182, *supra* note 59.

¹¹⁷ CRC, *supra* note 31, at art. 4(1).

¹¹⁸ Concluding Observations of the Committee on the Rights of the Child on Pakistan, CRC/C/PAK/5 at 18.

¹¹⁹ This overview is not exhaustive of all African human rights instruments and jurisprudence, but instead focuses only on those aspects of the legal rights framework that are especially relevant and useful in the context of protecting, respecting, and promoting the human and labour rights of domestic workers in Africa—the majority of whom are Black women.

2.3.1 Human Rights Instruments of the African Union

A range of AU treaties and conventions are relevant and applicable to the lives of domestic workers in Africa. These include treaties and conventions under the broad categories of women and gender issues; human rights; refugees and migration; and labour and development.

(a) African Charter on Human and People's Rights

The African Charter on Human and People's Rights¹²⁰ (the Banjul Charter) guarantees a range of rights based, *inter alia*, on the principle that "civil and political rights cannot be disassociated from economic, social, and cultural rights in their concept, as well as universality and that the satisfaction of economic, social, and cultural rights is a guarantee for the enjoyment of civil and political rights."¹²¹ It has been argued that the Banjul Charter is unique in its peremptory nature, creating immediate as opposed to progressive obligations.¹²²

Article 2 entitles every individual to the enjoyment of Banjul Charter rights "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."¹²³ Article 3 states that every individual shall be equal before the law, and every individual shall be entitled to equal protection of the law.¹²⁴ Together with article 19, these articles form the equality clauses of the Banjul Charter, which lay the foundation for interpreting all subsequent rights.¹²⁵

The Banjul Charter also prohibits exploitation of any kind and guarantees the right to freedom of association, movement and residence. Article 15 is critical for domestic work in Africa, since it guarantees "the right to work under equitable and satisfactory conditions... [and] equal pay for equal work."¹²⁶ Article 16 is relevant to occupational health and safety, since it guarantees "the right to enjoy the best

attainable state of physical and mental health."¹²⁷

Article 18 is relevant to the positive duty on states to eradicate discrimination against women: "The state shall ensure the elimination of every (sic) discrimination against women, and also ensure the protection of the rights of the woman and child, as stipulated in international declarations and conventions."¹²⁸

Uniquely, the Banjul Charter also sets out the duties of individual persons towards states, including article 27(1) and (2) which stipulate that an "individual shall have duties towards his family and society, the state and other legally recognized communities and the international community. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."¹²⁹

(b) The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Adopted on July 11, 2003, the Maputo Protocol constitutes a seminal instrument in the promotion of the rights of women in Africa, and supplements the rights and duties contained in the Banjul Charter.¹³⁰ In the absence of any African instrument that is specific to domestic work, the Maputo Protocol is perhaps the most important for the gendered workforce of domestic workers. It commits member states to take positive steps for the elimination of discrimination against women, enshrines women's right to dignity, the right to life and the integrity and security of the person.¹³¹ Significantly, states are enjoined to "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public."¹³² states are also required to proactively identify the causes and consequences of such violence.¹³³ states must also establish mechanisms for the rehabilitation and reparation of women victims,¹³⁴

¹²⁷ *Id.* at art. 16.

¹²⁸ *Id.* at art. 18.

¹²⁹ *Id.* at art. 27(1)-(2).

¹³⁰ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted July 11, 2003 (entered into force Nov. 25, 2005) [hereinafter Maputo Protocol], <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> [<https://perma.cc/F9KJ-NHU8>]. Ratified by 42 African states.

¹³¹ *Id.* at art. 2.

¹³² *Id.* at art. 4(2)(a).

¹³³ *Id.* at art. 4(2)(c).

¹³⁴ *Id.* at art. 4(2)(f).

¹²⁰ African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217 [hereinafter Banjul Charter]. Ratified by 54 African states.

¹²¹ *Id.* at preamble.

¹²² Yolanda Tarisayi Chekera-Radu, *The Relevance of Substantive Equality in African Jurisprudence to Women's Land and Property Rights* (2017) 1 AFR. HUM. RTS. Y.B. 41-59 (2017).

¹²³ Banjul Charter, *supra* note 120, at art. 2.

¹²⁴ *Id.* at art. 3.

¹²⁵ *Id.* at art. 19.

¹²⁶ *Id.* at art. 15.

and prevent and condemn trafficking in women,¹³⁵ while protecting those women who are most at risk. States must also ensure that women enjoy equal access to refugee status determination procedures.¹³⁶

It protects women's rights to equality before the law and the equal protection and benefit of the law, which includes ensuring that women can access courts and legal services, including legal aid,¹³⁷ and it supports local, regional, and international initiatives directed at such access for women.¹³⁸ It specifies that women must be equal partners with men at all levels of development and implementation of state policies and development standards programs.¹³⁹ This would include the development of any domestic labour standards.

Article 13 enshrines women's social and economic welfare rights, and is especially relevant for domestic work, since it requires states to "adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities."¹⁴⁰ It then elaborates on, *inter alia*, states' duties to promote the right to equal remuneration for jobs of equal value,¹⁴¹ combat and punish sexual harassment in the workplace,¹⁴² protect women from exploitation by their employers violating and exploiting their fundamental rights,¹⁴³ create conditions within the informal sector to promote and support the occupations and economic activities of women,¹⁴⁴ establish a system of protection and social insurance for women working in the informal sector,¹⁴⁵ guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors,¹⁴⁶ and recognize that both parents bear the primary responsibility for the upbringing and development of children.¹⁴⁷

Article 24 sets out special protection for women in distress, which includes an undertaking by states to ensure the protection of poor women and women heads of families, in-

cluding women from marginalized population groups, and provide an environment suitable to their condition and their special physical, economic and social needs.¹⁴⁸

There are also two general comments that speak directly to the rights of women. General Comments on Article 14 (1) (d) and (e)¹⁴⁹ recognizes that there are multiple forms of discrimination based on various grounds, such as race, sex, sexuality, sexual orientation, age, pregnancy, marital status, HIV status, social and economic status, disability, harmful customary practices and/or religion.¹⁵⁰ Under paragraph 7, states are enjoined not to read this general comment in isolation from other provisions of the Maputo Protocol, on the understanding that women's human rights issues intersect.¹⁵¹ General Comment No. 2¹⁵² recognizes that women face specific obstacles in accessing rights to sexual and reproductive health, includes economic barriers.¹⁵³ This recognition is appropriate, since it is self-evident that economic barriers will impact disproportionately on and exacerbate precarious socio-economic status.¹⁵⁴

(c) African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) entered into force in 1999¹⁵⁵ and is the only regional human rights system to have a dedicated instrument dealing with children's rights. As such, it is an important source of norms relating to child domestic work. It defines a child as any person under the age of eighteen.¹⁵⁶ It recognizes that "the child occupies a unique and privi-

¹⁴⁸ *Id.* at art. 24.

¹⁴⁹ Afr. Comm. on Hum. and Peoples' Rts., GENERAL COMMENTS ON ARTICLE 14 (1) (D) AND (E) OF THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (2012), https://www.achpr.org/public/Document/file/English/achpr_instr_general_comments_art_14_rights_women_2012_eng.pdf.

¹⁵⁰ *Id.* at ¶ 4.

¹⁵¹ *Id.* at ¶ 7. Also, paragraph 47 says that states also should create the legal, social and economic conditions that enable women to exercise their sexual and reproductive health rights and should take all appropriate measures to eliminate women's economic barriers in accessing health services.

¹⁵² Afr. Comm. on Hum. and Peoples' Rts., GENERAL COMMENT NO. 2 ON ARTICLE 14.1 (A), (B), (C) AND (F) AND ARTICLE 14. 2 (A) AND (C) OF THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (2014), <https://www.achpr.org/legalinstruments/detail?id=13>.

¹⁵³ *Id.* at ¶ 61.

¹⁵⁴ *Id.* at ¶ 38.

¹⁵⁵ African Charter on the Rights and Welfare of the Child, entered into force Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49 (1990), 1577 U.N.T.S. 3 [hereinafter ACRWC].

¹⁵⁶ *Id.* at art. 2.

¹³⁵ *Id.* at art. 4(2)(g).

¹³⁶ *Id.* at art. 4(2)(k).

¹³⁷ *Id.* at art. 8(a).

¹³⁸ *Id.* at art. 8(b).

¹³⁹ *Id.* at art. 91(c) and 9.

¹⁴⁰ *Id.* at art. 13.

¹⁴¹ *Id.* at art. 13(b).

¹⁴² *Id.* at art. 13(c).

¹⁴³ *Id.* at art. 13(d).

¹⁴⁴ *Id.* at art. 13(e).

¹⁴⁵ *Id.* at art. 13(f).

¹⁴⁶ *Id.* at art. 13(g).

¹⁴⁷ *Id.* at art. 13(l).

leged position in African society," and "due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development." It guarantees the right to nondiscrimination on the basis of the child's, parent's, or legal guardian's "race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status"¹⁵⁷ and asserts that in all actions concerning the child, "the best interests shall be the primary consideration."¹⁵⁸

Article 15 sets out that "every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development."¹⁵⁹ Article 16(2) makes clear that this charter covers both the formal and informal sectors, and having regard to ILO instruments, mandates that state parties provide legislation on minimum age for admission to any employment; regulation of hours and conditions of employment; provide appropriate penalties and sanctions and "promote the dissemination of information on the hazard[s] of child labour to all sectors of the community."¹⁶⁰

Under the ACRWC, every child has the right to an education, and to be free from all forms of torture, inhuman or degrading treatment, "especially physical or mental injury or abuse, neglect or maltreatment, including sexual abuse, while in the care of a parent, legal guardian or school."¹⁶¹ The ACRWC also requires protective measures, including the establishment of "monitoring units" to prevent and address minor child abuse and neglect.

Article 21 significantly requires states to take all appropriate measures to eliminate harmful, social and cultural practices that prejudice the health or life of the child, and "those customs and practices discriminatory to the child on the grounds of sex or other status."¹⁶²

(d) Interpreting Non-Discrimination and Gender: African Human Rights Jurisprudence

African Court on Human and Peoples' Rights

On June 10, 1998, the ACHPR adopted the Protocol to the

¹⁵⁷ *Id.* at art. 3.

¹⁵⁸ *Id.* at art. 4.

¹⁵⁹ *Id.* at art. 15.

¹⁶⁰ *Id.* at art. 16(2).

¹⁶¹ *Id.* art. 16. See also *id.* art. 11.

¹⁶² *Id.* at art. 21(1)(b). Article 21(2) specifies the minimum age of marriage to be eighteen years and that registration of all marriages in an official registry compulsory. *Id.* at art. 21(2).

African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.¹⁶³ A decade later, in 2008, this court was merged with the Court of Justice of the African Union, to become a single African Court on Human and Peoples' Rights (AC).¹⁶⁴ The ACHPR is responsible for the promotion and protection of the rights contained in the Banjul Charter¹⁶⁵ and its protocols. It complements the mandate of the ACHPR.¹⁶⁶

It currently has no commentaries, advisory opinions, or contentious cases dealing with domestic work, but has dealt with the right to work¹⁶⁷ and other relevant rights in the Banjul Charter to a limited extent, including the freedom of association,¹⁶⁸ equality before the law,¹⁶⁹ equality

¹⁶³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

¹⁶⁴ Protocol on the Statute of the African Court of Justice and Human Rights, adopted July 1, 2008, 48 I.L.M. 317.

¹⁶⁵ *Id.* at preamble.

¹⁶⁶ *Id.* at art. 2. To date, 33 states have ratified the Protocol: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Democratic Republic of Congo, Gabon, The Gambia, Ghana, Guinea-Bissau, Kenya, Libya, Lesotho, Madagascar, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. While 8 of these states have deposited the declaration recognizing the competence of the Court to receive cases directly from NGOs and individuals. The eight states are: Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger and Tunisia.

¹⁶⁷ *Umuhoza v. Rwanda*, No. 003/2014, 2 Afr. Ct. L. Rep. 165, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Nov. 24, 2017), <https://africanlii.org/afu/judgment/african-court/2017/21>; *Kouma v. Mali*, No. 040/2016, 2 Afr. Ct. L. Rep. 237, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Mar. 21, 2018), <https://africanlii.org/afu/judgment/african-court/2018/3>; *Anudo v. Tanzania*, No. 012/2015, 2 Afr. Ct. L. Rep. 248, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Mar. 22, 2018), <https://www.african-court.org/en/images/Cases/Judgment/-012%20-%202015%20-%20Anudo%20Vs.%20Tanzania%20-%20Judgment%2022%20March%202018%20-%20Optimized.pdf>; *Omary v. Tanzania*, No. 1 001/2012, 1 Afr. Ct. L. Rep. 358, Ruling on Admissibility, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Mar. 28, 2014), <https://www.african-court.org/cpmt/details-case/0012012>; *Urban Mkandawire v. Malawi*, No. 002/011, 1 Afr. Ct. L. Rep. 283, Ruling on Admissibility, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (June 21, 2013), <https://africanlii.org/afu/judgment/african-court/2013/1>; *Umuhoza v. Rwanda*, No. 003/014, 1 Afr. Ct. L. Rep. 562, Order on Procedure, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Mar. 18, 2016) <https://www.african-court.org/cpmt/details-case/0032014>.

¹⁶⁸ *Tanganyika Law Society v. Tanzania*, No. 009/011, 1 Afr. Ct. L. Rep. 34, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (June 14, 2013), <https://www.african-court.org/cpmt/details-case/0092011>.

¹⁶⁹ *Zongo v. Burkina Faso*, No. 013/2011, 1 Afr. Ct. L. Rep. 219, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (2014), <https://globalfreedomofexpression.columbia.edu/wp-content/>

ty and non-discrimination.¹⁷⁰ While the AC has been approached with cases involving violations of the Maputo Protocol, only one of these cases has been decided on its merits.¹⁷¹

In this 2018 case, the AC declared that the Family Code adopted by Mali which provided a minimum age of marriage for girls as 16, and boys at 18,¹⁷² to violate 6(b) of the Maputo Protocol and the African Charter on the Rights and Welfare of the Child, which require a minimum age of 18.¹⁷³ Under the Mali law, parents could get a special exemption to consent to their child marrying at 15. The second issue was that the law allowed religious ministers to perform marriages but provided no sanction for ministers who failed to verify consent. The government of Mali argued that these age limits reflect the social, cultural and religious realities in Mali, and it would serve no purpose, to pass laws that could not be implemented. Further, they argued that by the age of 15, biological and psychological "conditions of marriage are in place."¹⁷⁴

The AC disagreed and found that Mali had violated obligations under article 6(b) of the Maputo Protocol, and articles 2, 4(1) and 21 of the Children's Charter which require the minimum age of marriage be 18.¹⁷⁵ The AC found that the manner in which the marriage is celebrated, which does not put in place sanctions for religious ministers who fail to verify consent, poses serious risks that could lead to forced marriage and perpetuates traditional practices that violate international norms in both CEDAW and the Maputo Protocol on consent.¹⁷⁶ The AC went further to find that

[uploads/2015/02/Nobert-Zongo-Judgment-English.pdf](#); *Kemboge v. Tanzania*, No. 002/2016, 2 AfCLR 369, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (May 11, 2018), <https://africanlii.org/afu/judgment/african-court/2018/10>; *Evarist v. Tanzania*, No. 027/2015, 2 AfCLR 402, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Sept. 21, 2018), <https://africanlii.org/afu/judgment/african-court/2018/12>.

¹⁷⁰ Afr. Comm. on Hum. and Peoples' Rts. v. Kenya, No. 006/2012, 2 AfCLR 9, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], (May 26, 2017), <https://africanlii.org/afu/judgment/african-court/2017/28>.

¹⁷¹ *Association pour le progrès et la défense des droits des femmes Maliennes (APDF) v. Mali*, No. 046/2016, Judgment on the Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], (May 11, 2016) [hereinafter APDF case], <https://www.african-court.org/cpmt/details-case/0462016>.

¹⁷² CODE DES PERSONNES ET DE LA FAMILLE [FAMILY CODE] art. 281 (Mali), <https://sgg-mali.ml/codes/mali-code-2011-personnes-famille-2.pdf>.

¹⁷³ APDF case, *supra* note 174.

¹⁷⁴ *Id.* at ¶ 66.

¹⁷⁵ *Id.* at ¶ 78.

¹⁷⁶ *Id.* at ¶ 95.

that this code section violates obligations to *eliminate practices or traditions harmful towards women and children* under article 2(2) of the Maputo Protocol; article 5(a) of CEDAW and article 21(1) of the Children's Charter and ordered that the legislation be amended so that Mali complies with its international law obligations.¹⁷⁷ It also ordered Mali to comply with its obligation to "promote and ensure through teaching, education and publication, the respect for the rights and freedom in the Charter."¹⁷⁸

This case, which deals with minimum age of marriage and the absence of effective sanction in cases where the marriage officer does not verify consent, is deeply relevant to those domestic workers who are family members of their employers and are frequently legal minors. Indeed, in many jurisdictions, domestic work is understood to constitute light work, and permitted for minors well below the age of 18. The Mali child marriage case is further analogous to domestic work because many jurisdictions exempt employers of domestic workers who are family members from the application of labour law, presumably in recognition of the widespread practice of *familiage*, whereby poorer relatives from rural areas are sent by their families to work in the homes of wealthier family members. The blanket exemption of these relationships from labour law protection, and any related sanction, expose these domestic workers to an increased risk of domestic servitude.

Accordingly, the willingness of the Court to directly confront legally discriminatory laws that are well entrenched in social (and religious) norms and practices and its insistence in giving significant weight to its obligations under both CEDAW and the Maputo Protocol to *eliminate practices or traditions harmful towards women and children*, could prove critical to cases involving domestic workers who are minors and those who are employed by family members.

African Commission

The African Commission on Human and People's Rights (the ACHPR) is an important source of jurisprudence on human rights, including the right to work under equitable and satisfactory conditions, to receive equal pay for equal work,¹⁷⁹ and the rights of women in Africa.¹⁸⁰ While the ACHPR has considered the right to work in several cases, it has not dealt with the rights of specific groups or sectors of workers, including domestic work.

¹⁷⁷ *Id.* at ¶ 125.

¹⁷⁸ *Id.* at ¶ 131.

¹⁷⁹ Banjul Charter, *supra* note 132, at art. 15.

¹⁸⁰ Maputo Protocol, *supra* note 131.

The ACHPR has addressed non-discrimination in a limited number of cases.¹⁸¹ The jurisprudence has been described as “favoring a formal approach to equality,” which understands “equality at its most fundamental level is a principle under which each individual is subject to the same laws, with no individual or groups having special legal privileges.”¹⁸² This jurisprudence is of relevance to domestic worker litigation since comparative national (South Africa) and regional (Europe) litigation on the exclusion of domestic workers from social protection laws have been decided as cases of indirect rather than direct discrimination, since they do not directly target black women, but instead exclude a category—domestic workers—who are predominantly black women. Consequently, an adjudicating body would need go beyond a purely direct or “formal approach” to non-discrimination. However, there is evidence that in at least one case, the Commission has held that “positive discrimination or affirmative action” is not discriminatory when employed for the purposes of helping to redress imbalance.¹⁸³

African Committee of Experts on the Rights and Welfare of the Child

While not directly addressing gender-discrimination, but of critical importance to child domestic work, the African Committee of Experts on the Rights and Welfare of the Child (the Committee), has addressed issues of child labour in its communications and concluding comments.

In a communication against Mauritania by an NGO, the Committee found that two boys had been held as slaves by a private family in Mauritania, and the sentence meted out to them was inadequate.¹⁸⁴ In this case, the boys were required to look after the family's herd of camels, sleep and eat in a make-shift camp, and forced to undertake domes-

tic chores, including cooking, cleaning, washing clothes and buying goods from the market. These boys worked seven days a week without pay, with no time off, and regularly faced corporal punishment. They were referred to as “slaves” and did not attend school. The Committee held that their rights to equality, education, leisure, recreation and cultural activities, protection against child abuse and torture, and protection against child labour, amongst other rights, had been violated. They instructed Mauritania to ensure that the family receive sentences commensurate to the crimes, and that Mauritania make the elimination of slavery and slavery like practices one of its priorities in issuing policies.

Another case was brought by the Centre for Human Rights at the University of Pretoria in South Africa and *Rencontre Africain pour la Défense des Droits de l'Homme* (RAD-DHO) against Senegal. This case dealt with the plight of as many as 100,000 children who were sent to study in private Quranic schools in Senegal, which provided free education. To fund this “free” education, the children were forced by their teachers to beg in the streets. Despite the criminalization of forced begging in Senegal, the law was not enforced, and the children spent more time begging than learning.¹⁸⁵

The Committee found that Senegal violated article 4 on the best interests of the child; article 5 on the right to survival and development; article 11 on the right to education; article 14 on the right to health; article 15 on the freedom from child labour; article 29 on protection from harmful practices; and article 21 on freedom from sale, trafficking and abduction.¹⁸⁶

These communications together are apposite to domestic workers who are minors, and frequently considered to be engaged in “light work” and excluded from minimum age prescriptions. Further, even in cases where domestic workers are adequately included in legal protection, there is a widespread absence of enforcement of laws in the sector. Through these communications, the Committee shows its willingness to recognize the often-blurred inter-connection between domestic work and family relationships and the ways in which exemptions of such relationships from labour protection and enforcement can lead to exploitation of children and domestic servitude and slavery. The RADDHO case shows that the Committee takes seriously the state's obligation to protect children from harm-

¹⁸¹ Egyptian Initiative for Personal Rts. and Interrights v. Egypt, Communication 334/06, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Dec. 16, 2011), <https://www.achpr.org/sessions/descions?id=201>; see also *In Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Ethiopia*, Communication 341/2007, Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Oct. 14, 2021), <https://www.achpr.org/sessions/descions?id=297>; Chekera-Radu *supra* note 122.

¹⁸² Egyptian Initiative for Personal Rts. and Interrights v. Egypt, Communication 334/06, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Dec. 16, 2011), <https://www.achpr.org/sessions/descions?id=201>.

¹⁸³ Chekera-Radu *supra* note 122 (citing Ctr. for Minority Rts. Dev. v. Kenya, Communication 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 196 (Feb. 4, 2010), https://www.achpr.org/public/Document/file/English/achpr46_276_03_eng.pdf).

¹⁸⁴ Minority Rts. Group Int'l v. Mauritania, Communication 007/Com/003/2015, African Committee of Experts on the Rights and Welfare of the Child, (Dec. 15, 2017), <https://www.acerwc.africa/en/member-state/ratifications/92/mauritania>.

¹⁸⁵ Centre for Human Rights v. Senegal, Communication 003/Com/001/2012, African Committee of Experts on the Rights and Welfare of the Child (July 27, 2012), <https://www.acerwc.africa/en/member-state/ratifications/118/senegal>.

¹⁸⁶ *Id.* at paras. 38, 50, 56, 61, 71, 80.

ful practices and is willing to make a finding that criminalization of a practice (in this instance, begging) without corresponding adequate enforcement violates the African Charter on the Rights and Welfare of the Child.

Economic Community of West African States (ECOWAS) Community Court of Justice

The Economic Community of West African states currently comprises 15 countries in West Africa.¹⁸⁷ The Community Court of Justice has jurisdiction over the interpretation and application of the ECOWAS treaty,¹⁸⁸ and under its supplementary protocols,¹⁸⁹ allows individuals to bring human rights related cases. Significantly, the Court does not require applicants to exhaust domestic remedies to bring suit, rendering justice accessible.¹⁹⁰

In at least one case, the ECOWAS Community Court of Justice has addressed domestic slavery in Niger.¹⁹¹ In this case, a young girl was held in slavery for 9 years, as a concubine/servant, and had been repeatedly raped and forced into hard labour without pay or vacation. The Court found that although Niger had a law criminalizing slavery, it was not enforced, and Niger was responsible for its failure to protect victims from slavery, and from discharging its duty to protect. The complainant also argued discrimination on the grounds of gender and social origin, since slavery is gendered and only affects girls and women, but the Court held that the latter violation was attributable to individuals and not the state. While this approach appears to fall short of requiring states to “protect” its citizens from rights violations by non-state actors, in the context of domestic worker regulation there is frequently state action in the form of exclusion from labour laws.

Soft Law Instruments and Intersectional Approach

Specific consideration of domestic work by the African Union and the ACHPR are sparse. There is, however, one 2015 document from the Specialized Technical Committee on Social Development, Labour and Employment, entitled *Special Initiative on Domestic Workers*, which recognizes “domestic work as among the most vulnerable

forms of labour in Africa” and acknowledges that part of the vulnerability of the sector is its exclusion from labour laws and protections enjoyed by other workers.¹⁹² Although this document was submitted for consideration by the AU Specialized Technical Committee on Social Development in April 2015, it does not appear to have been adopted.

Similarly, in November 2021, the NGO Forum of the African Commission passed a Special Resolution that addressed discrimination and domestic work in Africa. The Resolution recognized that “domestic workers experience intersectional discrimination based on race, class, nationality and the gendered historical legacies of colonialism in Africa.”¹⁹³ It recommended that “all necessary steps” be taken to “remove references to servants and other derogatory language against domestic workers in laws, policies and regulations,” and that the African Commission embark on a study for the purpose of developing a model law that would recognize and regulate the rights of domestic workers in the African context.¹⁹⁴ It is not clear if that resolution was ever passed by the African Commission.

However, at both the African Union and the ACHPR level, there is a broad framework of soft law instruments recognizing multiple forms of discrimination and, to some extent, intersectional discrimination. For example, the Solemn Declaration on Gender Equality in Africa by AU member states recognises that while women’s participation in the labour force has increased significantly over the past two decades, wide disparities persist between men and women in terms of access to employment and remuneration.¹⁹⁵ Similarly, the AU Strategy on Gender Equality and Women’s Empowerment 2018-2028¹⁹⁶ recognizes that

¹⁹² Specialized Tech. Comm. on Soc. Dev., Lab. and Emp., Afr. Union, Special Initiative on Domestic Workers, Doc. STC-SDLE-1 (2015), https://au.int/sites/default/files/newsevents/workingdocuments/28072-wd-special_initiative_on_domestic_workers_-_1st_sdle-2015_-_rev.1_-_tc-english.pdf [<https://perma.cc/3U36-NL8F>].

¹⁹³ NGO Forums, Resolution on Domestic Work in South Africa, Doc. TRES/003/11/21, at 6 (Nov. 12, 2021), <https://www.acdhrs.org/wp-content/uploads/2021/11/thematic-Resolutions.pdf>.

¹⁹⁴ *Id.*

¹⁹⁵ Solemn Declaration on Gender Equality in Africa, African Union, at preamble (2004), <https://au.int/en/documents/20200708/solemn-declaration-gender-equality-africa>.

¹⁹⁶ African Union, AU STRATEGY FOR GENDER EQUALITY & WOMEN’S EMPOWERMENT: 2018-2028 (2019) [hereinafter AU Strategy], <https://au.int/en/documents/20190320/au-strategy-gender-equality-womens-empowerment-2018-2028>. See also African Union, AGENDA 2063: THE AFRICA WE WANT (2013) (setting out seven aspirations for Africa including “an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children”), https://au.int/en/Agenda2063/popular_version; African Union, Social Protection Plan for the Informal Economy and Rural Workers 2011-2015 (2011), <https://au.int/sites/default/files/new->

¹⁸⁷ Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

¹⁸⁸ About Us, ECOWAS, <https://ecowas.int/institutions/community-court-of-justice/> [<https://perma.cc/KP6N-E2YK>] (last visited Nov. 9, 2022).

¹⁸⁹ *Id.*

¹⁹⁰ Saidykhon v. The Gambia, Case No. ECW/CCJ/APP/11/07, Ruling, ¶ 43 (June 30, 2009).

¹⁹¹ Karaou v. Niger, Case No. ECW/CCJ/APP/08/08, Judgment, (Oct. 27, 2008), <https://www.refworld.org/cases/ECOWAS-CCJ/496b41fa2.html>.

migrant women must be one of its target groups,¹⁹⁷ noting that trafficking in women and girls under the guise of domestic work is on the rise.¹⁹⁸ It recognizes the concept of gendered economies, and that “(w)omen in Africa remain the majority of the poor, the dispossessed, the landless, the unemployed, those working in the informal sector, and those shouldering the burden of care, especially where war, hunger and disease have weakened state capacity and responses.”¹⁹⁹

Under the Tunis Reporting Guidelines, states must provide information on legislative and practical steps taken to ensure the enjoyment of the rights on a non-discriminatory basis, including by members of vulnerable or marginalized groups, and particularly for gender equality.²⁰⁰ The Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights guides states in reporting on each of the socio-economic rights in the Banjul Charter.²⁰¹ It also sets out a comprehensive definition of “vulnerable and disadvantaged groups” that is applicable to domestic workers²⁰² and must be considered in the context of each socio-economic right individually. It is of particular importance that this guideline specifically defines “intersectional or multiple discrimination,” which occurs when “a person is subjected to discrimination on more than one ground at the same time, e.g., race and gender,”²⁰³ making these guidelines potentially the only ACHPR instrument that expressly recognizes intersectionality in its text.

[sevents/workingdocuments/26937-wd-sa4543_spirework_final_english.reviewed.clean_doc.](https://www.achpr.org/public/Document/file/English/State%20Reporting%20Guidelines%20on%20ECOSOC%20Rights%20(2012).pdf)

¹⁹⁷ Among youth, women living in rural areas, women with disabilities, and men and boys.

¹⁹⁸ AU Strategy, *supra* note 201, at 16.

¹⁹⁹ *Id.* at 27.

²⁰⁰ Afr. Comm’n H.P.R., State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (Tunis Reporting Guidelines), ¶ 6 (2011) [hereinafter Tunis Reporting Guidelines], [https://www.achpr.org/public/Document/file/English/State%20Reporting%20Guidelines%20on%20ECOSOC%20Rights%20\(2012\).pdf](https://www.achpr.org/public/Document/file/English/State%20Reporting%20Guidelines%20on%20ECOSOC%20Rights%20(2012).pdf).

²⁰¹ African Comm’n on Human & Peoples’ Rights [ACHPR], Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (Oct. 24, 2011) (including the right to work at ¶¶ 56–59), <https://www.escr-net.org/resources/principles-and-guidelines-implementation-economic-social-cultural-rights-african-charter>.

²⁰² *Id.* at ¶ 1(e) (“Vulnerable and disadvantaged groups are people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include, but are not limited to, women, linguistic, racial, religious minorities, children (particularly orphans, young girls, children of low-income groups...)”).

²⁰³ *Id.* at ¶ 1(l).

The ACHPR also adopts resolutions to address diverse human rights issues. While there is no resolution dedicated to domestic work to date, there are several recent resolutions that are relevant to domestic workers in Africa, since they address issues of gender discrimination, workplace rights and disadvantage. The 2004 Resolution on Economic, Social and Cultural Rights in Africa²⁰⁴ adopted the Pretoria Declaration,²⁰⁵ making it “an authoritative value in the interpretation of economic, social and cultural rights.”²⁰⁶ It expressly includes workers in informal employment under the right to work and calls on state parties to eliminate all forms of discrimination, including all forms of discrimination against women,²⁰⁷ by providing equitable and satisfactory work conditions for women engaged in household labour, a minimum living wage for labour, equal remuneration for work of equal value, equitable and satisfactory conditions of work of women engaged in household labour, and the prohibition of forced labour and economic exploitation, among others.²⁰⁸



Photo © Mary Moerame / Solidarity Center

²⁰⁴ Afr. Comm’n H.P.R., Res. on Econ., Soc. and Cultural Rts. in Afr., Doc. ACHPR/Res.73(XXXVI)04 (Dec. 7, 2004), <https://www.achpr.org/sessions/resolutions?id=78>.

²⁰⁵ Afr. Comm’n H.P.R., Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) [hereinafter Pretoria Declaration], https://www.achpr.org/public/Document/file/English/achpr_instr_dec-la_pretoria_esc_rights_2004_eng.pdf.

²⁰⁶ Afr. Comm’n H.P.R., Impact of the African Charter on domestic human rights in Africa, <https://www.achpr.org/iotacodhria> (last visited Nov. 9, 2022).

²⁰⁷ Pretoria Declaration, *supra* note 211, at art. 4.

²⁰⁸ Pretoria Declaration, *supra* note 211, at 6. See also Afr. Comm’n H.P.R., Res. on Mixed Migratory Flows, Challenges of Protecting Migrants and the Prohibition of Trafficking in Pers. and all forms of Violence in North and Sub-Saharan Afr., Doc. ACHPR/Res.389(LXII) (May 9, 2018), <https://www.achpr.org/sessions/resolutions?id=407>.

3. Nine Case Studies

The second part of this paper maps the regulation of domestic work in nine selected countries in Africa namely, South Africa, Mauritius, Ghana, Kenya, Nigeria, Uganda, Ethiopia, Lesotho and Malawi. As highlighted above, only five countries in Africa have ratified the International Labour Organisation Convention 189 (C. 189). However, all the countries have ratified core international human rights convention, as well as the African Charter. The case studies are approached by looking at the following set of issues:

1. The factual and historic context for domestic work in the particular country: Since domestic workers tend to be female, migrant or child workers, from historically disadvantaged communities, the analyses will make clear who the population of domestic workers are in a particular country context.
2. All the countries in this study in Africa have in place constitutional frameworks entrenching rights to non-discrimination and equality. Increasingly international conventions, even when unratified, as well as jurisprudence are being used as an interpretive tool by domestic courts and are becoming a significant method of effective domestication of international norms. This is of critical importance because it is a means through which C. 189, itself underpinned by a commitment to treating domestic workers no worse than other workers, and/or African/United Nations human rights norms, can be brought into play in adjudication of domestic worker issues in national courts.
3. Regulation of domestic work can be through a specific regulation on domestic work, a general labour code, a separate regulatory instrument or a mixture of both.²⁰⁹ The approach adopted to the regulation of employment between a domestic worker and their employer is critical to balancing the inherently unequal relationship between the employer and the employee. Article 18 of C. 189 calls upon member states to extend or adapt existing measures to cover domestic workers or develop *specific measures* for them, as appropriate. The ILO has recognized that *the special conditions under which domestic work is carried out* make it desirable to supplement the general standards with standards specific to domestic workers, so as

to enable them to enjoy their rights fully.²¹⁰

In mapping out the legal regulation of domestic work in a particular country, a key assumption adopted in this review is that unless domestic workers are expressly excluded from the scope of labour legislation, they are included within it. However, it is crucial to note that the inclusion of domestic workers in the scope of labour law does not necessarily indicate effective or meaningful legal coverage that other workers enjoy. A country may recognize domestic workers under a general labour law, but then exclude them from specific provisions on working time, wages, social protection or any other regulation. Alternatively, the category of domestic worker might not be mentioned at all in labour laws, but the absence of an explicit exclusion is interpreted to connote inclusion within these laws. Moreover, notwithstanding inclusion in general labour laws, such laws may fail to address the particularities of the sector, such as accommodation standards, privacy or freedom of movement in the context of live-in domestic workers.

This analysis identifies three predominant approaches to the regulation of domestic workers: (a) Exclusion from labour laws or exclusion of the domestic work sector from particular labour provisions; (b) inclusion of domestic workers in general labour law, but structural exclusion from particular provisions, which only apply to larger workplaces, and (c) specific regulation of the sector, alongside inclusion in general labour laws.

In our assessment of domestic legal systems, we will use C. 189 as a normative framework to consider the gaps addressing domestic worker regulations, including the following issues: minimum wage, contractual provisions, sexual harassment, collective labour rights, social protection (e.g., maternity rights, workers compensation and pension) and provisions with respect to particularly vulnerable workers, such as child workers and live-in workers, including live-in family workers. However, not all case studies will address all these issues.

(a) Complete Exclusion of the Domestic Worker as a Category from Labour Law or from Particular Provisions of Labour Law: Ethiopia, Lesotho and Uganda

This category of case studies, includes the complete explicit exclusion of “domestic workers” as a category from

²⁰⁹ ILO, DECENT WORK FOR DOMESTIC WORKERS: FOURTH ITEM ON THE AGENDA (2010), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_104700.pdf.

²¹⁰ C. 189, *supra* note 7, at preamble.

labour law protection as in the case of Ethiopia, or partial explicit exclusion of the category of “domestic worker” from particular provisions in the labour law, as seen in Lesotho and Uganda. In the absence of any rational reason for this exclusion, it would, depending on the particular constitutional jurisprudence, arguably amount to prima facie violations of equal protection guarantees.

3.1 Ethiopia

3.1.1 Background

With more than 117 million people, Ethiopia is the second most populous nation in Africa and is a multilingual nation with over 80 ethnolinguistic groups.²¹¹ It is also one of the poorest countries in the region, with a per capita gross national income of \$960.²¹² Ethiopia is the only African country never to have been colonized by a European power.

Domestic work there is rooted in slavery, which was only abolished in the early part of the 20th century. Female slaves, usually worked in the home, while male slaves worked in the fields.²¹³ According to Mussie Mezgebo Gebremedhin, slave women served households “by replacing the traditional responsibility of their master women.”²¹⁴ With the liberalization of the global community and the expansion of equality rights for women, Gebremedhin writes that post-slavery, “a new class based dimension of domestic work occurred, which placed the weight of domestic work on “women of low economic status, particularly women in the global South.”²¹⁵ He concludes that “being a wife, slave and poor” are the factors that frame the feminization of domestic work in Ethiopia.²¹⁶

Estimates from the Ministry of Labour and Social Affairs (MOLSA) and LABORSTA of ILO show 1.5% of the total women in the country are currently working as domestic workers, with little access to legal protection, since they work within families and are vulnerable to “private” abuse

²¹¹ Population in millions according to 2007 Census. The four largest being the Oromo, Amhara, Somali and Tigrayans.

²¹² The World Bank in Ethiopia, WORLD BANK, <https://www.worldbank.org/en/country/ethiopia/overview> [<https://perma.cc/FZ4V-JHA5>] (last visited Nov. 9, 2022).

²¹³ Kidist Mulugeta et al., *Vulnerability, Legal Protection, and Work Conditions of Female Domestic Workers in Addis Ababa, Ethiopia* 20 ADVANCES SOC. WORK 532 (2020). See also Emebet Kebede, International Labour Office, ETHIOPIA: AN ASSESSMENT OF THE INTERNATIONAL LABOUR MIGRATION SITUATION: THE CASE OF FEMALE LABOUR MIGRANTS (2002), https://www.ilo.org/employment/Whatwedo/Publications/WCMS_117931/lang-en/index.htm.

²¹⁴ Mussie Mezgebo Gebremedhin, *Procrastination in Recognizing the Rights of Domestic Workers in Ethiopia*, 10 MIZAN L. REV. 38 (2016).

²¹⁵ *Id.* at 45.

²¹⁶ *Id.* at 45.

and exploitation.²¹⁷ Poverty explains why domestic workers, who usually have a basic primary education, are mostly female and migrate from rural to urban areas or to the middle east in search of domestic work.²¹⁸

3.1.2 International Law

Ethiopia has ratified the core international human rights conventions, including the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the Convention on all forms of Discrimination against Women, the International Convention on the Elimination of all Forms of Racial Discrimination and the International Convention on Economic, Social and Cultural Rights, as well as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. Ethiopia has also ratified the core ILO labour conventions, although it has not ratified the Domestic Worker Convention. Ethiopia has ratified the African Charter on Human and Peoples’ Rights, as well as the Maputo Protocol.

The exclusion of domestic workers from labour protections has come to the attention of UN treaty bodies. In its 2019 review of Ethiopia, the CEDAW Committee specifically recommended that Ethiopia ensure that domestic workers are guaranteed the same level of protection and benefits as other workers and that they are protected from abusive and exploitative working conditions.²¹⁹

3.1.3 Constitution of Ethiopia²²⁰

Ethiopia’s Constitution—the fourth written constitution in modern Ethiopian history—establishes a federal form of government with regional states drawn primarily along ethnic lines.²²¹ Some authors have described its Constitution as committed to the “self-determination of ethnic groups and not individual rights and liberties of members.”²²² However, the Ethiopian Constitution, has also put in place a constitution which has supremacy over all laws and customs and guarantees the right to equality.

²¹⁷ Mulugeta, *supra* note 220.

²¹⁸ Mulugeta, Kebede, *supra* note 220.

²¹⁹ Comm. on the Elimination of Discrimination Against Women, Concluding observations on the eighth periodic report of Ethiopia, U.N. Doc. CEDAW/C/ETH/CO/8 (2019).

²²⁰ Adopted on 8, 1994.

²²¹ CONST. OF THE FED. DEMOCRATIC REPUBLIC OF ETHIOPIA Aug. 21, 1995, art. 46-47 (Eth.) [hereinafter Ethiopian Constitution].

²²² Berihun Adugna Gebeye, A THEORY OF AFRICAN CONSTITUTIONALISM 204 (2021) [hereinafter Gebeye]. The preamble reads, “We, the Nations, Nationalities and Peoples of Ethiopia: Strongly committed, in full and free exercise of our right to self-determination, to building a political community...” CONST. OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Aug. 21, 1995 (Eth.).

Article 25 guarantees “equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.” Further, article 35 embraces special measures and protects the rights of women by recognizing “the historical legacy of inequality and discrimination suffered by women in Ethiopia,” and entitles them to affirmative measures “to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.”

The state is also obliged to “eliminate the influences of harmful customs,” and “laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.” Under article 36, children have the right “not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or wellbeing.”

It is also important to note that under article 42, the right to form and join a trade union and collectively bargain is limited to “factory and service workers, farmers, farm labourers, other rural workers and government employees.”

However, significantly, Ethiopia’s Constitution integrates international human rights into national law through article 13(2), which provides that the fundamental rights and freedoms recognized under chapter 3 of Constitution shall be interpreted in a manner conforming to the “Universal Declaration of Human Rights, the International Covenants on Human Rights and international instruments adopted by Ethiopia.”²²³ Furthermore, article 9(4) provides that “all international agreements ratified by Ethiopia are an integral part of the law of the land.” Gebeye observes that, these two clauses give human rights status under the Constitution, and channel instruments, such as CEDAW into the interpretation of constitutional rights.²²⁴

In terms of constitutional adjudication, two chambers exist through its parliamentary government: the House of Peoples’ Representatives (HPR), which is the lower chamber, and the House of Federation (HoF), which is the upper chamber. The latter adjudicates constitutional disputes and has some legislative functions.²²⁵ The Council of Constitutional Inquiry (CCI) is a constitutional body vested with powers of constitutional adjudication together with the HoF, while simultaneously all federal judicial powers are vested in an independent federal judiciary.²²⁶ Whenever a constitutional issue arises in judicial proceedings, courts must stay the proceeding before them and refer the constitutional matter to the CCI. If the CCI rules that there is indeed a constitutional issue, it forwards its recommendations to the HoF for a final decision. If the CCI

rules that there is no constitutional issue involved, it refers the matter back to the court that referred the constitutional issue.²²⁷ Ultimately, the guardian of constitutional interpretation is the Hof, not the federal judiciary.²²⁸

The CCI has drafted rules on standing, which set out that constitutional claims can be brought by government bodies, private parties or judicial referrals.²²⁹ The HoF has been overloaded with cases, most are based on abstract review (rather than concrete cases) and come from private parties, including individuals, political parties and associations.²³⁰ Its jurisprudence has been criticized for being unsystematic, inconsistent and tending to favor government.²³¹ However, there are cases in which it has relied on international human rights law to strengthen its analyses, with positive impact.²³² In one case, dealing with women’s rights, the HoF, reversed the earlier sharia and federal court, and relied on constitutional provisions and ratified international human rights treaties, to find in the case of Kedija Beshir, that sharia courts do not have jurisdiction without the consent of the parties under article 34(5) of the Constitution.²³³

3.1.4 Domestic Law

Ethiopian domestic laws wholly exclude domestic workers from the protection of the labour law, and minimally protect live-in domestic workers in the Civil Code of Ethiopia.

²²⁷ Adem Kassie Abebe, *Access to Constitutional Justice in Ethiopia* in ACCESS TO JUSTICE IN ETHIOPIA: TOWARDS AN INVENTORY OF ISSUES (Pietro S. Toggia et al. eds., 2014). See also ETHIOPIAN CONST., arts. 62, 83 and 84.

²²⁸ Anchinesh Shiferaw Mulu, *The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia*, 13 MIZAN L. REV. 419, 420 (2019) (“The second reason was that the framers wanted to avoid the “tyranny of the judiciary” or “judicial activism/adventurism” by empowering the judiciary with the power to interpret the Constitution.”)

²²⁹ *Id.*

²³⁰ *Id.* at 423.

²³¹ Mulu, *supra* note 236.

²³² Council of Constitutional Inquiry [CCI], Federal Ethics & Anti-Corruption Commission (FEACC) vs. Ato Melaku et al, 2009 E.C. (2017), 2 HOF J. Const. Decisions 7 (2009).

²³³ Council of Constitutional Inquiry [CCI], In re Beshir, 1 J. CONST. DECISIONS 35 (2008)(Eth.); see also Gebeye, *supra* note 230, at 208. In another case on gender equality, *Mehamed v. Abdi*, File No. 713/04 in House of Federation, Journal of Constitutional Decisions, 2009 E.C., Vol. 2 (2), p. 64, the complainant argued that she and her children had inherited property from her deceased husband and that this property did not fall within the estate of her second husband by virtue of widow inheritance. The Supreme Court of Orania ruled against her and held that her second husband was entitled to half the property. The HoF however found in her favour in accord with provisions in the Constitution guaranteeing women equality with men in marriage, as well as constitutional rights to property.

²²³ ETHIOPIAN CONST., art. 13(2).

²²⁴ Gebeye, *supra* note 230.

²²⁵ ETHIOPIAN CONST., arts. 62(1) and 83(1).

²²⁶ *Id.* at art 79(1).

The Civil Code of Ethiopia²³⁴ contains *specific provisions* (arts. 2601–2604) which apply to domestic “servants” who are living with their employers. Under these articles, the employer shall “take all reasonable steps to safeguard the health and moral well-being” of the employee, with respect to “living quarters, food, times of work and rest.”²³⁵ Under article 2604, the employer has the final say in respect of wages which according to the code can be paid every three months, unless a shorter period is stipulated in the contract.²³⁶ Article 2602 creates obligations on the employer to look after employees when ill. However, it also allows the employer to “set off any expenses which he thus incurs against the wages that become due during the period of illness.”

The effect of these provisions is to leave live-in domestic workers’ protection up to the discretion of the employer, without creating any baseline standard of obligations with respect to labour issues, including issues, such as the timing of when wages are paid. Allowing employers to deduct, at their discretion for medical expenses incurred, places the domestic worker in a precarious situation especially considering that there is no minimum wage, which could in turn result in a never-ending cycle of debt bondage. The code also cites specific instances where a live-in domestic worker need not be looked after by the employer during times of ill health.²³⁷

The code also contains general principles of contract law, which apply broadly to the extent that the issue is not covered by specific provisions. These provisions include clauses on overtime work,²³⁸ wages,²³⁹ and accidents at work.²⁴⁰ However, article 2513(2) sets out that these provisions apply “to contracts of employment concluded by industrial or commercial undertakings administered by the state or its administrative or technical departments.” Since domestic work takes place in private homes, rather than in industrial or commercial environments, it is unlikely that they apply to non-live-in-domestic workers. This would then leave live-out domestic workers entirely outside of the purview of this law. Ultimately, these broad provisions were considered inadequate and were in effect revised by the labour laws.²⁴¹

(a) Exclusion of Domestic Workers from the Labour Proclamation

On July 5, 2019, the Ethiopian government approved a draft Labour Proclamation (Proclamation) replacing Labour Proclamation No. 377/2003.²⁴² The Proclamation includes the following core labour protections: employment contracts, minimum wage,²⁴³ minimum working age and prohibitions against child labour,²⁴⁴ maternity leave, overtime work,²⁴⁵ sexual harassment,²⁴⁶ medical support,²⁴⁷ and collective bargaining agreements (CBA).²⁴⁸ Significantly, it entirely excludes “contracts for the purpose of upbringing, treatment, care, or rehabilitation”²⁴⁹ from the ambit of the labour law. As a result, domestic work is wholly excluded from the protection of the Proclamation. Of critical importance, labour inspectors have no authority to inspect the homes where domestic workers are employed.²⁵⁰

(b) Migrant Domestic workers

In October 2013, the Ethiopian Government banned the migration of domestic workers to the middle east tem-

²⁴² Labour Proclamation No. 1156/2019, FEDERAL NEGARIT GAZETTE, No. 89, at 11691 (Sept. 5, 2019), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/109825/136386/F-1056558301/ETH109825.pdf> [<https://perma.cc/WC4Z-EF2Q>].

²⁴³ *Id.* at § 53(1) (wages).

²⁴⁴ *Id.* at § 89 (young workers).

²⁴⁵ *Id.* at § 68.

²⁴⁶ *Id.* at §§ 177–182. See also Overseas Employment Proclamation, which provides for the employment of Ethiopians abroad & for labour inspector to investigate the agency’s compliance. No. 923/2016, art. 7, FEDERAL NEGARIT GAZETTE, No. 89, at 13256 (Sept 5, 2019), https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=103965&p_count=1&p_classification=17 [<https://perma.cc/QJ6T-DEKH>]. It does not allow the Ministry to assign a labour inspector to conduct workplace inspection but allows the assignment of a labour attaché to the Ethiopian Mission in the receiving country. Although the 2004 Criminal Code prohibits sexual abuse and sexual harassment, it is limited to “unequal power relationships” and the prohibition of immoral soliciting and debauchery, which are not defined. Criminal Code arts. 625 and 846 (Eth.), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70993/75092/F1429731028/ETH70993.pdf> [<https://perma.cc/5DC2-QCHA>].

²⁴⁷ Labour Proclamation No. 1156/2019, art. 12(6), FEDERAL NEGARIT GAZETTE, No. 89, at 11691, 11700 (Sept. 5, 2019), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/109825/136386/F-1056558301/ETH109825.pdf> [<https://perma.cc/WC4Z-EF2Q>].

²⁴⁸ *Id.* at arts. 125–13.

²⁴⁹ *Id.* at arts. 3(2)(a) and (d). Articles 2512–2593 set out general principles of contract.

²⁵⁰ Overseas Employment Proclamation, which provides for the employment of Ethiopians abroad & for labour inspector to investigate the agency’s compliance. No. 923/2016, arts. 3, 4, 6–8, FEDERAL NEGARIT GAZETTE, No. 89, at 13256 (Sept 5, 2019), <https://www.lawethiopia.com/index.php/legislation/federal-legislation/labor-law/155-federal-legislations-by-number/3294-proclamation-no-923> [<https://perma.cc/QJ6T-DEKH>].

²³⁴ CIVIL CODE (Eth.), [https://www.lawethiopia.com/images/codes/Civil%20Code%20\(English\).pdf](https://www.lawethiopia.com/images/codes/Civil%20Code%20(English).pdf) [<https://perma.cc/S9FW-AB9W>].

²³⁵ *Id.* at art. 2601.

²³⁶ *Id.* at art. 2604 (wages for live in domestic workers).

²³⁷ *Id.* at art. 2603.

²³⁸ *Id.* at art. 2528 (“The employer may require the employee to do more work than has been agreed in the contract”).

²³⁹ *Id.* at arts. 2534–2547.

²⁴⁰ *Id.* at art. 2549.

²⁴¹ Gebremedhin, *Procrastination in Recognizing the Rights of Domestic Workers in Ethiopia*, *supra* note 221.

porarily. The ban was lifted in 2018 after the enactment of the Ethiopian Overseas Employment Proclamation No. 923/2016. This law requires that to deploy overseas workers from Ethiopia, there must be a bilateral agreement in place with the recipient country. To date, the following middle east countries have such bilateral agreements: Saudi Arabia, Kuwait, United Arab Emirates, Qatar, and Jordan.²⁵¹ All persons under the age of 18 are prohibited from overseas employment and generally cannot access a passport for the purpose of travel outside the borders of Ethiopia without a guardian.

Proclamation No. 923/2016 further prohibits any person without an 8th grade education and without a certificate of occupational competence from overseas deployments. A subsequent amendment²⁵² to the Proclamation No. 923/2016 defines “[d]omestic work” to mean “any kind of household work done with payment by concluding a contract of employment with the employer.” This suggests that the government recognises domestic work as work, which is deserving of fair wages and that it should be reduced to writing. Having an agreement in writing clarifies the rights and obligations of each party and protects the more vulnerable party from exploitation. Therefore, failing to implement a similar law applicable to domestic workers within Ethiopia is anomalous, given that Ethiopia recognizes the need for such intervention in foreign jurisdictions.

3.1.5 Analysis

In Ethiopia, domestic workers are defined in law as “domestic servants” and are entirely excluded from the labour law. Live-in domestic workers have limited protection under the Civil Code. The exclusion of domestic workers from the Labour Proclamation means that they are not included in restrictions on payment in kind, minimum age restrictions, maternity leave protection, overtime work, protection from sexual harassment. Most crucially, labour inspectors are not empowered to inspect private homes at all. Further provisions in the Civil Code allow employers of live-in domestic workers, an almost absolute unfettered discretion with respect to core labour protections, such as living quarters, food, times of work and rest, and payment of wages.

²⁵¹ R. 201 recommends states to cooperate at bilateral, regional & global levels for the purpose of enhancing the protection of DWs especially on prevention of forced labour/trafficking in persons. *Supra* note 50, at ¶ 26(2). Prevention & Suppression of TIP & Smuggling of Migrants Proclamation No. 909/2015, FEDERAL NEGARIT GAZETTE, No. 67, at 8318 (Aug. 17, 2015), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/113354/142083/F-760930814/ETH113354.pdf> [<https://perma.cc/ZDY5-AWPS>]; Convention against Transnational Organized Crime, adopted Nov. 15, 2001, 2225 U.N.T.S. 209. Ethiopia is a signatory but has not yet ratified.

²⁵² Ethiopia's Overseas Employment Amendment Proclamation No. 1246/2021, FEDERAL NEGARIT GAZETTE, No. 27, at 13256 (June 3, 2021), <https://perma.cc/5ABB-H494>.

These provisions run afoul of ILO C. 189 on domestic work, which sets out that domestic workers be informed of the terms and conditions of employment, preferably in a written contract. C. 189 also requires that domestic workers be paid their wages in cash at least once a month and that they enjoy equal treatment to other workers with respect to working hours, overtime pay, daily and weekly rest periods and an annual leave. Similarly, the convention requires progressive realization of social security protections, such as occupational health and maternity protection. Additional rights apply to protect children and live-in domestic workers, who are entitled under the C. 189 to privacy and decent standards of accommodation among other rights, in addition to collective bargaining, effective dispute resolution and complaint mechanisms.

While C. 189 has not been ratified by Ethiopia, Ethiopia has ratified conventions, such as CEDAW and the ICESCR, which protect all domestic workers labour and human rights, including the right to non-discrimination and collective bargaining. Indeed, the CEDAW Committee have criticized the exclusion of domestic workers from labour protections. These ratified conventions are an important source for Ethiopian law, since its Constitution incorporates ratified international human rights treaties, and there are some success stories in the courts in cases that include gender equality.

With respect to Ethiopia's Constitution, the exclusion of domestic workers from labour protections enjoyed by other workers—including domestic workers travelling overseas for employment—is arguably *prima facie* irrational and discriminatory on article 25 grounds of race, sex, and social origin. Indeed, the exclusions also contravene the article 35 commitment to affirmative measures that enable women to “compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.”

The Ministry of Labour and Social Affairs is aware of the critical gap in protection for domestic workers. However, they have rejected proposals for regulation arguing that they do not have the institutional and human resource capacity to implement regulations, and tellingly, that such regulation might disrupt the family-like context in which domestic workers work.²⁵³

It is significant that under article 42 of the Ethiopian Constitution the right to form and join a trade union and collectively bargain is limited to “[f]actory and service workers, farmers, farm labourers, other rural workers and government employees.” As a consequence, domestic workers are denied collective labour rights, which are regarded as an essential tool for balancing the otherwise unbalanced relationship between employers and employees. This is because socially domestic work was not seen as real work, given the personal nature of the place of work. However,

²⁵³ Gebremedhin, *Procrastination in Recognizing the Rights of Domestic Workers in Ethiopia*, *supra* note 221.

to the extent that Ethiopian constitutional provisions do not include domestic workers within collective labour law mechanisms, they are non-compliant with a number of ILO and international human rights instruments, including C. 189, ICECR, CEDAW, CERD and African Charter norms.

However, the 2021 Amendment, under the Ethiopian Overseas Employment Proclamation, which prohibits anyone under 18 from overseas employment, and requires bilateral agreements, is evidence that progress is being made in the sector. This can also be seen in the Proclamation's definition of "domestic work" as "any kind of household work done with payment by concluding a contract of employment with the employer." The shift in terminology, which defines a domestic worker as "worker" rather than domestic servant and the requirement of a contract, is a crucial step to the formalization of the sector. However, it is an advance that only applies to domestic workers working overseas, and perhaps ironically, reflects a greater protection for domestic workers abroad than is provided in Ethiopia.

The doctrinal exclusions of domestic workers could be constitutionally challenged under the article 25 non-discrimination clause which guarantees "equal and effective protection from discrimination on a number of grounds including sex, nation, birth or other status" which could be interpreted to include class. Other grounds to challenge exclusions include the article 36 "right of children" to "neither be required or permitted to perform work which may be hazardous or harmful to his or her education or well-being," as well as article 35's constitutional provision on affirmative measures, which recognizes the historic legacy of discrimination experienced by Ethiopian women. Possible litigation could be instituted in the Labour Court, which would then be appealed up to higher courts, and ultimately be referred to the Council of Constitutional Inquiry (CCI) and the HoF. Such cases could challenge the exclusion of domestic workers from the Labour Proclamation incrementally, by bringing discrete cases on the following exclusions of domestic workers from:

- Restrictions on payment in kind, minimum age restrictions, maternity leave protections, overtime work, protection from sexual harassment, as well as child labour prohibitions. These cases could also implicate the exclusion institutionally of labour inspectors who are not empowered to inspect private homes at all.
- The Civil Code provisions only address live-in domestic workers and essentially grants employers of such workers an unfettered discretion on issues, such as living quarters, provision of food, times of work and rest and payment of wages. This grant of discretion does not comply with non-discrimination guarantees, as well as international worker rights' norms contained in instruments that have been ratified by Ethiopia.

- Although, the Ethiopian Constitution does not explicitly include domestic workers under its article 42 provision on collective labour rights, it is arguable that the exclusion of domestic workers from collective rights would be constitutionally problematic in light of article 9(4) of the Constitution, which stipulates that all international agreements ratified by Ethiopia are an integral part of the law of the land. A number of international human rights instruments ratified by Ethiopia, such as ICECR, CEDAW, and CERD extend collective labour rights to all workers, including domestic workers.

3.2 Lesotho

3.2.1 Background

Lesotho is a very small country with a population of approximately two million. A large part of the population lives in abject poverty, as employment opportunities are scarce. As a result, the working population age group migrate to neighboring countries, particularly South Africa, in search of work to support families through remittances.²⁵⁴ Historically, the increase in Basotho female migration to South Africa can be attributed to the decline of migrant Basotho men's opportunities in South African mines.²⁵⁵ The care deficit is a noted consequence of women migrating to South Africa, which young girls, female relatives, grandmothers or even adult males in migrant household bear the brunt.²⁵⁶ As a consequence, many young people are forced into domestic work due to poverty particularly in child-headed families.

Lesotho has no specialized legislation for domestic workers. Two pieces of labour legislation, the Lesotho Labour Code of 1992 and the Workmen's Compensation Act, passed in 1977, mention domestic workers, though they refer to them as domestic "servants." While domestic workers in Lesotho are implicitly protected by the Labour Code (LC), they are expressly excluded from the Workmen's Compensation (WC) Act.

3.2.2 International Law

Lesotho has ratified, among other conventions, the Con-

²⁵⁴ Mantuna Makoro, *THE CONSTRUCTION OF ILLEGALITY: BASOTHO MIGRANT DOMESTIC WORKERS' EXPERIENCES* (2015).

²⁵⁵ See Janet Munakamwe, *Emerging Political Subjectivities in a Post Migrant Labour Regime: Mobilisation, Participation and Representation of Foreign Workers in South Africa (1980-2013)* (2018) (Ph.D. Dissertation, University of the Witwatersrand).

²⁵⁶ David Coplan & Thoahlane Thoahlane, *Motherless Households, Landless Farms: Employment Patterns among Lesotho Migrants in CROSSING BOUNDARIES: MINE MIGRANCY IN A DEMOCRATIC SOUTH AFRICA 139* (Jonathan Rush & Wilmot James eds., 1995).

vention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on Civil and Political Rights, the international Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Rights of Persons with Disabilities. Lesotho has also ratified the core ILO Conventions but has not yet ratified the Domestic Worker Convention. Lesotho has also ratified the African Charter and the Maputo Protocol, as well as the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

3.2.3 Constitutional Context

Article 4 guarantees rights to freedom from discrimination and participation in government regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²⁵⁷ Further, the Constitution prohibits discriminatory treatment carried out under written law or in the performance of the functions of any public office or public authority. Article 26 of the Constitution commits the state to adopting policies aimed at promoting a society based on equality and justice for all its citizens, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In particular, the state is obliged to take appropriate measures, in order to promote equality of opportunity for disadvantaged groups in society to enable them to participate fully in all aspects of public life.

Since the Constitution does not address international law and its manner of domestication, it is considered a dualist system.²⁵⁸ Despite this fact, courts are increasingly directly applying international instruments.²⁵⁹ Itumeleng Shale illustrates the different ways in which courts in Lesotho have incorporated instruments into their judgments, such as the Universal Declaration of Human Rights, as well as regional human rights instruments in Africa, Europe and the Americas.²⁶⁰ Shale argues that courts in Lesotho have incorporated international human rights treaty norms into domestic law, in ways that suggest that they "moved beyond the monist-dualist dichotomization in favor of hu-

man rights protection."²⁶¹

In the case of *Tsepe v. Independent Electoral Commission*,²⁶² the High Court, citing both comparative and international human rights instruments, endorsed a purposeful approach to constitutional interpretation that promotes equality among its citizens. The Court requires the state to take active measures to redress the inequality of historically disadvantaged groups, in order that they may participate equally in all spheres of public life. The Court cites both CEDAW and the SADC declaration on gender and development to support positive measures that are reasonable and constitutionally justifiable. In *Tsepe* an example of such a measure is a provision in the Local Government Election Act, reserving one third of all Council seats for women.

Another case, *Fuma v. Commander LDF*,²⁶³ dealt with a challenge to the forced retirement of a member of the Lesotho Defense Force, because he has become blind as a consequence of HIV. The Court found in his favor, holding that articles 18 and 19 of the Constitution, had to be interpreted in light of Lesotho's obligations under the Convention on the Rights of Persons with Disabilities, which had been ratified by Lesotho. In a much-cited quote, the Court states that the CRPD "stands not only as an inspirational instrument...but that it technically assumes the effect of municipal law in the country."

3.2.4 Domestic Law

(a) The Workmen's Compensation Act of 1977

The Lesotho Workmen's Compensation Act was enacted in 1977. The Act's expressed purpose is to provide compensation to workmen for injuries suffered in the course of their employment and for the payment of medical expenses in respect of such injuries and connected purposes. The Act requires an employer to purchase compulsory insurance with a private carrier, subject to approval by the Minister.²⁶⁴

A "workman" is broadly defined in this Act as "any person who has entered into or works under a contract of service or apprenticeship with an employer." However, under section 2(2) of the Act, domestic servants are explicitly ex-

²⁶¹ *Id.*

²⁶² No. CIV/APN/135/2005, [2005] L.S.H.C. 96 (27 April 2005), <https://lesotholii.org/ls/judgment/high-court/2005/96>.

²⁶³ *Fuma v. Commander*, No. CONST/8/2011, [2013] L.S.H.C. 68 (Oct. 10, 2013), <https://lesotholii.org/ls/judgment/high-court/2013/68/>.

²⁶⁴ Workmen's Compensation Act 1977, Act No. 13 of 1977, at § 28, Gazette No 3 (Oct. 14, 1977)(Lesotho), <http://www.labour.gov.ls/wp-content/uploads/2020/06/Workmen-Compensation-Act-1977.pdf>; Daemane, Moses M. M. Daemane, *The Critical Exposure of Lesotho's Labor Law Effectiveness: Industrial Relations' Calamity of Textile Industry Workers in Lesotho*, 5 J. SOC. & DEV. SCI. 58 (2014).

²⁵⁷ These rights are, however, limited to the extent that they prejudice the rights and freedoms of others or the public interest. They are also subject to provisos, with respect to non-citizen's personal laws and the application of customary law

²⁵⁸ Itumeleng Shale, *Historical Perspective on the Place of International Human Rights Treaties in the Legal system of Lesotho: Moving Beyond the Monist-Dualist Dichotomy*, 19 Afr. Hum. Rights L.J. 193 (2019).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

cluded from the definition of “workman” alongside “family workers. Any person whose services are rewarded in kind according to Sesotho custom, including shepherds, may be excluded from the application of the Act by the Minister.”²⁶⁵

However, under article 13 of C. 189, state parties are obliged to take measures to ensure the progressive realization of occupational health and safety for all workers. This explicit exclusion of domestic “servants” from workers’ compensation raises the precise issues addressed in the *Mahlangu* decision in South Africa. In that case, the Court viewed the exclusion of domestic workers from workers’ compensation as constituting both direct and indirect intersectional discrimination on the basis of race, class and gender. Since Lesotho shares a Roman-Dutch common law with South Africa, it also relies on South African legal authority.

(b) The Lesotho Labour Code

The Lesotho Labour Code Order 24 of 1992²⁶⁶ is the primary law on labour and employment in the country. In 2000, it was further amended by the democratically elected parliament as the Labour Code (Amendment) Act 2000. The Code prohibits discrimination and sexual harassment and requires equal pay for work of equal value.²⁶⁷ Section 6 guarantees freedom of association to all workers. The Code requires that its interpretation should closely conform with ILO provisions and recommendations.

However, commitments to non-discrimination are limited when it comes to equal treatment for domestic workers. At the outset, the Labour Code defines a domestic worker as a “domestic servant,” which is a person employed wholly or partly in a private residence, which includes a “house servant” and a “personal servant.”²⁶⁸ Under the Labour Code, the only provisions addressing domestic work-

²⁶⁵ The main statutory exclusions are: “[A] person whose employment is of a casual nature and who is employed other than for the purpose of the employer’s trade or business; a person who is employed for the purpose of any game or recreation and engaged or paid through a club; domestic workers; outworkers; and family workers; and any person whose services are rewarded in kind according to Sesotho custom, including shepherds; and such persons as may be excluded from the application of the Act by the Minister.”

²⁶⁶ This draws from the following sections: Labour Code §§ 93, 97-99, 110, 157 and Part XVII (Lesotho); CONST. OF LESOTHO, 1993, §§ 7, 15, 16; and Human Rights Act, 1983, Act No. 24 of 1983, § 7.

²⁶⁷ This prohibition of discrimination includes “any distinction, exclusion or preference made on the basis of race, colour, sex, marital status, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, is incompatible with the provisions of the Code.”

²⁶⁸ Further, the definition of domestic worker includes, “any person employed in or about a private residence either wholly or partly in any of the following capacities—cook, house servant, waiter, butler, nurse, personal servant, bar attendant, footman, chauffeur, groom, gardener, launderer or watch keeper.”

ers explicitly are (a) exemptions of employers of domestic workers who are family members from restrictions on hours of work and mandatory rest periods; and (b) the permission to employ children as domestic workers at night, with no obligation on the employer to permit their return to their families/residential homes at night.

Exemptions of family members, from restrictions on hours of work and mandatory rest periods

Section 117 and 118 of the Labour Code address hours of work and rest periods. Section 117 provides for a weekly rest period of at least 24 continuous hours, which must include Sunday. Where the employee is required to work on his or her day of rest or a public holiday, the Act entitles him or her to double pay. Section 118 limits normal hours of work to no more than 45 hours per week, with the maximum of nine hours per day for an employee who works 5 days per week; and for an employee who works 6 days a week, a maximum of 8 hours of work for 5 days, and 5 hours on the last day. It prohibits requiring an employee to be required to work continuously for more than five hours without being given a rest period of an hour. Section 118(3) permits an employer to request an additional 11 hours of work, but sets out payment of no less than one and a quarter of the normal wage rate for overtime work.²⁶⁹

Critically, under section 119, the Code permits exemption from provisions of section 117 and 118 which do not apply to “(a) undertakings in which only members of the employer’s family, up to a total of five including the employer, are employed.” Further, “family” is defined broadly in the Act to include “the wife or wives, husband and the dependent relatives of the employee.” A “dependent” is in turn defined under the Act as “any member of an employee’s family, including an illegitimate child who is wholly or partly legally dependent on the earnings of the employee for the provision of the ordinary necessities of life.”

Presumably, employment as a domestic worker in a private house would constitute an “undertaking in which only the members of an employer’s family are employed” and “any” family members, who are employed as domestic workers would be excluded from crucial protections with respect to rest periods, limited work weeks and payment of overtime. The employer would similarly not be liable for the penalty set out.

However, under C. 189, a domestic worker is defined as “any person engaged in domestic work within an employment relationship.” There are no blanket exemptions for family members, if they are also employees, even if those who are employed in a family undertaking.²⁷⁰ Consequent-

²⁶⁹ Penalties for violating these provisions include a fine of 600 maloti or imprisonment not exceeding six months or both.

²⁷⁰ However, under article 2 of C. 189, states can, after consulting with representative employer and domestic worker unions, “exclude wholly or in part...limited categories of workers in respect of which special problems of a substantial nature arise.”

ly, these exclusions with respect to section 117 and 118, would run afoul of provisions in C. 189 that specify that domestic workers receive equal treatment to other workers, particularly with respect to working hours, overtime pay, and daily and weekly rest periods and annual leave. The Convention requires that domestic workers have a minimum weekly rest period of 24 hours.

Protection for Children and Young Workers

Part IX of the Act deals with employment of women, young persons and children. Section 124(1) stipulates that “[n]o child shall be employed or work in any commercial or industrial undertaking other than a *private undertaking in which only members of the child's own family, up to five in total number, are employed.*” Although the Code does not define a “private undertaking,” presumably it includes domestic work in a private home. Under this section, it is permissible to employ a “child,” which according to the definition section, means “a person under the age of 15” who could be part of the extended family including “the wife or wives, husband and the dependent relatives of the employee.”

Section 125 goes on to set out the restrictions on employment of children (under the age of 15) and young persons (over 15 and under 18).²⁷¹ Significantly, section 125(5) prohibits employment of people under the age of 16 years under conditions preventing him or her from returning each night to the place of residence of his or her parent or guardian. However, the section stipulates that “this provision shall not apply to domestic servants.” Similarly, restrictions on night work under section 126, apply only to commercial or industrial undertakings. Accordingly, the section does not protect children under the age of 16 from working as live-in domestic workers and working at night. It also permits the employment of such a person under conditions which prevent him/her from returning to their parents'/guardian's residence.

At the outset, the C. 189 obliges state parties to protect especially vulnerable groups of domestic workers, including child domestic workers.²⁷² It also requires member states to set a minimum age for domestic workers consistent with the provisions of the ILO Convention 138 on Minimum Age and ILO Convention 182 on the Worst Forms of Child Labour and not lower than that established by national laws and regulations for workers generally.²⁷³ However, section 124 of the Labour Code permits children, under fifteen, who could be distant members of the extended family, to work as an employee in a family members home, with minimal restriction.

²⁷¹ It prohibits the employment of a person under the age of 16 years for more than four consecutive hours without a break of at least one hour, or for more than eight hours in any one day.

²⁷² C. 189, *supra* note 7, at Preamble read R. 201, *supra* note 59, at ¶ 5.

²⁷³ C. 189, *supra* note 7, at art. 4(1).

Under section 125(5), the protections afforded to workers in industrial and commercial undertakings—that they are not prevented from returning to their parental home/guardian home each night—are not afforded to domestic workers. While other children under the age of 16 are prohibited from night work, employers of child domestic workers, are not equivalently restricted. These provisions also arguably contravene C. 189 provisions, which mandates that measures be taken to ensure that domestic workers are “free to reach agreement with their employer or potential employer on whether to reside in the household... and that they are not required to stay in the accommodation during rest periods and leave.”²⁷⁴

Further, the recommendation elaborates that when employing a domestic worker under the age of 18, but above the minimum age of employment defined by national law, members must: (a) strictly limit their hours of work to ensure adequate time for rest, education and training, leisure activities and family contacts; (b) prohibiting night work; (c) placing restrictions on work that is excessively demanding, whether physically or psychologically; and (d) establishing or strengthening physical mechanisms to monitor their working and living conditions.²⁷⁵

Maternity Protection

Section (2) provides that an employer “shall not permit or require her to return to work until the expiry of six weeks immediately after her confinement.” It further provides that dismissal of an employee that takes place in her statutory maternity leave is automatically unfair. However, section 134 makes clear that there is no obligation on the employer to pay wages to a female employee in respect of the absence from work.

C. 189 requires states to take appropriate measures to progressively ensure that domestic workers enjoy the same conditions as other workers generally in respect of social security protection, including for maternity protection. Although, these provisions, including the absence of paid maternity leave apply to all workers, it is arguable that given the low wages of domestic workers in Lesotho, it would be unlikely that they would have the savings to support taking unpaid maternity leave.²⁷⁶

Labour Inspection

Section 14 empowers a labour officer to enter freely and inspect, “at all reasonable times, whether by day or night, and without previous notice,” work premises to inspect, question, enforce, prohibit and order labour laws. However, with respect to the inspection of a private dwelling, “the labour officer or [any] other officer shall not enter or inspect a private dwelling-house or any land or building pri-

²⁷⁴ *Id.* at art. 9(a).

²⁷⁵ R. 201, *supra* note 59, at ¶ 5.

²⁷⁶ C. 189, *supra* note 7, at art. 14.

vately occupied in connection therewith, during the hours of darkness, and shall not without the consent of the occupier thereof enter such land or premises during the hours of daylight."

It is particularly anomalous that section 125 permits child domestic workers to work at night and does not prevent an employer from creating conditions which do not allow him/her to return to their parental home at night, but provisions on labour inspection put in place a blanket prohibition on inspecting homes at night. Further, even in the daytime, homes cannot be inspected, without the consent of the occupier of the home. These two provisions essentially render labour protections for domestic workers unenforceable.

Under article 17 of C. 189, each member "shall develop and implement measures for labour inspection, enforcement and penalties, with due regard for the special characteristics of domestic work, in accordance with national laws and regulations." Further, article 17(3) sets out that "in so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due regard to privacy." Section 14 essentially allows employer "privacy" to trump equal protection rights when it comes to domestic worker in private homes. To the extent that these domestic workers are children, the section creates a gap in the provision of mechanisms to monitor the working and living conditions of children.

National Minimum Wage

In Lesotho, there is a separate national minimum wage for domestic workers, which has been set at the sum of approximately \$34.69 (LSL624.00) per month for employees with less than twelve month continuous service with the same employer; and \$38,31 (LSL689.00) for employees with more than twelve months continuous service with the same employer.²⁷⁷ This wage is lower than that set for other sectors, including the small business sector, service sector and hospitality sector, as well as lower than the designated general minimum wage, which is approximately \$90 (LSL 1,620.00) for employees with less than twelve months service, and LSL 1,786.00 for employees with more than twelve months of continuous service with the same employer.

C. 189 obliges member states to put in place a number of working conditions relating to wages. Firstly, if there is a minimum wage in their country, it must apply to domestic workers as well, and such remuneration must be without discrimination based on sex.²⁷⁸ However, in Lesotho, do-

mestic workers have sectoral minimum wages, with their wages being the lowest of all sectors. It is arguable that, establishing the lowest wages for a female dominated sector is a form of pay discrimination, and amounts to discrimination based on sex under the convention. Both the IC-ESCR and CERD committees have recommended in concluding observation's that there be one minimum wage for all sectors.

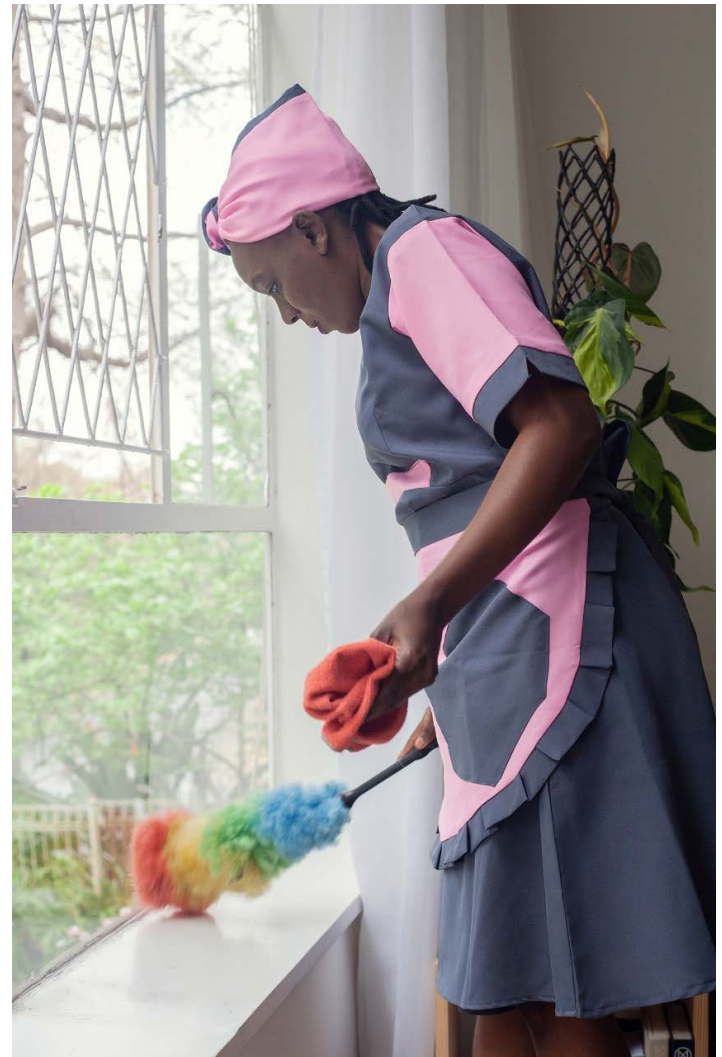


Photo © Izwi Domestic Workers Alliance

Labour Agents and Informal Placement Agencies

In contrast to the wide berth given to employing family members within Lesotho and an exemption from key protections afforded other workers, the Act has several provisions protecting workers migrating abroad, including the right of the recruited worker to not be separated from his

²⁷⁷ Minimum Wage—I. Domestic worker (including light physical worker), MYWAGE.ORG/LESOTHO, <https://mywage.org/lesotho/salary/minimum-wage/1969-i-domestic-worker-including-light-physical-worker> [<https://perma.cc/2KD8-PYC3>] (last visited Nov. 9. 2022).

²⁷⁸ C. 189, *supra* note 7, at art. 3(2)(d) and 11 R. 201, *supra* note 59, at ¶ 3(a)—(c). Must be read with ILO conventions and recommendations,

including Equal Remuneration Convention, 1951 (No. 100); Equal Remuneration Recommendation, 1951 (No. 90); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111); HIV and AIDS Recommendation, 2010 (No. 200); Maternity Protection Convention, 2000 (No. 183); and Maternity Protection Recommendation, 2000 (No. 191).

or her spouse or minor children, and also making clear that recruiting a “head of a family” is not deemed to include the recruiting of any family member. Further, section 148 makes clear that no person under 18, may be recruited for employment outside Lesotho.²⁷⁹

3.2.5 Analysis

The fact that Lesotho still refers to domestic workers as “servants” in its laws reflects the extent to which conceptions of domestic work remain embedded in historic slavery and colonialism. The Labour Code systematically excludes and discriminates against domestic workers, primarily black women, young girls and children. There are almost no provisions addressed directly to the home as workplace, except for three provisions: (1) making it impossible to inspect a private home at night or at all without the occupiers consent; (2) exempting employers of family members from obligations with respect to weekly rest and public holidays, and (3) exempting employers of child or young domestic workers from prohibitions on night work, and not obliging them to refrain from preventing a child under 16 from returning to his/her home and parents at night. Domestic workers also have a separate and lower national minimum wage than other workers, and like other workers, no entitlement to paid maternity leave.

These provisions conflict with C. 189 and its recommendation on domestic work. However, Lesotho has not ratified C. 189. Yet, it has ratified, the core UN Human Rights Conventions, the eight ILO core Conventions and the African Human Rights Conventions. These conventions similarly would require that Lesotho fulfils its obligations with respect to non-discrimination of domestic workers, and that provisions with respect to child and young person domestic workers protect them from exploitation and preserve their physical or mental health, rather than subjecting them to greater employer control. In contrast, the African Charter on the Rights and Welfare of the Child, defines a child as a person below 18, and puts in place a “best interest of the child standard,” which requires non-discrimination and protection from economic exploitation. Significantly, article, 21 requires states to take all appropriate measures to eliminate harmful, social and cultural practices that prejudice the health or life of the child, as well as “those customs and practices that are discriminatory to

the child on the grounds of sex or other status.”

Lesotho has a constitution that promotes enjoyment of rights and freedoms and prohibits discrimination on any grounds, including sex, race, social origin, or other status. Its courts have incorporated international and regional human rights norms in their legal interpretations of their constitutional provisions. Of particular relevance to litigating domestic worker exclusions is the courts embrace of positive measures to ensure the enjoyment of substantive, rather than formal equality. Consequently, the arguments that the exclusion of domestic workers (and herd boys) from workers’ compensation, amounts to both direct and indirect discrimination, in much the same way as was found by the *Mahlangu* Court. Further, the distinction between workers employed in homes, including children and young person, from other workers, similarly amount to prima facie discrimination on the grounds of race and sex and are unjustified. To the extent that these “permissions to exploit” are grounded in custom and practice, the recent jurisprudence of the African Court on harmful traditional practices should strengthen the case that such discrimination is impermissible.

Indeed, the discrimination case is strengthened when we contrast the legal provisions, which essentially amount to a “legal privilege” to exploit domestic workers who are family members, including children and youth, with provisions in the Labour Code that protect the rights of an overseas worker to live with his or her family, and specifies that in the case of working abroad, the employment of a spouse does not imply that his/her spouse will also be employed. These provisions also prevent employment of children under 18 years of age. As a consequence, domestic workers in Lesotho can be said to be better protected by their own governments when they work abroad, than when they remain at home.

As a result, we would argue that the following provisions are constitutionally egregious and could be subject to constitutional challenge in the High Court on the basis of article 4 rights to freedom from discrimination on basis of sex, social origin, birth or other status, as well as provisions obliging the state to take appropriate measures in order to promote equality of opportunity for disadvantaged groups in Lesotho:

- Exclusion of domestic “servants” from accessing compensation in cases of injury and illness under the Workmen’s Compensation Act of 1977, as well as exclusion of family workers, any person rewarded in kind under Sesotho custom including shepherds.
- Exclusions of members of the employers extended family, including an illegitimate child, from sections 117 and 118 of the Labour Code, which limit

²⁷⁹ Labour Code § 147, Recruiting of head of family:

(1) The recruiting of the head of a family shall not be deemed to include the recruiting of any member of the family.

(2) A recruited person shall not without his or her consent be separated from his wife or husband and his or her minor children who have been authorized to accompany him or her to and remain with him or her at the place of employment.

(3) An authorization to accompany a recruited person shall, in default of agreement to the contrary before the departure of the recruited person from the place of recruiting, be deemed to authorise the husband or wife and the minor children of such person to remain with that person for the full duration of his or her term of service.

daily and weekly hours of work, set out compulsory rest periods and over-time rates of payment

- Exclusion of children who are members of families, including extended families, including those under 15 years old, from prohibitions that apply to employing children in commercial and industrial undertakings under section 124(1) of the Labour Code.
- Exclusion of domestic workers from section 125, which prohibits employment of a young person under the age of 16 under conditions preventing him or her from returning each night to the place of residence of his guardians or parents and under section 126 from night work. These provisions also clash with the article 4(c) right to freedom of movement and residence and both employer and employees' rights under 4 (1)(g), which require respect for private life and family. Of relevance is article 11(2)(b) of the Constitution, which specifies that these rights do not preclude legal conduct "to protect the rights and freedoms of others."
- Section 14 prohibition on an inspector entering a private dwelling-house or any land or building connected with it during both the hours of darkness and daylight without the consent of the owner or occupier. This also implicates the article 4(1)(o) right to equality and equal protection of the law.
- the complete absence of provisions on paid maternity protection
- Separate and lower national minimum wages for domestic workers.

3.3 Uganda

3.3.1 Background

In the Ugandan context, domestic workers are women and men employed to support with chores commonly on farms or households in urban areas. These would include house help, nannies, shamba boys, security guards, among others commonly referred to as house girl, house boy, house maid or house help. Most of them are distant relatives and friends from rural areas. What drives most people into domestic work is the need to meet their economic needs. This category of people cuts across all ethnic groups in the country.

According to a Platform for Labour Action 2017 baseline survey that profiled domestic work and its socio-economic contribution at the household level, 93% of domestic

workers in Uganda are aged between 15 to 30 years and have been exposed to physical and psychosocial abuses, including non-payment of wages, verbal abuse, long working hours, sexual assault, among others.²⁸⁰ Furthermore, according to the same baseline survey, in Uganda, domestic workers come from vulnerable groups, such as young widows, orphans, divorced women, and people from very poor families, which exacerbate their vulnerability.

Most domestic workers, especially live-in workers, come from the rural areas, and it's usually their first time to the urban centers where they work. These workers are usually recruited or referred by relatives or friends and some by informal recruiters. Most live-out domestic workers live in or near the areas where they work or have worked in those areas before. The live-outs usually have mastered not only the geography of the area where they work, but also have amassed experiences working as domestic workers.

Domestic work in Uganda is not only limited to women, as children are also often recruited informally. The placement of children in the homes of wealthier relatives or friends to perform domestic work in exchange for education and other benefits is considered a survival strategy.²⁸¹ Like in many other societies, Ugandan communities find it culturally acceptable for children to be used in collective family efforts to raise family income.

3.3.2 International Law

Uganda has ratified the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment; International Covenant on Civil and Political rights; Convention on Elimination of all Forms of Discrimination against Women; International Convention on the Elimination of all Forms of Racial Discrimination; International Covenant on Social and Cultural Rights, International Convention on the Protection of all Rights of Migrant Workers and Members of their Families; Convention on the Rights of the Child; and Convention on the Rights of Persons with disabilities. Uganda has also ratified the ILO fundamental Conventions, but has not ratified the Domestic Worker Convention, C. 189 or C. 190 on Violence and Harassment at Work. Uganda has ratified the African Charter on Human and Peoples Rights, the Protocol to the African Charter on the Rights of Women in Africa, the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, and the African Charter on the Rights and Welfare of the Child. Uganda is

²⁸⁰ Jamie Hitchen & Suzane Muhereza, U.N. Democracy Fund, POST PROJECT EVALUATION FOR THE UNITED NATIONS DEMOCRACY FUND: EMPOWERING FEMALE AND YOUTH DOMESTIC WORKERS IN UGANDA (2020), <https://www.un.org/democracyfund/sites/www.un.org/democracyfund/files/uganda-udf-15-648-uga-evaluation-report.pdf> [<https://perma.cc/A9TF-5ZSF>].

²⁸¹ Anne M. Nyakato, Hidden and Forgotten: The Plight of Children Trafficked for Domestic Work in Uganda (2011) (Master's thesis, University of the Witwatersrand).

also a member of the African Community treaty.

3.3.3 Constitutional Framework

At the national level, the 1995 Constitution of Uganda, as amended, is the supreme law of the land and sets out state recognition of the significant role that women play in society, as one of its social and economic objectives.²⁸² Article 21 provides for equality and freedom from discrimination, specifically stating that, "all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law" and that "a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion, or disability."

Under article 32, the state is obligated to take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition, or custom, for the purpose of redressing imbalances against them. Further, article 33 provides that woman, in particular, shall have the right to affirmative action for the purposes of redressing imbalances created by history, tradition, or custom. Article 40 focuses on economic rights and obliges parliament to enact laws to provide for the right of people to work under satisfactory, safe and healthy conditions; enjoy equal payment for work of equal value without discrimination, and to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, etc.²⁸³

Article 50 deals with the enforcement of rights by courts, and permits any person who claims that a constitutional right has been infringed or threatened to apply to a competent court for redress.²⁸⁴ The Constitution also allows for public interest litigation, where any person or organization may bring an action against the violation of another person's or groups' human rights. It is noteworthy that under article 126 dealing with the exercise of judicial power, one of the core principles is that "justice shall be done to all irrespective of their social or economic status."

Uganda is dualist in its approach to international law. Article 123[1] of the Constitution allows the president or the president's delegate to ratify treaties, while article 123[2] empowers parliament to enact laws relating to the ratifi-

²⁸² CONST. OF THE REPUB. OF UGANDA 1995, art. XV.

²⁸³ The 1995 Constitution of Uganda also guarantees decent work under the following articles: articles 25(1) on slavery and servitude; article 25(2) on forced labour; article 29(1) on the right to freedom of association; article 34(4) on protection of children from economic exploitation and hazardous work, article 39 on right to a clean and healthy environment.

²⁸⁴ "All citizens of Uganda shall have the right and duty at all times: (a) to defend the Constitution and in particular to resist any person or group of persons seeking to overthrow the established constitutional order." CONST. OF THE REPUB. OF UGANDA 1995, art. 3(4).

cation of treaties. Even though the Constitution does not enjoin courts to use comparative or international law in interpreting constitutional rights, the courts have and do rely on both international and comparative jurisprudence in their analyses.²⁸⁵ For example, in a case dealing with the constitutionality of the mandatory death penalty in murder cases, the Court referred to the Universal Declaration on Human Rights, the International Convention on Civil and Political Rights and its jurisprudence, and the African Charter. It also made reference to comparative jurisprudence on the death penalty in South Africa and Tanzania.²⁸⁶ In a case dealing with children's rights, the Court relied on provisions of the African Children's charter in coming to its decision.²⁸⁷

Ugandan courts have also been willing to strike down laws found to discriminate on the basis of gender. In the 2004 case of *Uganda Association of Woman's Lawyers v. Attorney General*, the Constitutional Court struck down discriminatory provisions of the Divorce Act, which permitted a husband to file for divorce on the grounds of adultery, but the wife had to combine adultery with another ground, such as desertion, bigamy, bestiality, sodomy, and cruelty.²⁸⁸ The Court made reference to comparative case law in Tanzania in finding provisions of the Divorce Act to amount to discrimination. The Court observed that the divorce law in question was archaic and a relic of colonialism which viewed a husband as patriarch and head of the family and the woman was subservient to her husband and without any ability to seek separate legal existence.

3.3.4 Legislative Context

The Employment Act of 2006

The Employment Act of 2006 covers all workers in an employee-employer relationship, whether the contract is oral or written, and sets out minimal conditions, such as working hours; annual leave; contracts; forced labour; non-discrimination; sexual harassment; maternity and paternity leave; and restrictions on the employment of children, who are defined as people under the age of 18. It also includes provisions on reporting cases.²⁸⁹ Although the Act does not explicitly include domestic workers, they are implicitly in-

²⁸⁵ See Jamil Ddaamulia Mujuzi, *International Human Rights Law and Foreign Case Law in Interpreting Constitutional Rights: The Supreme Court and the Death Penalty Question*, 9 AFR. HUM. RTS. L.J. 576 (2009).

²⁸⁶ *Id.* (on Attorney General v. Kigula).

²⁸⁷ See Renny v. Wanyoto (Civil Rev. 17 of 2014), [2015] UGHCCD 54 (27 February 2015), <https://ulii.org/ug/judgment/hc-civil-division-uganda/2015/54>; Sahabo v. Kaneza (Misc. App. 524 of 2019), [2020] UGHCFD 3 (11 March 2020), <https://ulii.org/ug/judgment/hc-family-division-uganda/2020/3>.

²⁸⁸ *Uganda Assoc. of Women Lawyers v. Attorney General* (Const. Petition 2 of 2003), [2004] UGCC 1 (Mar. 10, 2004), <https://ulii.org/ug/judgment/constitutional-court-uganda/2004/1>.

²⁸⁹ Employment Act, 2006, Act 6 of 2006, Uganda Gazette no. 26 (June 8, 2006), <https://ulii.org/akn/ug/act/2006/6/eng%402006-06-08>.

cluded within the ambit of the act.²⁹⁰

(a) Exclusion of Dependent Relatives in Family Undertakings

However, at the outset, the Act does not apply to “employers and their dependent relatives when the dependent relatives are the only employees in a family undertaking, as long as the total number of dependent relatives does not exceed five.”²⁹¹ In terms of the definition provided, a “dependent relative” means “a member of the employees family who substantially depends on that employee for his or her livelihood.”

C. 189 defines a domestic worker as, “any person engaged in domestic work within an employment relationship,”²⁹² and does not provide a categorical exclusion for family undertakings employing dependents. The effect of this exclusion is that the safeguards against exploitation and even servitude and forced labour and also prohibitions on child labour do not extend to family members employed in family undertakings employing under 5 family members. Given that familiage is widely practiced in Uganda, this exclusion, is significant.

(b) Exclusion of Recruiters of Domestic Workers

It is important to note that the Employment Act does not make specific mention of domestic work except in section 38, where it recognizes that “no one shall engage in the business of operating a recruitment agency unless he or she is in possession of valid recruitment permit issued by the commissioner, and subject to conditions set by the commissioner.” However, section 38(3)(a) provides that the section shall not apply to recruitment for employment as a domestic servant.

This provision has leaves the domestic work sector unregulated, which has the effect of exacerbating the vulnerability of abuse of domestic workers. It also runs counter to C. 189 obligations with respect to protection of domestic workers from abuse by private employment agencies. Article 15 of C. 189 has provisions to effectively regulate such agencies and to ensure there are avenues to investigate abuse and complaints of fraud against agencies, and to take measures to ensure that fees charged by private employment agencies are not deducted from domestic worker remuneration.

²⁹⁰ Domestic Workers are similarly not excluded from Workers Compensation Act, 2000, which provides compensation for accidents and injuries at work. Ch. 225, Dec. 31, 2000, <https://ulii.org/akn/ug/act/2000/8/eng@2000-12-31>. Additionally, they're not excluded from the Labour Unions Act 2006. Act No. 7 of 2006, July 27, 2006, Uganda Gazette, no. 47, vol. XCVIX (Aug. 4, 2006), <https://ulii.org/akn/ug/act/si/2006/36/eng@2006-08-04>.

²⁹¹ Employment Act, Art. 3(a).

²⁹² C. 189, *supra* note 7, at art. 1(b).

(c) Sexual Harassment

Although section 7 of the Employment Act contains provisions addressing sexual harassment in employment, the provisions are limited in a number of respects. Under section 7(1), such harassment must be perpetrated by an employer or his/her representative and must take a “sexual” form.²⁹³ Their focus on sexual conduct and under section 7(1)(d) “must have a detrimental effect on the employees job performance or job satisfaction.” Section 7(3) defines an employer’s representative “as a person employed by that employer who has authority over the employee alleging sexual harassment or who is in the position of authority over other employees in the workplace.” Most critically for domestic workers, section 7(4) of the Employment Act only requires employers of more than twenty-five employees to have in place measures to prevent sexual harassment at work.

These provisions on sexual harassment do not comply with ILO norms on sexual harassment as contained in C. 190 on Violence and Harassment at work. C. 190 covers harassment perpetrated not only by authority figures, but also by fellow employees and even third parties. It also is not limited to sexual conduct but includes harassment that is gender-based. Under section 7, employers of domestic workers, who generally work in private homes, would not be required to put in place measures to prevent sexual harassment, and would not comply with C. 190.

(d) Labour Inspection and Homes

According to section 11 of the Employment Act, labour officers are mandated to inspect and enforce labour laws at workplaces within the country. It is however worth noting that while the Employment Act does not define a workplace and permits the officer “to enter freely and without previous notice at any hour of the day or night, any workplace for inspection,” the Employment Regulations define a workplace as “all places of work and all sites where work is carried out...including fields, forests, roads and mobile places of work such as cabs of trucks...”²⁹⁴

The section does not explicitly include the home as workplace, and as such it is unclear whether labour inspectors are empowered to enter a homestead to inspect and intervene in cases of abuse. However, under article 17 of C. 189, each member “shall develop and implement measures for labour inspection, enforcement and penalties, with due regard to the special characteristics of domestic work, in accordance with national laws and regulations.” Further, 17(3) sets out that “in so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be

²⁹³ Employment Act, art. 7(1)(a)–(d).

²⁹⁴ Employment Regulations, 2011 No. 61, Uganda Gazette, no. 69, vol. CIV, supp. No 35 (Nov.18, 2011), https://media.ulii.org/files/government_gazette/files/ug-government-gazette-dated-2011-11-18-no-69.pdf.

granted, having due regard to privacy.”

(e) National Minimum Wage Act

The national minimum wage is of particular importance to domestic workers—who in absence of stringent collective bargaining agreements—rely on that to raise their meager wages. However, the national minimum wage was last set at 1.6 USD, in 1984. In 2019, parliament passed the National Minimum Wage Act, which was rejected by the president in August 2019.

According to the 2015 study by Platform for Labour Action, a non-profit organization promoting and protecting labour rights in the country including rights of domestic workers, domestic workers are paid as little as UGX 50,000 (approximately USD15) to UGX 100,000 (approximately USD30). Without a minimum wage in the country, these low wages will most likely not rise. Under C. 189, if there is a minimum wage in their country, it must apply to domestic workers as well; and further such remuneration must be without discrimination based on sex.²⁹⁵

3.3.5 Analysis: Justice Delayed is Justice Denied

Uganda has made significant steps towards the protection of the rights of workers in the 2006 Employment Act and its 2011 regulations, among others. Indeed, in January 2022, Uganda passed the National Social Security Fund (Amendment) Act, 2021, which removed the limitation on employer obligations to employers employing over five employees.

However, the Employment Act, contains two explicit gaps; (1) the exclusion of recruiters of domestic workers from regulatory oversight; and (2) the exclusion of employees and their dependent relatives, when the dependent relatives are the only employees in a family undertaking that does not exceed five employees.²⁹⁶ In the context of widespread famillage, these exclusions are consequential and enables exploitation of child domestic workers. Further, neither the Employment Act nor its regulations, address labour inspection when the workplace is a private home. This absence captures the limits of applying and implementing generalized labour laws to protect the rights of domestic workers.

²⁹⁵ C. 189, *supra* note 7, at art. 3(2)(d) and 11; R. 201, *supra* note 59, at ¶ of 3(a)–(c). Must be read with ILO conventions and recommendations, including Equal Remuneration Convention, 1951 (No. 100); Equal Remuneration Recommendation, 1951 (No. 90); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111); HIV and AIDS Recommendation, 2010 (No. 200); Maternity Protection Convention, 2000 (No. 183); and Maternity Protection Recommendation, 2000 (No. 191)

²⁹⁶ Employment Act, art. 3(a).

These exclusions are inconsistent with C. 189, which applies to anyone who is in an employment relationship in a household, including family members and dependents of employees, regardless of the number of people employed in the household. C. 189 recognizes both child domestic workers and live-in domestic workers as particularly vulnerable workers, which require special consideration. Further, under article 15 of C. 189, states are bound to protect domestic workers from abusive practices from private employment agencies rather than leave them unregulated.

While, Uganda has not ratified C. 189, it has ratified a plethora of international human rights instruments, including ILO and African human right instruments. Its constitution is committed to gender equality, and to the provision of affirmative action on basis of gender or any other reason created by history, tradition, or custom, for the purpose of redressing imbalances. Its courts have demonstrated a willingness to consider the normative impact of international and regional human rights, as well as comparative jurisprudence in its adjudications, including those dealing with colonial era laws that continue to discriminate against women. Accordingly, these courts would be well placed to consider recent comparative jurisprudence, such as a case arguing that the exclusions and invisibility of domestic workers under current labour law amounts to a form of indirect discrimination on the basis of race, gender, and class and is similarly the relic of colonial era norms.

Yet, the Ugandan government is aware of these significant gaps and has taken action. The Employment Amendment Bill was passed into law on April 1, 2021 by the 10th Parliament, which addresses most of the gaps identified and explicitly defines domestic workers as employees and a household as a place of employment. It removes the exclusion of employees working for family members. It also removes the threshold of 25 employees for employer obligations to prevent sexual harassment and widens the definition of harassment. Recruitment regulations must now cover all categories of workers in the country, including domestic workers. The law explicitly authorizes labour inspectors to inspect private homes, makes provision for breast-feeding at work, and explicitly includes domestic workers in rights to freedom of association and collective bargaining. Further, the Draft Employment (Domestic Workers) Regulations of 2020 explicitly recognizes domestic workers as a special category of workers in Uganda that need special regulation under the law and addresses issues particular to the sector.

However, both the Bills is still waiting the assent of the president. Similarly, the Minimum Wages Advisory Boards and Wages Councils Act would bring into force “The Minimum Wages Act,” which would set the minimum pay for domestic workers as determined by government. The Minimum Wages Bill was passed by parliament in 2019. However, the President has not yet assented to it. One commentator writes that while the bill is laudable, it is the president who

has the final word on whether and in what form it will be passed, and “he is reluctant to sign off on laws that have the effect of increasing employment costs, since they are a disincentive to investors to invest in Uganda in favor of other countries with lower employment costs.”²⁹⁷

The existence of the plethora of draft Bills is encouraging. However, as long as the laws are not assented to, the violations remain in place. In other contexts, the Constitution has successfully been engaged to propel constitutionally mandated reforms that were in limbo.²⁹⁸

As a result, the following provisions still remain in force, are constitutionally egregious, and could be subject to constitutional challenge in the High Court on the basis of article 21, which guarantees freedom from discrimination in all spheres, including economic and cultural, and which explicitly prohibits discrimination on the grounds of sex, race, colour and “economic standing.” Article 33 could also provide a basis for litigation, since it stipulates, that women are entitled to affirmative action in order to redress historic imbalances created by history or custom, as well as article 40, which obliges parliament to pass laws to protect the right to work under safe and satisfactory conditions:

- Exclusion of dependent relatives working in a home that employs no more than 5 employees who are family members.
- Exclusion of recruiters of domestic workers from regulation
- Absence of provisions addressing labour inspection in homes
- Limiting preventative measures with respect to sexual harassment to workplaces employing more than 25 employees
- The separate and lower national minimum wages for domestic workers

²⁹⁷ Christopher Lwebuga, Employment Law Alert: An Overview on The Employment (Amendment) Bill 2019 Uganda (unpublished manuscript), https://www.academia.edu/43155489/Employment_Law_Alert_An_Overview_on_The_Employment_Amendment_Bill_2019_Uganda (last visited Nov. 9, 2022).

²⁹⁸ In the 2016 case of *Centre for Rights Education v. Speaker of the National Assembly*, the Kenyan High Court dealt with the failure of parliament to pass a law to give effect to the two-thirds gender rule. [2017] eKLR (Kenya), <http://kenyalaw.org/caselaw/cases/view/133439/> [<https://perma.cc/C784-4W5J>]. Also, in the ground-breaking Mahlangu case in South Africa, proposed legislative changes had been on the table for over twenty years, but never were passed. Ultimately, the Constitutional Court decided the issue.

(b) Structural Exclusion from Core Labour Law Protections: Kenya, Nigeria and Malawi

In this category of case studies, domestic workers are included within general labour laws. The form of inclusion in labour law varies. In Nigeria, the labour law explicitly includes domestic “servants;” in Kenya inclusion has been achieved through judicial incorporation of unratified international conventions; and in Malawian labour law, there is no reference to the sector in its provisions.

However, in all three case studies domestic workers are to varying degrees *structurally* excluded from key protective provisions in the labour law, which only apply to larger workforces. In Kenya, employers with under twenty employees are excluded from obligations with respect to sexual harassment policies. Nigeria’s law excludes similar employers from key provisions with respect to hours of work, minimum wage, maternity protection, and national health insurance. While in Malawi, domestic workers are structurally excluded from obligations to provide written contracts of employment and pensions. Further, prohibitions on child labour in Malawian labour law do not explicitly address domestic work.

The structural exclusion of domestic workers from labour protections amounts to a form of indirect discrimination, since the sector is not explicitly excluded by name, as in category one cases. Rather, the impact of exclusion of employers employing less than a certain number of employees from core obligations amounts to a removal of domestic workers from critical labour protections in ways that are arguably unjustified and amount to indirect discrimination.

3.4 Kenya

3.4.1 Background

Statistics show that Kenya has more than two million domestic workers out of a population of more than 15 million persons employed in the informal sector.²⁹⁹ Domestic workers in Kenya perform a range of tasks, which include cooking, cleaning, laundry, childcare, elder care and other household duties. The majority of domestic workers are women, although there are a few men in the sector. There are an estimated 350 000 child domestic workers in Kenya, the majority of whom are girls between the ages of 16 and 18.³⁰⁰

²⁹⁹ George Owidhi, Central Org. of Trade Unions, Analysis of Working conditions and wages of domestic workers in Kenya, ALREI.ORG (Feb. 2017), <https://alrei.org/education/analysis-of-working-conditions-and-wages-of-domestic-workers-in-kenya-by-george-owidhi-economist> [<https://perma.cc/K7XB-CEBN>].

³⁰⁰ ILO, Observation (CEAR), NORMLEX (2021), <https://www.ilo.org/>

Studies have shown that most of the child domestic workers in the urban areas come from the impoverished zones of Kenya: North Eastern, Nyanza, Eastern Coast and the Western.³⁰¹ Most of the domestic workers come from backgrounds where they have endured hardships, such as early pregnancy, early marriage, being orphaned and living with HIV/AIDS.³⁰²

The practice of hiring women for domestic work in Kenya is strongly rooted in its social structure. More specifically, research shows that the employment of girls is part of a wider social structure that has institutionalised violence against women and exploits the labour of children.³⁰³ Furthermore, reports show that a large number of women are employed as domestic workers in the Middle East.³⁰⁴ Kenya is also a receiving country for migrant domestic workers from Somalia.

The regulation of domestic work falls under the general labour laws. Despite the strides that Kenya has made towards the recognition of domestic work, the vast majority of domestic workers remain vulnerable to abuse and exploitation including verbal abuse, long working hours, limited or no rest, sexual abuse, exposure to hazardous work and lack of privacy.

3.4.2 International law

Kenya is a signatory to several international instruments that provide for human rights to domestic workers. These include the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights to the Child (CRC).

More specifically, CEDAW obliges state parties to take appropriate measures "to eliminate discrimination against women in the field of employment to ensure, on a basis of equality of men and women, the same rights."³⁰⁵ General Recommendation No.19 to CEDAW provides that, "equality in employment can be seriously impaired when

[dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4041702:YES](https://www.unhcr.org/refugees/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4041702:YES).

³⁰¹ Pacificah F. Okemwa, REPORT OF SURVEY: DOMESTIC WORKERS IN KENYA (2015), <http://invisibleworkers.eu/wp-content/uploads/2016/02/20160224-Kenya-report-final-2015.pdf> [<https://perma.cc/ZTS2-ZXXZ>].

³⁰² *Id.*

³⁰³ Mary Mzungu, *Girl Domestic Workers in Kenya*, LINKS: OXFAM'S NEWSLETTER ON GENDER, Mar. 1999, <http://www.hartford-hwp.com/archives/36/182.html>.

³⁰⁴ Sophia Njiru & Nikirote Laiboni, WOMEN'S LABOUR MIGRATION ON THE AFRICA-MIDDLE EAST CORRIDOR: EXPERIENCE OF MIGRANT DOMESTIC WORKERS FROM KENYA (2019), https://www.gaatw.org/publications/Kenya_Country_Report.pdf [<https://perma.cc/XJK7-5FMY>].

³⁰⁵ CEDAW, *supra* note 29, at art. 11.

women are subject to gender-specific violence, such as sexual harassment in the workplace."³⁰⁶ Kenya is also a signatory to the Beijing Declaration and Platform for Action, which calls for governments, employers, trade unions, and communities to develop programs and procedures to eliminate sexual harassment and other forms of violence against women in all educational institutions, workplaces and elsewhere.³⁰⁷ Indeed, this gap in fulfilling positive measures to prevent sexual harassment is critical and was noted by the CEDAW Committee, in its consideration of Kenya's fulfilment of its convention obligations.³⁰⁸ The CEDAW and ICESCR Committee have expressed concern over the high level of child labour in Kenya.³⁰⁹

Kenya is also a member of the International Labour Organisation. Under this membership, it is bound to respect the ILO Declaration of Philadelphia, which affirms that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."³¹⁰ Kenya has also ratified several key ILO conventions including the eight fundamental conventions.³¹¹ More significantly, Kenya has ratified the ILO Convention on Discrimination (Employment and Occupational), 1958 (No.111), which provides a framework to address discrimination and sexual harassment in the workplace.

Kenya is yet to ratify the C. 189 and the Violence and Harassment Convention, 2019 (No.190)(C. 190). Of critical importance, the courts have held that the Employment Act of 2007 applies to domestic workers and that even without ratification of C. 189, the minimum labour standards defined under it are already part of the law of Kenya. However, ratification serves to clarify and expand the existing minimum standards and rights of domestic workers.³¹²

³⁰⁶ Comm. on the Elimination of Racial Discrimination, General Recommendation No. 19: Violence Against Women, U.N. Doc. A/47/38(SUPP) at 3 (1992)[hereinafter Gen. Rec. No. 19], [http://undocs.org/A/47/38\(-SUPP\)](http://undocs.org/A/47/38(-SUPP)).

³⁰⁷ Beijing Declaration and Platform for Action, 1995, at ¶ 126, <https://www.un.org/womenwatch/daw/beijing/platform/declar.htm>.

³⁰⁸ Comm. on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Discrimination against Women, U.N. Doc. Cedaw/C/KEN/CO/7 (2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/418/57/PDF/G1141857.pdf?OpenElement>.

³⁰⁹ Comm. on Econ., Soc. and Cultural Rts., Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Kenya, U.N. Doc. E/C.12/KEN/CO/1 (2008), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/456/03/PDF/G0845603.pdf?OpenElement>.

³¹⁰ ILO, Declaration of Philadelphia, 1944, art. II (a).

³¹¹ The eight ILO fundamental Conventions regulate forced labour, freedom of association and collective bargaining, equal remuneration, minimum age and worst forms of Child Labour.

³¹² *Lundu v. Nderitu*, No. 759 of 1013, [2014] eKLR ¶ 7 (Indust. Ct. Nairobi)(Kenya), <http://kenyalaw.org/caselaw/cases/view/93963>.

Besides being a signatory to international instruments, Kenya is also a signatory to several regional protocols and instruments including the African Charter on Human and People's Rights and the Rights of Women (2003). Kenya is also a member of the East African Community (EAC), where it is committed to regional cooperation in facilitating inter-regional trade infrastructure development; the four freedoms; free movement of persons, labour, services, capital; and two rights: right of establishment and right of residence.³¹³

3.4.3 Constitutional Context

At a national level, the Constitution of Kenya (2010) provides the highest guarantee of protection to workers in general and domestic workers in particular. Kenya is a constitutional democracy in which the constitution is the supreme law of the land.³¹⁴ More specifically the Constitution provides that any law, including customary law, that is inconsistent with it shall be void.³¹⁵ Furthermore, the general rules of international law form part of Kenyan law and any treaty or convention ratified by Kenya forms part of the law of Kenya.³¹⁶ This implies that any action in contravention of a ratified treaty or convention may be subject to constitutional scrutiny.

The Constitution creates obligations upon both the state and private individuals.³¹⁷ The Constitution provides everyone, including domestic workers with fundamental rights and freedoms. According to article 27, everyone is entitled to equal protection and benefit of the law; and "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." Under 27(4), neither the state nor "any person," shall "discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth." Article 27(6) permits affirmative action in order to benefit previously disadvantaged communities and individuals. While article 27(8) requires that the "state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

³¹³ Uhuru Kenyatta, Exec. Off. of the President, REPUBLIC OF KENYA PROGRESS MADE IN FULFILMENT OF INTERNATIONAL OBLIGATIONS OF THE REPUBLIC OF KENYA (2020), <http://www.parliament.go.ke/sites/default/files/2020-11/L%20889%20INTERNATIONAL%20OBLIGATION%20FINANCIAL.pdf> [<https://perma.cc/7A5V-XGWJ>].

³¹⁴ CONST. OF KENYA 2010, art. 2.

³¹⁵ *Id.* at art. 2(4).

³¹⁶ *Id.* at arts. 2(5)-2(6).

³¹⁷ Article 3(1) of the Constitution provides that every person has an obligation to respect, uphold and defend the Constitution. More specifically, Article 20 (1) provides that the Bill of Rights applies to and binds all state organs and all persons.

In the 2016 case *Centre for Rights Education v. the Speaker of the National Assembly*, the High Court dealt with the failure of parliament to pass a law to give effect to the two-thirds gender rule.³¹⁸ Drawing on comparative South African jurisprudence and emphasizing the affirmative action provisions with respect to gender, the Court found that lawmakers failed to comply with their constitutional obligations, and this failure violated the rights of women to equality and freedom from discrimination.

Other rights entrenched include the right to human dignity³¹⁹ and the prohibition of slavery or servitude and forced labour.³²⁰ The Constitution also obliges state organs and public officers to address the needs of vulnerable groups within society. These include women, older members of society, persons with disabilities, children, youths, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.³²¹

Significantly, article 41 of the Constitution provides for labour rights which include the right to fair labour practice, fair remuneration, reasonable working conditions, collective bargaining, and the right to strike. Article 43 provides for the right to social security, which includes the right to health care services like reproductive health care and education.

The Constitution further entrenches the right to privacy, which includes the right not to have their person, home or property searched and the right not to have information relating to their family or private affairs unnecessarily revealed.³²² Furthermore, every person has the right to freedom of movement.³²³ Given that the bill of rights binds all persons, those engaging domestic workers have a constitutional duty to respect the right to privacy, right to fair labour practices, and freedom of movement of domestic workers, including those workers that fall outside the scope of the employer-employee relationship regulated under the general labour laws.³²⁴

It must be noted that the Constitution makes provision for the implementation of the bill of rights. Under the Constitution, a person acting on their own behalf, or in an interest group, or in the public interest, or as an association acting in the interest of one or more of its members may institute

³¹⁸ *Centre for Rights Education v. Speaker of the National Assembly*, the Kenyan High Court dealt with the failure of parliament to pass a law to give effect to the two-thirds gender rule. [2017] eKLR (Kenya), <http://kenyalaw.org/caselaw/cases/view/133439/> [<https://perma.cc/C784-4W5J>].

³¹⁹ CONST. OF KENYA, 2010, art. 28.

³²⁰ *Id.* at art. 30.

³²¹ *Id.* at art. 21(3).

³²² *Id.* at art. 31.

³²³ *Id.* at art. 39(1).

³²⁴ *Id.* at art. 41 (providing every person with a right to fair labour practice).

proceedings claiming that a right has been infringed.³²⁵ Significantly, the Constitution provides that the Chief Justice shall make rules for proceedings which include that no fees may be charged for commencing proceedings.³²⁶ This makes the courts accessible to domestic workers and their representatives.

3.4.4 Domestic Laws

The general approach in the regulation of domestic work in Kenya is that it is regulated under the general laws, which regulate all other workers, with no specific laws and regulations addressing the specificity of the sector. The central labour laws, including the Employment Act, 2007, do not exclude domestic workers from their ambit, so in theory they regulate their conditions of work.³²⁷ Of note, the Work Injury Benefits Act excludes from the definition of "employee" a family member "dwelling in the employer's house or cartilage thereof and not for the purpose of employment." Presumably this would not exclude a family member who is dwelling in the employer's house for the purposes of employment.³²⁸

The Kenyan government has sectoral specific wage determinations under the Regulations of Wages Order. Domestic workers in cities earn a higher wage, than domestic workers who work in non-urban areas.

(a) The Employment Act, 2007

The Employment Act is the main substantive law on employment in Kenya and incorporates the principles enshrined in the Constitution, as well as several international labour law instruments which include the prohibition against forced labour,³²⁹ elimination of discrimination and promotion of equality,³³⁰ the protection against sexual harassment,³³¹ paid maternity leave, and provisions on employer obligation with respect to housing, water and food of employees, as well as provisions regulating and prohib-

³²⁵ *Id.* at art. 22.

³²⁶ *Id.* at art. 22 (3)(c).

³²⁷ Act 11 of 2007, <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011%20of%202007> [<https://perma.cc/PA6Q-QUQP>]. See also Labour Relations Act, 2007; the Occupational Safety and Health Act, 2007; the Work Injury Benefits Act, 2007; the Labour Institution Act, 2007, National Social Security Fund, Paye as You Earn (PAYE) and the National Hospital Insurance Fund.

³²⁸ Under section 5 (3)(c) of the Act, "[A] member of the employer's family dwelling in the employer's house or cartilage thereof and not for the purpose of employment" are not considered employees for the purposes of the Act. Employment, Act 11 of 2007, <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011%20of%202007> [<https://perma.cc/PA6Q-QUQP>].

³²⁹ *Id.* at § 4.

³³⁰ *Id.* at § 5.

³³¹ *Id.* at § 6.

iting child labour.

In terms of its scope and application, the Act applies to employees and employers under a contract of service. The law recognizes both oral and written contracts.³³² There have been cases involving domestic workers which have been instituted in the Employment and Labour Relations Court on behalf of domestic workers.³³³ For example in the case of *Musiuzi v. Khan*,³³⁴ the domestic worker had been employed since 2007 and was abruptly dismissed. She had no written contract, her duties were ad hoc and included taking care of the respondent's children for a specified salary. The Court held that the termination of employment was unfair, and that the domestic worker was entitled to all benefits entitled to an employee. It held that verbal contracts conferred rights and were applicable under the Employment Act. The Court further held that employers should, at the earliest time possible, have oral contracts reduced to written form. In the subsequent case of *KUDHEIHA v. Mohammed*, the Court held that non-issuance of advance notice of termination constituted an unfair labour practice.³³⁵

(b) Family Undertaking

The Employment Act does not explicitly define domestic work, and there are no provisions addressed specifically to that sector or context. Section 3, dealing with application, determines that the act does not apply to "the employer's dependents where the dependents are the only employees in a family undertaking." A "dependent" is defined as "a member of an employee's family or a relative who substantially depends on that employee for his livelihood."

Significantly, this provision means that family members employed as domestic workers in a home where they are "dependent" would not be covered by any of the protections in the Act, including rights to sick leave, vacation, freedom from sexual harassment, maternity leave, as well as rights to accommodation, water and food. It also means that employers of dependent family members are not bound by restrictions with respect to employment of children in the Act.

These provisions are inconsistent with ILO C. 189 on Domestic Work, which does not contain a blanket exclusion from protection for family members working in a home.

³³² The Employment Act prohibits forced labour, discrimination, harassment and the worst forms of child labour. It further regulates the payment of wages, annual leave, maternity leave, sick leave, and hours of work, amongst other regulations.

³³³ by KUDHEIHA, or nongovernmental organisations such as Kituo cha Sheria (a legal aid centre) and in some cases, domestic workers in person.

³³⁴ Case No. 267 of 2012 [2013].

³³⁵ Kenya Union of Domestic Hotels Educ. Inst. and Hosp. Workers (KUDHEIHA) v. Mohamed, No. 1035, [2015] eKLRCase (Emp. & Lab. Rel. Ct.)(Kenya), <http://kenyalaw.org/caselaw/cases/view/112376>.

This exclusion is more extensive than similar provisions found in Lesotho and Uganda, which only exclude dependents employed by family member where no more than five other family members are also employed.

(c) Sexual Harassment

Section six of the Employment Act addresses sexual harassment, and sets out that an employee is harassed “if the employer of the employee or a representative of that employer or a co-worker (a) directly or indirectly requests sexual intercourse, sexual contact and or any other form of sexual activity that contains either a promise of preferential treatment or a threat of detrimental treatment or about the future or present employment status of the employee; or uses language or visual material of a sexual nature, or shows physical behavior of a sexual nature that is unwelcome or offensive and has a detrimental impact on the employee. While section five places the onus on the employer to rebut allegations of discrimination, the reverse onus provision is not found in section six on sexual harassment.

Further, Subsection (2) and (3) require an employer who employs twenty or more employees, to, after consultation with the employees/representatives, to issue a policy statement on sexual harassment, which must include the definition of harassment; a statement that every employee is entitled to employment that is free from sexual harassment; that the employer shall take steps to ensure that no employee is subject to sexual harassment; and will take disciplinary measures against alleged harassers; explaining the ways which complaints can be brought; and guaranteeing a degree of confidentiality. This section also requires an employer to make this policy known to third parties dealing with the business.

These provisions fall short of obligations to effectively prevent sexual harassment and gender-based violence at work in a number of crucial respects.

First, the definition of sexual harassment as relating to conduct of a sexual nature is unduly narrow, and does not capture gender-based harassment, which would include gender-motivated conduct that is not necessarily sexual, but that is equally unwelcome. Under C. 190, gender-based violence and harassment is defined as “violence and harassment directed at persons because of their sex or gender or affecting persons of a particular sex or gender disproportionately.”

Secondly, in the situation where domestic workers are dependent family members, they would not be covered by any of the provisions on non-discrimination and sexual harassment, since they are entirely excluded from the protection of the Act.

Thirdly, since most private employers of domestic workers employ under twenty workers, they would not be

bound at all with respect to provisions to prevent sexual harassment by issuing a policy statement, which includes a definition of what sexual harassment entails, that there is a right to an environment free of sexual harassment and explaining the complaint mechanisms available to the domestic worker. This language means that domestic workers are entirely excluded from one of the most critical mechanisms for prevention and protection under the Employment Act.

These provisions would similarly fall short of requirements under C. 190 on Violence and Harassment, which make clear that the obligation to adopt laws and regulations to define and prohibit violence and harassment, including gender-based violence and harassment, apply to all workers and sectors, including domestic workers. Article nine obliges states to adopt laws and regulations requiring employers to take appropriate steps commensurate with their degree of control to prevent violence and harassment in the world of work, which includes adopting workplace policies, identifying hazards and risks and providing information and training. These provisions are not limited to the formal sector or urban areas.

Indeed, courts in Kenya have adjudicated several cases relating to sexual harassment of domestic workers. In *LMM v. SV & DIT LTD*, a domestic worker was sexually harassed by her employer. In *NML v. Petrausch*, the Court accepted the evidence that the domestic worker had been sexually abused and harassed. In reaching its decision, the Court relied on section six of the Employment Act, which outlaws sexual harassment.³³⁶ Citing *P.O. v. Board of Trustees AF*, the Court held that gender-based violence is the most prevalent human rights violation in the world. It violates many of the fundamental rights articulated in the Universal Declaration on the Elimination of Violence against women and ILO Convention 111. The Court further relied on the rights enshrined under section 27 of the Constitution, which guarantee the right to equality and freedom of all persons, section 28 which ensures the right to dignity, and section 29 which guarantees the right not to be subjected to any forms of violence from either public or private sources. The Court further relied on C. 189.

The courts have gone a long way in the promotion and protection of human rights for domestic workers. The fact that the courts are willing to recognise ILO conventions not ratified as being part of the Kenyan law is *highly commendable*. However, there is a need to ratify ILO conventions relevant to domestic work, especially C. 189 and C. 190.

(d) Child Workers

Under the Kenyan Employment Act, a child is defined as a person under the age of 18 years. While section 56 of the

³³⁶ *NML v. Petrausch*, no. 441, [2015] eKLR (Indust. Ct. Mombasa)(Kenya). <http://kenyalaw.org/caselaw/cases/view/110471/>.

act makes it illegal to employ a child under the age of 13, children between the ages of 13 and 16 can be employed in "light work." Those between the ages of 16 and 18 are employable under the Act.

However, C. 189 obliges governments to ensure that domestic workers enjoy equal treatment to other workers in the country.³³⁷ It recognises that child domestic workers are particularly vulnerable, as are live-in domestic workers and special measures need to be taken to address these vulnerabilities. Recommendation five elaborates that when employing a domestic worker under the age of 18 but above the minimum age of employment defined by national law, members must: (a) strictly limit their hours of work to ensure adequate time for rest, education and training, leisure activities and family contacts; (b) prohibiting night work; (c) placing restrictions on work that is excessively demanding, whether physically or psychologically; and (d) establishing or strengthening physical mechanisms to monitor their working and living conditions.

(e) Sexual Offences Act

Under section 23 of the Sexual Offences Act of 2006, "any person, who being in a position of authority or holding a public office, who persistently makes any sexual advances or requests which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the offence of sexual harassment and shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shilling or both."

However 23(2), places an onus on the victim to prove that (a) the submission or rejection of the sexual advances or requests would be used as a basis for employment or as a decision relevant to the career of the alleged victim; (b) the sexual advances or requests by the perpetrator have the effect of interfering with the alleged victim's work, educational performance, or have created an offensive working or learning environment; or (c) from a public officer.

Consequently, under the Sexual Offences Act, sexual harassment is a criminal offence, only when perpetrated by someone in position of authority; when such conduct is persistent; and when he/she has reasonable grounds to know it is unwelcome. Significantly, it is the victim who bears the onus of proving that there was a work-related quid pro quo, or the advances have had the effect of interfering with their work.

These prerequisites and limitations undermine the ability of victims of gender-based violence and harassment from obtaining a remedy where the conduct is not persistent or culturally sanctioned, such that it would not be considered unreasonable. It also would not protect domestic workers working in a home, where the harassment or violence emanates from a family member that is not in a position

of power. For example, in a private home, it might be the children of the employer who are perpetrators of such offences.

Similarly, these provisions would not satisfy the obligations under C. 190 on Violence and harassment, which recognize all forms of violence and harassment, including that occurring from third parties, and that which is in the form of a single incident or recurrent "that result in or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment." Under C. 190, it is "unacceptable conduct" that is impugned, rather than a reasonable belief that it was not unwanted as set out in the Sexual Offences Act. Under section 16(e) of Recommendation 206 on Violence and Harassment, the shifting of the burden of proof is appropriate in non-criminal proceedings.

3.4.5 Analysis

Domestic workers face significant risk of violence and harassment in the workplace. According to the ILO, "domestic workers frequently suffer forms of violence and harassment, exploitation, coercion, ranging from verbal abuse to sexual violence and sometimes even death."³³⁸ The fact that domestic workers work in isolation makes them particularly vulnerable to abuse.

However, the Employment Act does not protect domestic workers who are family members and does not adequately protect domestic workers who are employed in private homes, particularly with respect to the prevention of gender-based violence and harassment. Indeed, the Employment Act provides no mechanisms to prevent sexual harassment in houses employing under 20 people, as well as no requirement of any employment policy, complaint mechanism, or statement on the right to be free from sexual harassment.

These gaps amount to a failure to prevent and protect victims from gender-based violence and harassment under C. 190 and C. 189 obligations to provide effective protection against all forms of abuse, harassment, and violence,³³⁹ which should include the establishment of complaint and other mechanisms. Kenya should be adopting "positive" measures to ensure they are protected from violence and abuse, rather than excluding them from crucial preventative provisions in the Employment Act.

³³⁸ *Recognizing the Rights of Domestic Workers*, ILO (Aug. 23, 2018), https://www.ilo.org/global/about-the-ilo/mission-and-objectives/features/WCMS_641738/lang-en/index.htm.

³³⁹ C. 189, *supra* note 7, at art. 5; R. 201, *supra* note 59, at ¶ 7. See also Convention Concerning the Elimination of Violence and Harassment in the World of Work, adopted June 21, 2019, 58 I.L.M. 1170 [hereinafter C. 190]; ILO, Violence and Harassment Recommendation (2019) [hereinafter R. 206], https://www.ilo.org/dyn/normlex/en/f?p=NORML-EXPUB:12100:0::NO::P12100_ILO_CODE:R206.

³³⁷ C. 189, *supra* note 7, at art. 6.

While Kenya has not ratified either C. 190 or C. 189, it has ratified CEDAW, which has identified these gaps in compliance with treaty obligations. Further, the courts have indeed gone a long way in the promotion and protection of human rights, by drawing on international human rights norms. Indeed, they have been willing to recognize ILO conventions not ratified as being part of the Kenyan law. As a consequence, both C. 190 and C. 189 could be used in a constitutional case that addresses whether the Employment Act's treatment of domestic workers amounts to discrimination under the Constitution, and/or a failure to adopt special measures/affirmative action policies to provide redress to a historically disadvantaged community.

Furthermore, there is a need to enact specific laws to regulate domestic work to ensure that the unique characteristics of domestic work are addressed within a specific regulatory framework. Frequently the inclusion of domestic work in generalized labour law, without taking into account the particularities of the sector, render many critical rights—including to a large extent labour inspection—unenforceable. Although the recently revamped Wages Council regulating minimum wages for domestic workers provides a first phase towards the enactment of specific laws for domestic workers, there is a need to enact regulations covering terms and conditions of employment, which take into account the unique aspects of domestic work.

As a result, we would argue that given the Kenyan constitutional commitment to the prohibition of both direct and indirect discrimination, to affirmative action measures in favour of disadvantaged communities and individuals, to a monist approach to ratified conventions, and to jurisprudence relying in unratified ILO Conventions, the following provisions could be subject to a constitutional challenge in the High Court:

- The exclusion of dependents working in a family undertaking
- Absence of provisions with respect the employer's obligation to prevent sexual harassment, which would build on existing jurisprudence on sexual harassment and ILO C. 190 and C. 189
- Absence of provisions in the Employment Act prohibiting the employment of girls between the age of 14 and 16 in domestic work in contravention of the African Charter.
- The separate and lower national minimum wages for domestic workers

3.5 Nigeria

3.5.1 Background

Domestic work is an essential part of the Nigerian social life.³⁴⁰ Households often employ a range of workers to perform services like cooking, cleaning, caring of children, washing clothes, driving, gardening and security.³⁴¹ Statistics on domestic work in Nigeria are highly contested, underestimated and outdated due to the high degree of informality in domestic work. For example, the 2007 National Bureau Statistics of Nigeria estimated that domestic workers numbered 197,900. This figure was composed of 98,300 women and 99,600 men, thus constituting of about 0.5 per cent of the total employment. The Labour Force surveys do not expressly include domestic workers as a category of unpaid house workers which in 2017 constituted 4.5 million or 7.17% of the population.

More than 85% of domestic workers in Nigeria are women.³⁴² Furthermore, the vast majority of domestic workers are children who are often trafficked from rural areas to work in households in the urban areas.³⁴³ In addition, there are also large numbers of migrant domestic workers from neighboring countries like Benin Republic and Togo. Furthermore, significant numbers of workers from Nigeria are said to be working in the middle east.

Despite the prevalence of domestic work in Nigeria, these workers *are structurally excluded from key protections in labour law*. This results in the vast majority of black women from poor rural areas and in some instances girls or migrants being left with no legal protection. The practice of hiring women and girls in domestic work is a cultural practice rooted in the culture where women, regardless of their status and profession, are responsible for domestic responsibilities, such as household chores, bearing and raising children, doing laundry etc. within the family.³⁴⁴ Furthermore, the history of domestic work in Nigeria dates

³⁴⁰ Zahrah Nesbitt-Ahmed, Gender, Paid Domestic Work and Social Protection. Exploring Opportunities and Challenges to Extending Social Protection Coverage Among Paid Domestic Workers in Nigeria, UNICEF (Jan 20, 2020), <https://www.unicef-irc.org/article/1961-gender-paid-domestic-work-and-social-protection.html> [<https://perma.cc/F83E-TPBZ>].

³⁴¹ *Id.*

³⁴² Toyin Ajibade Adisa, Olatunji David Adekoya & Olajumoke Okoya, *Modern-Day slavery? The Work-Life Conflict of Domestic Workers in Nigeria*, 36 GENDER IN MGMT. 519 (2021).

³⁴³ Nwamaka Ibeme, *Child Domestic Worker in Rural and Urban Areas in Nigeria: Implications for National Development*, 1 INT'L J. EMERGING KNOWLEDGE 219 (IJEK) (2014).

³⁴⁴ Abidemi R. Asiyanbola, Patriarchy, Male Dominance, the Role and Women Empowerment in Nigeria (2005)(unpublished manuscript), http://www.demoscope.ru/weekly/knigi/tours_2005/papers/iussp2005s50005.pdf [<https://perma.cc/95SW-WV9P>].

back to the colonial period, where missionaries, taking advantage of the surplus black labour sourced many house helpers who were predominantly men.³⁴⁵

In post-colonial Nigeria, the acquisition of western education and the change in the class structure between the "haves and the have nots" and the advancement of some ethnic groups has resulted in the uneven distribution of wealth in this society. This has resulted in the poor working for and providing services like domestic work to the rich. Modern day domestic workers are usually recruited through agents who negotiates with the family of the girl or the boy (but most times girls); these workers mostly from poverty stricken rural areas.³⁴⁶



Photo © Jonathan Torgovnik / Getty Images / Images of Empowerment

3.5.2 International Law

Nigeria is a signatory to a number of international instruments that provide for human rights for domestic workers. These include the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights to the Child (CRC).

Nigeria has ratified a number of key International Labour Organisation (ILO) conventions including the eight ILO fundamental Conventions.³⁴⁷ Besides being a signatory

³⁴⁵ Ibeme, *supra* note 352, at 221.

³⁴⁶ Busola Babalola, U.N. Off. of the High Comm'r for Hum. Rts., RECRUITMENT AND EMPLOYMENT OF MIGRANT DOMESTIC WORKERS, <https://www2.ohchr.org/english/bodies/cmw/docs/DGD/DefenceChildrenInternationalNigeria.doc> [<https://perma.cc/7BY3-LBKL>] (last visited Nov. 9, 2022).

³⁴⁷ The eight ILO fundamental conventions regulate forced labour; freedom of association and collective bargaining; equal remuneration; minimum age; and worst forms of Child Labour. Nigeria has *not* ratified ILO C. 189.

to international instruments, Nigeria is also a signatory to a number of regional protocols and instruments including the African Charter on Human and People's Rights (ACHPR) and the Rights of Women (2003). Nigeria is also a signatory to the Economic Community of West African States (ECOWAS) and has signed the ECOWAS free movement protocol, which seeks to harmonize labour practices among the regions. This implies that Nigeria is obliged to respect and comply with the obligations laid down in the ratified conventions and protocols.

3.5.3 Constitution

Nigeria is a constitutional democracy in which the constitution is the supreme law of the land, and a federal state consisting of states and federal capital territory.³⁴⁸ At the national level, the Constitution of Nigeria (1999) entrenches traditional liberal rights, at the same time as recognizing Sharia and customary law.³⁴⁹ Its Constitution contains fundamental rights, which are justiciable, and directive principles, that serve as guidelines for implementation of the Constitution.³⁵⁰

The fundamental rights section entrenches wide-ranging rights including the respect of human dignity and the prohibition of slavery or servitude and forced labour, as well as the right to freedom of association.³⁵¹ Section 42 of the Constitution provides for the right to freedom from discrimination and provides that

a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person... be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject.

These provisions are important, because they explicitly prohibit both direct and indirect discrimination on grounds including sex, ethnic group or belonging to a particular community.³⁵² There are cases dealing with customary inheritance rights which precluded women from inheriting, where the Supreme Court has found particular customary

³⁴⁸ CONST. OF NIGERIA, May 29, 1999, § 2(1)[hereinafter CONST. OF NIGERIA].

³⁴⁹ Gebeye, *supra* note 230, at 182.

³⁵⁰ *Id.*

³⁵¹ CONST. OF NIGERIA, §§ 34 (1) (b) and 40.

³⁵² Abigail Osiki, Towards Achieving Equality in the Nigerian Workplace: With a Focus on Women, Persons Living with Disabilities and Ethnic Minorities (Feb. 2014) (Master's thesis, University of Cape Town), <https://open.uct.ac.za/handle/11427/9162> [<https://perma.cc/77TP-M2M3>].

laws to be discriminatory and unconstitutional.³⁵³

The Constitution also includes socio-economic rights in the section entitled, "Fundamental Objectives and Directive Principles of State policy," and which also contain key labour provisions.³⁵⁴ In these provisions, the state is directed to ensure that all citizens, without discrimination are afforded the opportunity to secure adequate means of livelihood and suitable employment; to ensure that conditions of work are just and humane, and that there are adequate facilities for leisure, social, religious and cultural life.³⁵⁵ The state is also obliged to safeguard the health, safety and welfare of all people in employment and that there is equal pay for equal work without discrimination on the basis of sex "or any other ground whatsoever."³⁵⁶ Similarly, under these provisions, children, young persons and the aged are protected against any exploitation and must be provided with public assistance in deserving cases.

The Constitution provides for the enforcement of the rights contained in the bill of rights, and any person alleging that any provision of the bill of rights has been infringed may approach the High Court to seek redress.³⁵⁷

3.5.4 Constitutional Cases

While Nigeria has been considered a dualist system, which requires domestication of ratified treaties,³⁵⁸ the Nigerian Supreme Court has held that once Nigeria has incorporated treaties into the domestic legal system through statutory law, a treaty "becomes binding and our courts must give effect to it like other laws falling within the judicial powers of the courts."³⁵⁹ In the case of *Abacha v. Fawehinmi*, the Supreme Court found that where there is a conflict between a domestic law and a domesticated international treaty, the latter will trump. In this case, the Court stated that since the African Charter had been incorporated by statute into the domestic legal system, it is a "statute with an international flavor. Therefore, if there is a conflict be-

³⁵³ See *Ujeke v. Ujeke* [2001] 27 WRN 127 (Nigeria); *Anekwe v. Nweke* (2014) 234 LRCN 34 (Nigeria).

³⁵⁴ CONST. OF NIGERIA, § 17(2)(a).

³⁵⁵ Adeyinka A. Adejugbe & Adedolapo N. Adejugbe, *Women and Discrimination in the Workplace: A Nigerian Perspective* (Working Paper, 2018), Adejugbe, Adeyinka and Adejugbe, Adedolapo, *Women and Discrimination in the Workplace: A Nigerian Perspective* (August 20, 2018), <https://ssrn.com/abstract=3244971>.

³⁵⁶ CONST. OF NIGERIA, § 17.

³⁵⁷ CONST. OF NIGERIA, § 46.

³⁵⁸ CONST. OF NIGERIA, § 12 PROVIDES THAT: "NO TREATY BETWEEN THE FEDERATION AND ANY OTHER COUNTRY SHALL HAVE THE FORCE OF LAW EXCEPT TO THE EXTENT TO WHICH ANY SUCH TREATY HAS BEEN ENACTED INTO LAW BY THE NATIONAL ASSEMBLY." IN ADDITION, PARLIAMENT IS OBLIGED TO ENACT LAWS RELATING TO THE OPERATION OF THE COURTS AND FINANCIAL AID FOR INDIGENT PEOPLE WHOSE RIGHTS HAVE BEEN INFRINGED.

³⁵⁹ *Abacha v. Fawehinmi* [2000] 6 NWLR 288 (Nigeria).

tween it and another statute, its provisions will prevail over those of that other statute because it is presumed that the legislature does not intend to breach an international obligation. Thus, it possesses a greater vigor and strength than any other domestic statute." In the *Fawehinmi* case, the Court went on to find that, since the African Charter on Human and Peoples' Rights was an instrument for protecting human rights, its provisions could be referred to before Nigerian courts, and further, if there was no remedy in domestic legislation, the Charter could be directly relied on for a remedy.

Nigerian Industrial Courts have also played a critical role in promoting and protecting rights for all workers and Nigeria has a substantial jurisprudence on discrimination. The National Industrial Court (NIC) has a constitutional mandate "to apply international best practice in Labour, Employment and Industrial Relations" and also has the "jurisdiction and power to deal with any matter connected with or pertaining to the application of any International Convention, treaty or protocol which Nigeria has ratified." This constitutional provision has been interpreted to permit the court to apply unratified ILO treaties.³⁶⁰

Indeed, the National Industrial Courts, in absence of any provisions in the Labour Act addressing sexual harassment at work, have relied on the constitutional provisions on freedom from discrimination and degrading treatment in the workplace found in the Constitution, as well as the African Charter on Human and People's Rights, CEDAW and the ILO Discrimination Convention. For example, in *In Maduka v. Microsoft Nigeria Ltd.*,³⁶¹ a case concerning sexual harassment of an employee by her manager, the Court held that a parent company was vicariously liable for the actions of its subsidiary employer. The companies had a duty to take the utmost care to ensure that the fundamental rights of its employee were protected.

The courts have similarly relied on international law and comparative law in cases involving maternity discrimination. In the case of *Maiya v. Incorporated Trustees of Clin-*

³⁶⁰ "[T]he National Assembly may by law make provisions conferring upon the Federal High Court powers additional to those conferred by this section as may appear necessary or desirable for enabling the Court more effectively to exercise its jurisdiction." CONST. OF NIGERIA, § 252(C)(2). SUBSEQUENTLY, THE CONSTITUTION OF THE REPUBLIC OF NIGERIA, 2010 (THIRD ALTERATION ACT) GAVE THE NATIONAL INDUSTRIAL COURT EXCLUSIVE JURISDICTION "RELATED TO.....INTERNATIONAL BEST PRACTICES IN LABOR, EMPLOYMENT AND INDUSTRIAL RELATIONS; RELATED OR CONNECTED WITH OR PERTAINING TO THE APPLICATION OR INTERPRETATION OF INTERNATIONAL LABOR STANDARDS....THE NIC SHALL HAVE THE JURISDICTION AND POWER TO DEAL WITH ANY MATTER CONNECTED WITH OR PERTAINING TO THE APPLICATION OF ANY INTERNATIONAL CONVENTION, TREATY OR PROTOCOL WHICH NIGERIA HAS RATIFIED..." See Chidi Ukandu, *Direct Application of International Labour Organizations Conventions in Nigeria* (unpublished manuscript), https://www.academia.edu/13393908/DIRECT_APPLICATION_OF_INTERNATIONAL_LABOUR_ORGANISATION_CONVENTIONS_IN_NIGERIA_AN_APPRAISAL [<https://perma.cc/5ZQH-7XAU>] (last visited Nov. 9, 2022).

³⁶¹ [2014] 41 NLLR (125) 67 NIC (Nigeria).

ton Health Access Initiative,³⁶² the Court considered the termination of employment of an employee on probation on grounds that she was pregnant. In arriving at its decision that the dismissal was unlawful and in contravention of the article 42 constitutional prohibition against discrimination on the grounds of sex, the court considered a ratified Convention on Discrimination (Employment and Occupational 1958 No.111).

Courts similarly held the dismissal of an employee on grounds of pregnancy was unlawful in *Onyekachi v. Stanquean Investments Ltd.*³⁶³ In this case, a pregnant employee applied to proceed on maternity leave and the employer denied receiving the application. The employer subsequently retrenched the employee on the basis of reorganization of the company. The Court found that the employment had been terminated on grounds of pregnancy and not redundancy and thus held that the termination was unlawful. The Court considered this to be a claim of unlawful termination of employment on the basis of pregnancy. In reaching this decision, the Court referred to the Discrimination (Employment and Occupation) Convention 1958 (No. 111) and comparative foreign decisions.

3.5.5 Domestic Law

The existing legal framework governing domestic work in Nigeria has several gaps, exclusions and loopholes which leaves domestic workers in a precarious position. The general approach in the regulation of domestic work is that while domestic workers are not excluded from general labour laws, such as the Labour Act and the Trade Union Act, there are no specific provisions in these acts or regulations governing the specifics of the sector. Further, the Labour Act does not have any provisions addressing sexual harassment at work.

(a) Labour Act (2004)

Family Members

As a starting point, the Labour Act (2004) defines a “domestic servant” as being “any house, table or garden servant employed in or in connection with the domestic services of any private dwelling house, and includes a servant employed as the driver of a privately owned or privately used motor car.”³⁶⁴ Under section 91(c), this definition excludes from its ambit family members who are living in an employer’s house and employed as domestic workers.³⁶⁵

³⁶² [2012] 27 NLLR (P+76) IIO NICN (Nigeria).

³⁶³ Unreported Suit No. NINCILA/271/2014 (Nigeria).

³⁶⁴ Labour Act (2004) Cap. (L1 LFN), § 91 (Nigeria)[hereinafter Labour Act].

³⁶⁵ *Id.* at 91(c) (excluding members of the employer’s family from the definition of a worker; defining “family” with reference to the first schedule of the Workmen’s Compensation Act, which defines “workmen” to exclude in 10(2)(d) “a member of the employer’s family

The continued use of the term “domestic servant” perpetuates the cultural and historical perception that domestic workers are engaged in servitude rather than employment. This can be contrasted with C. 189, which defines a domestic worker as “any person engaged in domestic work within an employment relationship” and does not permit an exception for domestic workers who are employed by relatives. Consequently, the blanket exclusion of family members who are employed as domestic workers from the ambit of the Act is also inconsistent with C. 189.

Child Labour

Under Section 59(1) of the Labour Act, no child is permitted to be employed “in any capacity except where he is employed by a member of his family on light work of an agricultural, horticultural or domestic character approved by the Minister.” Under section 91, a child “means a young person under the age of twelve years old.”

Section 59(2) prohibits the employment of young people under 15 from being employed in an industrial undertaking. Section 59(3) permits a young person under the age of fourteen years to work for a daily wage on a day-to-day basis, so long as “he returns each night to the place of residence of his parents or guardian...” The section then has a proviso that “this subsection shall not apply to a young person employed in domestic work.” Section 59(5) prohibits the employment of a young person under 16 years underground, on a machine work or on a public holiday. Section 59(8) provides that no young person under the age of 16 shall be required to work for longer than four consecutive hours or be permitted to work for more than eight working hours in any one day. However, there is a proviso that “this subsection shall not apply to a young person employed in domestic service.”

The effect of these provisions is to permit a child to be employed as a domestic worker in light work and permit a child under 14 years to be employed and paid on a daily basis as a domestic worker. While other similarly employed children would need to be returned to their parental home in the evenings, child domestic workers would not. In addition, the prohibition on allowing children under 16 years from working for longer than four consecutive hours, or for more than eight hours in any one day, explicitly does not extend to domestic workers. These provisions which effectively exclude child domestic workers from protections enjoyed by children who are not employed as domestic workers.

In contrast, section 29(4) of the Nigerian Constitution defines a child as any person under eighteen years old. Similarly, section 10(1) and (2) of the Child’s Rights Act of 2003, sets out the right of non-discrimination by reason of “belonging to a particular community or ethnic group or by reason of his place of origin, sex, religion or political opinion,” and also prohibits deprivation or disability “merely by dwelling in his house.”).

reason of the circumstances of his birth.”³⁶⁶ Under the section 28(1)(d) prohibition of exploited labour, “no child shall be employed as a domestic help outside his own home or family environment.” However, under section 28(c), there is an exception which allows children to work where they “are employed by a member of his family on light work of an agricultural, horticultural or domestic character.”

In contrast, C. 189 requires member states to set a minimum age for domestic workers consistent with the provisions of C. 138 on Minimum Age and C. 182 on Worst Forms of Child Labour Convention and not lower than that established by national laws and regulations for workers generally.³⁶⁷

Article 4(b) of C. 189 also requires that members ensure that work performed by domestic workers under the age of 18 and above the minimum age of employment, does not deprive them of compulsory education or interfere with opportunities to participate in further education or vocational training. However, section 59 of the Labour Act makes no reference to compulsory education and imposes no analogous restriction on the employment of child domestic workers.

Section 59(8) does not comply with C. 189 obligation to ensure that domestic workers enjoy equal treatment to other workers in the country, with respect to working hours, overtime pay, daily and weekly rest periods, and paid annual leave,³⁶⁸ in that the hours of work and rest period are strictly regulated for other workers under 16, but not domestic workers. C. 189 requires taking measures to ensure that these workers are not required to stay in the accommodation during rest periods and leave.³⁶⁹ In contrast, under these sections, the employer of a child domestic worker does not have to ensure that she returns to her parental/guardian's home at night.

Further, Recommendation 5 elaborates that when employing a domestic worker under the age of 18 but above the minimum age of employment defined by national law, members must: (a) strictly limit their hours of work to ensure adequate time for rest, education and training, leisure activities and family contacts; (b) prohibiting night work; (c) placing restrictions on work that is excessively demanding, whether physically or psychologically; and (d) establishing or strengthening physical mechanisms to monitor their working and living conditions.

Hours of Work

The Labour Act also makes provision for written contracts for all workers in general.³⁷⁰ Under the Act, regular hours of

work may be fixed either by mutual agreement between the employer and the employee, by collective bargaining or by the Industrial Wage Board.³⁷¹ Given that there is no registered collective agreement either at federal or national level, this leaves domestic workers at a disadvantage given the inherently uneven power relationship between domestic workers and their employers. Notwithstanding this gap, the law sets the maximum working hours to ten hours a day with two hours for break.³⁷² However enforcing such provisions especially in the context of live-in domestic workers is challenging.

By contrast, C. 189 obliges member countries to ensure that domestic workers enjoy equal treatment to other workers in the country, with respect to working hours, overtime pay, daily and weekly rest periods and paid annual leave.³⁷³ The ILO recognizes that domestic workers generally work long and unpredictable hours, so C. 189 requires that domestic workers have a minimum weekly rest period of 24 consecutive hours.³⁷⁴

Maternity Protection

Domestic workers are implicitly excluded from maternity protection. Section 54 of the Labour Act (2004) extends maternity protection to women “in any public or private industrial or commercial undertaking or in any branch or in agricultural undertaking.” The provisions prohibit work for the six-week period after childbirth and entitles her to not less than 50 percent of her wages, provided she has been employed continuously for six months prior to her absence. Further, under section 54(d), if she is nursing her child, she must be allowed two half hour breaks for this during the day.

Since domestic work does not form part of the “public or private industrial or commercial undertaking”, domestic workers, the majority of whom are women, have no maternity protection under the Labour Act. This conflicts with C. 189 which obliges states to take appropriate measures to progressively ensure that domestic workers enjoy the same conditions as other workers generally in respect of social security protection, including for maternity protection.³⁷⁵

Labour Inspection

Despite the exclusion of domestic workers from legal coverage in key legal provisions, there are no restrictions in the inspection and enforcement of the Act. Labour inspectors

ployee within three months of employment.

³⁷¹ Labour Act § 13.

³⁷² Labour Act § 28(1)

³⁷³ C. 189, *supra* note 7, at art. 10(1)–(2).

³⁷⁴ Claire Hobden, ILO, WORKING TIME FOR LIVE-IN DOMESTIC WORKERS (2013), https://www.ilo.org/travail/info/publications/WCMS_230837/lang-en/index.htm.

³⁷⁵ C. 189, *supra* note 7, at art. 14.

³⁶⁶ Children's Rights Act 2003 Cap. 454 (Nigeria).

³⁶⁷ C. 189, *supra* note 7, at art. 4(1).

³⁶⁸ *Id.* at arts. 10(1) and 10(2).

³⁶⁹ *Id.* at art. 6.

³⁷⁰ Labour Act, 2004, § 7. A written statement is to be given to an em-

are legally authorised to “enter, inspect and examine by day or night any labour encampment, farm, factory or land or workplace whatsoever (and every part thereof) if he has reasonable cause to believe that any worker is employed therein or thereon.”³⁷⁶

However, on the ground, labour inspectors lack powers to enforce the laws due to poor funding, understaffing, poor deployment of members, undertraining, deplorable conditions of inspectors.³⁷⁷ There has generally been a decrease in the number and frequency of inspections on industrial establishments, let alone private households where domestic workers are employed.

(b) National Minimum Wage Act

Domestic workers are implicitly excluded from the legislative provisions regarding minimum wages. Section four of the National Minimum wage (Amendment) Act, 2019 provides that the Act does not apply to establishments where less than 25 workers are employed. Given that domestic workers are generally employed in private households employing significantly fewer than 25 workers, this provision “structurally” excludes domestic workers from the minimum wage regulations.

This exclusion is in direct contradiction to the provision of article 11 of C. 189, which provides that if there is a minimum wage in a country, it must apply to domestic workers as well. Further, C. 189 requires that such remuneration must be without discrimination based on sex.³⁷⁸ It also requires member states to ensure that domestic workers are paid their wages in cash at least once a month, and if they are paid in-kind, the value of the in-kind is fair and reasonable and the in-kind payment helps them.³⁷⁹

It is arguable, however, that in the context of recruitment agencies and labour contractors in the domestic work sector, agencies employing more than 25 workers, could be

bound by the provisions on the national minimum wage.³⁸⁰

(c) Social Protection and Workmen’s Compensation Act

Under the Workmen’s Compensation Act, which makes provision for payment of compensation to “workmen” injured in the course of their employment, a “member of the employers family dwelling in his house” is not considered a “workman” under the Act. In addition, domestic workers are implicitly excluded from mandatory registration under the National Health Insurance Act (2004). Under the Act, it is mandatory for employers with ten employees and above to register under the scheme.³⁸¹ However, domestic workers may voluntarily register under the scheme in terms of section 17(3) of the Act. This legal coverage does not necessarily translate to actual registrations in practice. Further, under the Pension Reform Act of 2014, only employers employing over 15 employees are obligated to make contributions.

Consequently, family members employed as domestic workers would be entirely excluded from claiming workers compensation. While employers of domestic workers more broadly are not obliged to register them for national health insurance or pensions, since most employers of domestic workers do not employ over the threshold number of employees to trigger the legal obligation.

3.5.6 Analysis

The vast majority of domestic workers in Nigeria are impoverished black, female, children and many are migrants from marginalized ethnic groups. The low regard for domestic workers is embedded in the historical patriarchal and class divisions within the society; it is also firmly embedded in the labour law.

Despite constitutionally entrenched non-discrimination and labour rights, there are critical gaps and exclusions in the labour regulation of domestic work. At the outset, the Labour Act (2004) still contains the use of a servitude-based title of domestic workers as “domestic servants,” which reflects a colonial era conception of domestic work, which is prevalent throughout the Labour Act and is evidenced in both explicit exclusions of particular categories of domestic worker and then a host of structural exclusions from protection for all domestic workers.

The complete exclusion of family members, living with the employer and employed as domestic workers from the protection of the Labour Act, as well as from protection under the Workmen’s Compensation Act, amount to forms of discrimination and would be unlikely to survive

³⁷⁶ Labour Act, 2004, § 78.

³⁷⁷ Victor Akhedonor, *Ministry of Labour: Gap and Opportunities Analysis*, CABLE (Jan. 18, 2021), <https://www.thecable.ng/ministry-of-labour-gap-and-opportunities-analysis>.

³⁷⁸ C. 189, *supra* note 7, at art. 3(2)(d), R. 201, *supra* note 59, at ¶¶ 3(a)–(c). Must be read with ILO conventions and recommendations, including Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 [hereafter C. 100]; ILO, EQUAL REMUNERATION RECOMMENDATION (1951) [hereinafter R. 90]; Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 [hereinafter C. 111]; ILO, Discrimination (Employment and Occupation) Recommendation (1958) [hereinafter R. 111]; ILO, HIV and AIDS Recommendation (2010) [hereinafter No. 200]; Convention (No. 183) Concerning the Revision of the Maternity Protection Convention (Revised), 1952, June 15, 2000, 2181 U.N.T.S. 253 [hereinafter C. 183]; ILO, MATERNITY PROTECTION RECOMMENDATION (2000) [hereinafter R. 191].

³⁷⁹ C. 189, *supra* note 7, at art. 12(1).

³⁸⁰ Employment agencies and labour contractors are regulated under sections 23, 24, 25 and 71 of the Labour Act, 2004.

³⁸¹ National Health Insurance Scheme, Act 2004, § 17.

constitutional scrutiny. Similarly, the explicit exclusion of child domestic workers from provisions requiring child domestic workers to be returned to their homes at night and from restrictions on work hours enables exploitation, servitude and slavery-like conditions. These provisions do not address particularly vulnerable groups of domestic workers. Instead, they amount to blanket exclusions of child domestic workers and live-in domestic workers from labour protections.

Outside of these two sub-categories of family and child domestic workers who are excluded from labour protection, there are a number of other provisions which do not explicitly exclude the sector by name, but "structurally" exclude domestic workers working in private homes from critical labour protection that other workers enjoy, with respect to working hours, minimum wages, maternity protection and pensions. These ostensibly neutral provisions indirectly discriminate on the basis of sex in that the effect of the exclusions is to leave a predominantly female and historically disadvantaged group, without core labour protections.

Yet, the international and regional instruments ratified by Nigeria, such as the African Charter, the Maputo Protocol and the African Charter on Children's Rights, CEDAW and the ICESCR, provide an adequate legal basis to challenge many of the structural exclusions of domestic workers. Nigeria has also ratified the Protocol establishing the African Court on Human and Peoples' Rights and is a member of the Economic Community of West African States (ECOWAS), and as such could engage the ECOWAS Community Court of Justice without having exhausted domestic remedies.

However, given the constitutional framework in place in Nigeria, national courts could be engaged to challenge the range of issues identified as being constitutionally suspect. The Nigerian constitutional framework includes the right to be free from discrimination on the basis of sex, coupled with constitutional directive principles to that ensure that conditions of work are just and humane.³⁸² Further the state is obliged to safeguard the health, safety and welfare of all people in employment and ensure that there is equal pay for equal work without discrimination on the basis of sex "or any other ground whatsoever."³⁸³ Similarly, under these provisions, the state is required to protect children, young persons and the aged against exploitation.

The constitutional provision on freedom from discrimination has been interpreted in light of ratified conventions, and the African Charter has been given hierarchically predominant status amongst Nigerian legislation.³⁸⁴ While Ni-

geria has not ratified C. 189, there is evidence that Nigeria's Industrial Court is empowered to apply unratified labour conventions, including, C. 189 where it would be relevant. Accordingly, we would argue that the following provisions could be constitutionally challenged in the Industrial Court:

- The complete exclusions of family members "employed" as domestic workers, including those under 12 years old, from all labour law protection.
- The exclusion of family members from Workmen's Compensation.
- Section 59(1) prohibition on children, defined as a young person under the age of 12, from employment, except were employed by a family member on light work including domestic work, approved by the Minister.
- Section 15 of the Labour Act prohibitions and restrictions on work in industrial undertaking, which explicitly exclude young people employed as domestic workers.
- Section 59(5) of the Labour Act exclusion of domestic workers from prohibiting the employment of a young person under 16 underground, on machine work and on a public holiday, and restricts the hours of work to prohibit four hours of continuous work or more than eight hours of work per day. These provisions also conflict internally with section 28 of the Childs Rights Act, which prohibits exploited labour, and establishes that "no child shall be employed as a domestic help outside his own home or family environment." Under the Nigerian Constitution, a child is defined as a person under the age of 18. To the extent that it could be argued that bringing family members into one's home to work as domestic workers is a part of cultural practice or even a form of welfare practice, it is important to note that under Nigerian laws, those treaties which are signed, ratified and acceded, including the African Charter, would trump domestic law and custom. Of particular importance here is the African Court of Human Rights emerging jurisprudence on harmful traditional practices. Indeed, Nigerian courts have in a series of cases found that customary rules that discriminate against women to be unconstitutional.
- The Labour Act provisions on maternity protection apply to public or private industrial commercial undertaking or an agricultural undertaking, and, therefore, do not apply to private households.

³⁸² Adeyinka Adejugbe & Adedolapo Adejudge, *Women and Discrimination in the Workplace: A Nigerian Perspective* (Aug. 20, 2018)(unpublished manuscript), <https://ssrn.com/abstract=3244971>.

³⁸³ CONST. OF NIGERIA, § 17.

³⁸⁴ Its non-discrimination provisions in article 2: "without distinction

of any kind such as race, ethnic group, colour, sex, language, religion... national and social origin, birth or other status." It prohibits all forms of cruel, inhumane and degrading treatment (art. 5), and under article 15 guarantees "the right to work under equitable and satisfactory conditions, and to equal pay for equal work."

- The National Minimum Wage Act only applies to establishments employing more than 25 workers, and therefore also excludes domestic workers in private homes.
- Section 13 of the Labour Act states that regular hours of work may be fixed either by mutual agreement between the employer and employee, by collective bargaining or by the Industrial Wage Board. Given there are no registered collective agreements in the domestic work sector, and the inherently unequal bargaining relationship between the employer and employee, this leaves domestic workers vulnerable, and arguably amounts to indirect discrimination.
- The Labour Act does not address labour inspection in private homes.

3.6 Malawi

3.6.1 Background

Malawi is a small, landlocked country of 12 million in southeast Africa. The United Nations Development Program's Human Development Index ranks Malawi as one of the very poorest countries in the world, with the human development index³⁸⁵ positioned 174 out of 189 countries and territories.³⁸⁶ 89 percent of working persons in Malawi work in informal employment with women more likely to be informally employed than men.³⁸⁷ Data available indicates that almost 90 percent of domestic workers in Malawi are women, girls or children, with an age range of 12 to 75.³⁸⁸ It is estimated that that 25 percent of domestic workers in Malawi are younger than 14 years.³⁸⁹

The HIV pandemic has left many orphans. The combination of poverty, the lack of economic opportunities and the lack of education has led most rural orphans migrate to urban areas to look for work.³⁹⁰ The domestic service

workforce in Malawi is predominantly composed of these girls and women who have migrated from rural to urban areas in search of employment and better economic opportunities.³⁹¹ They are called by different names including "maid," "mayiee," "kitchen helper," "cook" and "sweeper."³⁹² Some research has indicated that placement agencies are increasingly placing young girls from tribal areas with employers in urban areas where such girls are financially exploited and abused because the unfamiliar conditions they work in.³⁹³

Domestic workers in Malawi usually live in their employer's household in order to be available to fulfil the work obligations and requirements.³⁹⁴ Very few women commute every day to their places of work and return home after they have completed their tasks.³⁹⁵ It is a common practice for households in Malawi to have a domestic worker assisting in its daily operations.³⁹⁶ Domestic workers are not only engaged by rich households, but also some relatively poor households engage the services of domestic workers. This is because of the number of people seeking employment.³⁹⁷

3.6.2 International Human Rights

Malawi has ratified the core UN Conventions, including the International Covenant on Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination against Women (CEDAW), the international Convention on the elimination of all forms of Racial Discrimination (ICERD) and Convention on the Rights of the Child (CRC). In its 2006 consideration of Malawi's compliance with its CEDAW obligations, the committee expressed concern at the difficulties that women face in attempting to engage in viable economic activity in the formal sector, forcing them to work in the informal sector.³⁹⁸

in Malawi, 30 HEALTH CARE WOMEN INT'L 783 (2009). A 2004 study showed that about 17.5% of children below the age of 15 years lost one or both parents with about half of these losing their lives to AIDS.

³⁸⁵ *Id.* at 785.

³⁸⁶ *Id.* at 1.

³⁸⁷ Thiruvassagam, *supra* note at 1167 (2019).

³⁸⁸ Mkandawire-Valhmu, *Surviving Life as a Woman*, *supra* note 400, at 785.

³⁸⁹ *Id.* at 785

³⁹⁰ Lucius Pandame, The Socio-Economic and Legal Position of Domestic Workers in Malawi: A Case Study of Zomba Municipality 10 (unpublished Master's thesis, University of Zimbabwe Faculty of Law) (Mar. 2006), <https://docplayer.net/46534970-The-socio-economic-and-legal-position-of-domestic-workers-in-malawi-a-case-study-of-zomba-municipality.html>.

³⁹¹ *Id.* Informal sector—domestic work.

³⁹² Comm. on the Elimination of Discrimination Against Women, Concluding Comments of the Committee on the Elimination of Discrimi-

³⁸⁵ The HDI is a summary measure for assessing long-term progress in three basic dimensions of human development: A long and healthy life, access to knowledge, and a decent standard of living.

³⁸⁶ U.N. Development Programme, HUMAN DEVELOPMENT REPORT 2020: THE NEXT FRONTIER: HUMAN DEVELOPMENT AND THE ANTHROPOCENE (2020), https://www.undp.org/sites/g/files/zskgke326/files/migration-by/HDR2020_Full-Report.pdf.

³⁸⁷ National Statistical Office Zomba, Malawi, MALAWI LABOUR FORCE SURVEY 2013 (2014). 91 percent of rural areas persons work in informal employment compared to 69 percent in urban areas.

³⁸⁸ G. Thiruvassagam, D. Rajasekar & R. Vetriselvan, *Profile and Problems of Women Domestic Workers in Mangochi, Malawi*, 8 INT'L J. RECENT TECH. & ENGINEERING 1167, 1168 (2019).

³⁸⁹ *Id.* See also Pandame, *supra* note 406.

³⁹⁰ Lucy Mkandawire-Valhmu et al., *Surviving Life as a Woman: A Critical Ethnography of Violence in the Lives of Female Domestic Workers*

Malawi is a member of the International Labour Organisation (ILO) and has ratified core ILO Conventions. Malawi has not ratified the C. 189 on Domestic Workers yet. Malawi has also not ratified C. 190 on Violence and Harassment.

Malawi ratified the African Charter, as well as the Maputo Protocol. It has also ratified the Protocol establishing the African Court and is one of only nine countries that have made a special declaration allowing individuals and NGOs to submit cases directly to the court.

3.6.3 Constitutional Context

After a referendum in 1993 indicating that Malawians wanted a multi-party democracy, a constitutional reform process was initiated leading to the adoption of the 1994 Constitution.³⁹⁹ Under section four, the Constitution binds the executive, legislature and judiciary and provides that "all the peoples of Malawi are entitled to the equal protection of this Constitution and laws made under it." Section five sets out that the Constitution is supreme, and any act of government or law that is inconsistent with it, will be unconstitutional. By way of interpretation, article 11 sets out that in interpreting the Constitution, courts shall "where applicable have regard to current norms of public international law and comparable case law." Significantly, one of the fundamental constitutional principles is, "the inherent dignity and worth of each human being..."⁴⁰⁰

Further, section 12(1)(e) states that all persons have equal status before the law and section 12(2) imposes duties on every individual towards other individuals, and his or her family including "the duty to respect his or her fellow beings without discrimination." Section 13 of the Constitution sets out principles of national policy, are directory in nature, and which require the state to pass laws and policies including on gender equality through (i) the full participation of women in all spheres of society; (ii) the implementation of principles of non-discrimination; and (iii) implementation of policies on social issues, such as lack of maternity benefits, economic exploitation etc.⁴⁰¹

Under Chapter IV Human Rights, article 20 entrenches equality and provides that "discrimination of persons in any form is prohibited" and "all persons, are, under any law guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, birth or other status or condition." Article 20(2) provides that legislation may be passed addressing

nation against Women: Malawi, U.N. Doc. CEDAW/C/MWI/CO/5 (2006).

³⁹⁹ *Id.* at 211.

⁴⁰⁰ Art. 12(1)(d).

⁴⁰¹ Under article 14, the principles of national policy are directory in nature, but courts shall have regard to them in interpreting and applying the provisions of any constitution or any law and in the interpretation of provisions of the constitution.

inequalities in society and prohibiting discriminatory practices.

This language implies that direct and indirect discrimination would fall within the prohibition of "all forms of discrimination." Further, article 20(2) is consistent with special measures. In the case of *Murinho v. SGS Blantyre*, the Court held that article 20 applies between individuals in an employment context, not only in cases involving the state.⁴⁰² While, in *Banda v. Lekha*, which dealt with dismissal after disclosing HIV positive status, the Court found that while HIV status is not one of the listed grounds, it is included as falling within "any form."⁴⁰³

Under article 24, women have the right to full and equal protection of the law and shall not be discriminated against on the basis of their gender or marital status. Article 24(2) goes on to provide that discrimination on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly (a) sexual abuse, harassment and violence; (b) discrimination in work, business and public affairs.⁴⁰⁴

Article 23 covers the right to equal treatment of all children, which is defined as a person under eighteen, "regardless of the circumstances of their birth" and determining that their best interests shall be the primary consideration in decisions impacting them. Further, they are entitled to protection from economic exploitation, including work that is hazardous, interferes with their education or is "harmful to their health, physical, mental, spiritual, or social well-being."

The Constitution also entrenches the right to freely engage in economic activity (section 29) and to fair and safe labour practices without discrimination (section 30).⁴⁰⁵ Courts have found that the standards set by the International Labour Organisation are relevant when seeking to determine what are fair and safe labour practices.⁴⁰⁶ Section 31(2) of the Constitution guarantees everyone the right "to form and join trade unions or not."⁴⁰⁷ Further, section 31 states that "every person shall have the right to fair

⁴⁰² See also *Salaka v. Registered Trustees of the Designated School Boards* [2003] MWHC 5.

⁴⁰³ [2005] MWIRC 44. The Court made reference to comparative South African case law and the African Charter, in coming to its decision.

⁴⁰⁴ See also article 30 on the Right to Development, which requires, women, children and people with disabilities, be given special consideration.

⁴⁰⁵ World Bank, *WOMEN, BUSINESS AND THE LAW 2014: REMOVING RESTRICTION TO ENHANCE GENDER EQUALITY* 121 (2013). Nor does it provide for universal free childcare, education, and support.

⁴⁰⁶ *Ngwenya v. Automotive Products Ltd*, [2000] MWIRC 180.

⁴⁰⁷ This is a separate right from the right to freedom of association guaranteed in section 32 of the Constitution, though the Labour Relations Act considers the right to join a trade union a part of freedom of association.

and safe labour practices and to fair remuneration" and section 31(3) goes on to state that "[e]very person shall be entitled to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular on basis of gender, disability or race." The IRC has recognized in the *Phiri v Small Holders Coffee Farmers Trust* that sexual harassment is form of discrimination on the basis of gender and sex, as it tends to prevail against women more than men, due to gender roles created in the workplace.⁴⁰⁸

Although the Constitution of Malawi does not make provision for social protection, the Constitutional Court of the country has explained that the right to social protection can be "read into" the right to life and the right to a livelihood.⁴⁰⁹

According to section 211 of the Constitution, international instruments ratified before the 1994 Constitution, become part of the laws of Malawi unless specifically excluded by an Act of parliament. Section 41(3) of the Constitution guarantees every person the right to an effective remedy by a court of law. While section 46(4) of the Constitution grants a court power to award compensation as remedial relief when it's appropriate.⁴¹⁰

3.6.4 Legislative Context and Domestic Work: The Employment Act and Domestic Work: Structural Gaps

(a) Employment Act

The Employment Act (EA) was enacted to ensure minimum standards of employment, and to accelerate economic growth and social justice.⁴¹¹ It includes provisions on non-discrimination, equal pay for work of equal value, as well as two months paid maternity leave every three years.⁴¹² While the Employment Act does not explicitly include domestic workers within its ambit, neither does it exclude them.⁴¹³ However, the EA does not in any way ad-

⁴⁰⁸ *Phiri v. Small Holders Coffee Farmers Trust*, [2006] MWIRC 11. See also *Jumbo v. Banja La Mtsogolo—Matter* [2002] MWIRC 12 (2002).

⁴⁰⁹ See *Kathumba v. President of Malawi*, [2020] MWHC 29.

⁴¹⁰ In addition, section 46(3) explains that where constitutional rights and freedoms are violated, a court "has the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms." Based on this alone, where domestic workers rights are violated, they have a constitutional right to seek relief in a court of law.

⁴¹¹ Employment Act (2000) (No. 6), preamble (Malawi)[hereinafter EA or Employment Act]

⁴¹² EA, § 47.

⁴¹³ Section 3 of the Employment Act defines an employee as (a) a person who offers his services under an oral or written contract of employment, whether express or implied, (b) any person who performs work or services for another person for remuneration or reward on such terms and conditions that he is in relation to that person in

dress the specific conditions faced by domestic workers who work in the private homes of their employers.⁴¹⁴ Similarly, domestic workers are not excluded from the Labour Relations Act, which provides for collective labour rights, although it also does not address the sector specifically. While the Employment Act does not contain provisions dealing with sexual harassment at work, the Gender Equality Act of 2013 prohibits sexual harassment and obliges the government to ensure that employers adopt sexual harassment policies and procedures.⁴¹⁵

One of the most telling reflections of the status of domestic workers in Malawian society is that in cases of loss of expectation of life, where there is no evidence of how much was earned by the deceased, the High Courts of Malawi awards a value equivalent to what a domestic worker earns.⁴¹⁶ As the Court has explained, this is because domestic work is considered to be the minimum lowest job that any persons can presumably occupy when they seek employment.⁴¹⁷ This designation makes clear domestic work is at the very bottom of the hierarchy in the world of work.

Contract of employment

Section 27(1)–(3) of the EA mandates every employer to give each employee a written statement of particulars of employment and provides some guidance on the particulars that must be included, such as rates and intervals of remuneration, normal hours of work, nature of work and termination of contract. However, section 27(4) defines an employer for the purposes of this section as a person who employs at least five employees.

While domestic workers are not explicitly excluded from this provision, having a minimum number of employees required, largely excludes domestic workers, since in Malawi the common practice is to employ two domestic workers for inside household and one for the garden, rarely do such employers have more than five employees.⁴¹⁸ Similarly, domestic workers do not often have written contracts of employment.⁴¹⁹

a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of employee than that of an independent contractor; or (c) where appropriate, a former employee.

⁴¹⁴ Pandame, *supra* note 406, at 7.

⁴¹⁵ Gender Equality Act (2014)(C. 25:06), § 7 (Malawi).

⁴¹⁶ *Godileki v. Chinoy*, [2003] MWHC 58.

⁴¹⁷ *Kanyenga v. Prime Insurance Co.* [2004] MWHC 29; Pandame, *supra* note 406, at 14.

⁴¹⁸ See also *Mkandawire-Valhmu, Surviving Life as a Women*, *supra* note 400, at 797 (referencing "garden boys").

⁴¹⁹ See *Kachika v. Longwe*, matter no. IRC 195/2003 (unreported), as cited and confirmed in *Chisowa v. Ibrahim Cash 'n Carry* [2005] MWIRC 86. The IRC has affirmed that the employer has the duty to draw up the particulars of employment and providing them to employee in terms of section 27 of the Employment Act.

C. 189 requires that member states to take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations, or collective agreements.⁴²⁰ Many comparative countries do specify the need for the establishment of employment contracts specifically for domestic workers namely, Namibia, South Africa, Zambia, Kenya, Tanzania, and Zimbabwe. In these countries, a model contract of employment for domestic workers is also provided.

The centrality of written contracts is critical both to proving employment in legal proceedings, and to specify terms of employment. The absence of a contract, means workers are employed to work in an open and unspecified manner that expects domestic workers to do all the domestic work and not specifically detail the particular tasks to be done.⁴²¹ Accordingly, some have stated that this contributes to a slave-like environment.⁴²²

The exclusion of workplaces employing under five people from the obligation to provide a written contract, has dire consequence for the domestic work sector, which is predominantly female, and enables economic exploitation. Arguably it violates article 20 of the Malawian Constitution, which protects against "all forms of discrimination," including indirect discrimination on the basis of sex. Since the Supreme Court has held that the listed grounds are not a closed list, arguably discrimination on intersectional grounds of race, gender and class could also be averred. Article 24(2) of the Constitution envisages that legislation be passed to eliminate customs or practices that discriminate against women, particularly with reference to work.

Child Domestic Workers

Section 21(1) of the EA prohibits the employment of any person under the age of 14 in any public or private agricultural, industrial or non-industrial undertaking. Section 21(2) however states that this prohibition does not include work done in "homes, vocational technical schools or other training institutions." The section contains a further proviso in subsection (2) with respect to work done in a vocational technical school or training program, which must be authorized and supervised by a public authority and be

In *Kachika v. Longwe*, the Industrial Labour Court addressed the issue of absence of a written contract of employment: "An employer can therefore not rely on the absence of such particulars as proof that there was no employer-employee relationship and therefore deny a claimant employee rights and benefits."

⁴²⁰ C. 189, *supra* note 7, at art. 7.

⁴²¹ Pandame, *supra* note 406, at 10.

⁴²² *Id.* (quoting Busia). Trade Unions in Malawi have been holding employees to task, and some employers are adopting some informal methods of documenting the agreements between employer and employee even it's in a hard covered book just to record the terms agreed and the way the domestic worker is working.

part of an education training program for which the school is responsible. However, there is no analogous proviso for domestic workers. As a consequence, children under the age of fourteen can legally work as domestic workers. The grouping of work in homes together with technical schools and training, implies that the legislature does not view domestic work as work proper, but as a form of training. This might explain the high number of child domestic workers in Malawi.

Section 22(1) of the EA provides that children between the ages of 14 and 18 years of age cannot be employed in any occupation or activity that is harmful to their education, health or safety or which is prejudicial to their education. It requires employers of children to register the children working for them and sets a fine for contravention. Section 22(1) does not exclude domestic workers.

Arguably children between the ages of 14 and 18 could be employed in domestic work in a manner envisaged by section 22(1) that is harmful to their education, health or safety.⁴²³ However, there is no similar limitation in the employment of children under 14.

However, article 23 of the Malawian Constitution entrenches the right to equal treatment of all children, defined as a person under eighteen "regardless of the circumstances of their birth," and determining that their best interests shall be the primary consideration in decisions impacting them. Arguably, the right to equal treatment is *prima facie* violated in 21(1), which prohibits the employment of any person under the age of 14 in any public or private agricultural, industrial or non-industrial undertaking; but excludes domestic work from this provision. Given that domestic work is predominantly performed by women and girls who are economically disadvantaged, this exclusion could amount to indirect discrimination on the basis of sex and class.

It also runs counter to C. 189, which recognizes that both child domestic workers and live-in domestic workers are particularly vulnerable and require special measures. Article 4(b), which requires that members ensure that work performed by domestic workers under the age of 18 and above the minimum age of employment, does not deprive them of compulsory education or interfere with opportunities to participate in further education or vocational training. R. 201 elaborates that when employing a domestic worker under the age of 18, but above the minimum age of employment defined by national law, members must: (a) strictly limit their hours of work to ensure adequate time for rest, education and training, leisure activities and family contacts; (b) prohibiting night work; (c)

⁴²³ However, employers could be held to task for employing child labourers through sections 140–47 and 257–69 of Malawi's Penal Code, which prohibits forced labour. Further, the Childcare, Protection and Justice Act 2010 identifies children in child labour as children in need of care and protection. It also prohibits forced labour in sections 79 and 82.

placing restrictions on work that is excessively demanding, whether physically or psychologically; and (d) establishing or strengthening physical mechanisms to monitor their working and living conditions.

Minimum Wage

According to section 54 of the Employment Act, the Minister for Labour may proclaim the minimum wages of any class of wage earners, if he is of the view that doing so will be "expedient."⁴²⁴ Malawi has a government-mandated minimum wage which currently is MWK1,923.08 per day and MWK50 000 per month for both urban and rural areas.⁴²⁵ Since 1993, the minister of labour has proclaimed a separate minimum wage for domestic workers. In 2012, the minister of labour increased the minimum wage for domestic workers from K178.25 to K317.⁴²⁶ A proclamation by the minister of labour set the minimum wage for domestic workers at K962.00 per day. The current minimum wage as of January 1, 2022, is K1 461.54 per day.⁴²⁷

Although the increase in national minimum wage for domestic workers represents progress, the separate and lower wage for this female dominated sector, arguably amounts to indirect discrimination on the basis of sex and gender, and violates section 31 of the Malawian Constitution, which states that "every person shall have the right to ...fair remuneration" and section 31(3) which declares that "[e]very person shall be entitled to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular on basis of gender, disability or race." The ICESCR has held that all workers should be included in one national minimum wage, and here should not be sectoral distinctions. Under C. 189, if there is a minimum wage in their country, it must apply to domestic workers

as well.⁴²⁸

Labour Inspections



Photo © Izwi Domestic Workers Alliance

Labour officers who conduct labour inspections can only enter private homes with the consent of the employer or an order from a magistrate.⁴²⁹ In contrast, under section 9, labour officers have the power to "freely and without prior notice any time of the day or night" to enter any premises that "he reasonably believes to be a workplace."

Limiting the inspector's ability to enter private homes by requiring the owner's consent, inhibits labour inspections.⁴³⁰ The process of seeking the consent of the employer for a labour inspection inevitably and certainly compromises the purpose and protections that comes from the labour inspector.⁴³¹ The requirement for the warrant from the magistrate also burdens the work of the labour inspector which means that they are unlikely to inspect any private

⁴²⁴ Section 54 further mandates the Minister of Labour to issue the wage orders through a government gazette after consulting with representative organisations of workers and employers.

⁴²⁵ Chimwemwe Mangazi, *New Minimum Wage Starts January 1*, TIMES (Dec. 24, 2020), <https://times.mw/new-minimum-wage-starts-january-1/>. See also *Minimum Wage – Malawi*, WAGEINDICATOR.ORG (2022), <https://wageindicator.org/salary/minimum-wage/malawi>

⁴²⁶ Malawi Increase Minimum Wage Rate Over 100 Percent, NYASA TIMES (July 27, 2012), <https://www.nyasatimes.com/malawi-increase-minimum-wage-rate-over-100-percent/>. See also Duncan Mlanjira, Govt Gazettes Amended Minimum Monthly Wages or Cargo Truck Drivers, NYASA TIMES (Dec. 29, 2020), <https://www.nyasatimes.com/govt-gazettes-amended-minimum-monthly-wages-for-cargo-truck-drivers/>.

⁴²⁷ Employment Act (Minimum Wages) Citation and commencement (Wet Cargo and Dry Cargo Truck Drivers) Order, Parliament Gazette Extraordinary 493 (Dec. 22, 2020). See also Duncan Mlanjira, Govt Gazettes Amended Minimum Monthly Wages or Cargo Truck Drivers, NYASA TIMES (Dec. 29, 2020), <https://www.nyasatimes.com/govt-gazettes-amended-minimum-monthly-wages-for-cargo-truck-drivers/>. Section 55 of the EA explains that any employer who pays a wage below the stipulated minimum wage rate is guilty of an offence and liable to a fine of MK 50,000 and to imprisonment for ten years.

⁴²⁸ C. 189, *supra* note 7, at art. 11.

⁴²⁹ EA, § 9(1)(c).

⁴³⁰ Pandame, *supra* note 406, at 13.

⁴³¹ Kalani Malema, Social Protection: The State Regulation of the Employment Relationship in Malawi-Achievements and Challenges (June 2014)(unpublished manuscript), https://www.researchgate.net/publication/324006461_Social_Protection_The_State_Regulation_of_the_Employment_Relationship_in_Malawi-Achievements_and_Challenges.

homes where domestic workers are employed.⁴³² In addition, labour inspectors are not fully resourced, often lack transport and are largely invisible in the labour sector in Malawi.⁴³³

Under the Malawian Constitution, it is arguable that the requirement of a court order or occupier consent prior to inspecting a home where domestic workers are employed, makes labour inspection ineffective and effectively denies domestic workers a remedy. Under article 17 of C.189, each member “shall develop and implement measures for labour inspection, enforcement and penalties, with due regard for the special characteristics of domestic work, in accordance with national laws and regulations.” Further, 17(3) sets out that “in so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due regard to privacy.” The ICESCR Committee has recommended that labour inspectors carry out unannounced labour inspections in domestic settings, without a notice or warrant.

Social Protection Including for Injury and Illness at Work

(b) Pension Act

The Pensions Act 6 of 2011 was adopted to regulate all employment related benefit entitlements arising from retirement, death or incapacitation. The Pensions Act mandates each employer to maintain a mandatory life insurance for each employee on a pension scheme. However, the application of the Pensions Act is limited as 6(3) of the Employment Amendment Act provides that “an employer whose employee’s monthly salary is below ten thousand kwachas may be exempted from complying with the provisions of the Pension Act.”⁴³⁴

While domestic workers minimum wage is more than K10 000 they are largely excluded from the operation of this Act, as most employers believe that this provision is only binding on formal employers. In some cases, domestic workers receive gratuity when they retire because of the exclusion from the Pensions Act.

(c) Workers Compensation Act

Similarly, the Workers Compensation Act, 7 of 2000 (hereinafter the WCA) was enacted to provide for compensation for injuries suffered or diseases contracted by workers in the course of their employment or for death resulting from such injuries or diseases, and to provide for the establish-

⁴³² *Id.*

⁴³³ Interview with Mary Dzinyemba, General Secretary, Commercial, Industrial and Allied Workers Union (CIAWU), 2022 by Mandi Mudarikwa.

⁴³⁴ Under § 10(2)(a), “[W]here an employer has more than five employees, that employer shall provide pension for those employees notwithstanding that the salary of those employees is below the salary threshold prescribed under this subsection.”

ment and administration of a Workers’ Compensation Fund.

Section two of the WCA defines a worker as any person who works under a contract of service or apprenticeship with an employer in any employment, whether the contract is expressed orally or in writing or is implied. However, the section goes on to exclude “a member of the employer’s family living in the employer’s house.” Section 3 of the WCA defines a “business” as any industry, undertaking, trade, occupation or other activity in which a worker is employed. While an “employer” is defined as “including the Government (except the armed forces of Malawi), a local authority, anybody or association of persons, corporate or unincorporated, and the personal representative of a deceased employer.”

While the exclusion of “a member of the employer’s family living in the employers house,” would clearly mean that a domestic worker who is family living in the house would not be able to claim from the fund in the event of injury or illness at work. It is also not immediately clear if this definition of employers, includes individual persons as employers and the definition of “business” includes a private home.

C. 190 imposes the obligation to take measures to ensure the progressive realization of occupational health and safety for all domestic workers, and to take appropriate measures to progressively ensure that domestic workers enjoy the same conditions as other workers generally in respect of social security protection, including for maternity protection and pensions. The particular exclusion of family members, who are employed as domestic workers in the home from claiming in cases of occupational injury essentially removes a particularly vulnerable class of domestic workers—family workers, who are frequently children, from critical workplace rights. It has gendered impacts, and arguably emanates from customs and practices that can be harmful, and also amounts to discrimination on the basis of gender at work, in contravention of article 24(2).

3.6.5 Analysis

In Malawi, the Constitution protects against all forms of discrimination, and courts are constitutionally enjoined to use international law norms and comparative law to interpret constitutional rights. Although the Industrial Court has not addressed domestic worker issues, it has given opinions recognizing unwritten employment contracts and recognizing the harms of sexual harassment to working women.

While domestic workers are not excluded from the ambit of labour protection, they are structurally excluded from critical protections, which apply only to the employment of a threshold number of five employees, which has the effect of excluding domestic workers working in private

homes from the requirement of a written contract.

Written contracts are central to proving employment in legal proceedings, and to specifying and limiting job requirements. The absence of a contract, means workers are employed to work in an open and unspecified manner that expects domestic workers to do all the domestic work and not specifically detail the particular tasks to be done.⁴³⁵ Accordingly, some have stated that this contributes to exploitation and a slave-like environment.⁴³⁶

The Labour Act also permits employment of children under 14 in a home, without any further regulation. With respect to wages, domestic workers have a separate and lower national minimum wage and can be excluded from mandatory pension if they earn below a certain threshold. Domestic workers who are family members and live in the house of the employer are entirely excluded from claiming workers compensation on injury or illness at work. Finally, requiring a prior court order or consent of the occupier in order to inspect a home, arguably renders protections in the sector unenforceable.

Each of these exclusions of a sector that is predominantly female, and vulnerable, from critical labour protections, could be subject to challenge under the generous Malawian Constitution, which incorporates all forms of discrimination, including indirect discrimination, and beyond the categories listed in article 20. Malawi also is monist with respect to the incorporation of ratified treaties, such as CEDAW and ICECR, both of which have recommended that labour inspectors be permitted to enter homes without prior notice or consent; that national minimum wage apply to all workers in a country, and that domestic workers be equally included in social protection including compensation for injury.

Further, the Malawian Constitution enjoins courts to consider comparative and international law, which would include a consideration of C. 189 (despite it being unratified by Malawi), as well as the notion that exclusion of domestic workers as a category from social protection, amounts to indirect intersectional discrimination under comparative jurisprudence in *Mahlangu*.

Finally, Malawi has also ratified the Protocol establishing the African Court and is one of only nine countries that have made a special declaration allowing individuals and NGOs to submit cases directly to the court. Accordingly, if domestic remedies fail, complainants would be well positioned to engage that court on these non-discrimination and worker rights issues under the African Charter, the Maputo Protocol, and the African Charter for Children, and

⁴³⁵ Pandame, *supra* note 406, at 10

⁴³⁶ Pandame, *supra* note 406, at 10 (quoting Busia). Trade Unions in Malawi have been holding employees to task. Some employers are adopting some informal methods of documenting the agreements between employer and employee, even it's in a hard covered book just to record the terms agreed and the way the domestic worker is working.

build on the court's demonstrated willingness to find discriminatory customs and social practices in violation of the Maputo Protocol and the African Children's charter.

However, given the generous constitutional framework in place in Malawi to address both direct and indirect forms of discrimination on, but not limited to, the enumerated grounds, and which also enjoins courts to consider both international legal norms and comparative jurisprudence to interpret rights, the following provisions could be challenged in the High Court or Industrial Court:

- The effective exclusion of domestic workers from the requirement under section 27 of the Employment Act for every employer to provide a written contract, but which only applies to employers employing five or more employees;
- The separate, lower minimum wage for the domestic sector, which is predominantly female and economically disadvantaged;
- The exclusion of domestic workers under the age of 14 from the prohibition on child and youth employment;
- The exclusion of family members employed as domestic workers from claiming workers compensation; and
- The limitations on inspecting a home where a domestic worker is employed.

(c) Regulative Recognition: South Africa, Mauritius and Ghana

Mauritius, South Africa and most recently Ghana, are examples of countries which have passed sector specific regulations that cover domestic work, as well as including domestic workers in general labour law. The specific regulation of the sector amounts to a regulative recognition of the particular vulnerabilities inherent in both the nature of the job, and historically in the workers in the sector. Consequently, these case studies in many ways do represent positive models for regulation of the sector. However, even within these models, there remain significant doctrinal gaps, and institutional challenges, which highlight the ways in which domestic workers do not fully enjoy rights enjoyed by other workers, and the ways in which even in models of special regulation of the domestic workers, there remain issues unique to working (and frequently living) in a private home that remain unaddressed.

3.7 South Africa

3.7.1 Background

According to the ILO, 8.1% of South Africa's employed people are engaged in domestic work.⁴³⁷ As of March 2021, South Africa had 848, 000 domestic workers, 96% of whom were women.⁴³⁸ This makes domestic work a highly feminized employment sector in South Africa⁴³⁹ and the fourth largest employer of women in the country. In addition to being highly feminized, many domestic workers in South Africa are also likely to be migrant workers. According to the ILO, migration for domestic work, in particular, has been recorded from, among others, Zimbabwe to South Africa.⁴⁴⁰

Under South Africa's long history of colonialism and Apartheid, "black labour (was framed) as cheap, informal and irregular home-based work"⁴⁴¹ for white employers. Working-class white households routinely underpaid for "cheap" domestic work performed by black women and men, in paternalistic and racist employment relationships in which the workers themselves were never formally recognized as skilled employees.⁴⁴²

However, domestic work was regarded as "easy" and unimportant "women's work" by many men engaged in the liberation struggle, and domestic workers' employment conditions became lost in the larger fight.⁴⁴³ Because skilled

⁴³⁷ *Who Are Domestic Workers*, ILO, <https://www.ilo.org/global/topics/domestic-workers/who/lang-en/index.htm> (last visited Nov. 20, 2022).

⁴³⁸ Statistics South Africa (Stat SA), QUARTERLY LABOUR FORCE SURVEY, Q1:2021 (2021), <https://www.statssa.gov.za/publications/P0211/P02111stQuarter2021.pdf>.

⁴³⁹ Statistics South Africa (Stat SA), QUARTERLY LABOUR FORCE SURVEY, Q4:2020 (2021), <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2020.pdf>.

⁴⁴⁰ ILO, MAKING DECENT WORK A REALITY FOR DOMESTIC WORKERS: PROGRESS AND PROSPECTS TEN YEARS AFTER THE ADOPTION OF THE DOMESTIC WORKERS CONVENTION, 2011 (NO. 189) (2021).

⁴⁴¹ Abigail Hunt, Fortunate Machingura, A Good Gig?, *The Rise of On-Demand Domestic Work* (Overseas Development Institute (ODI) Working Paper 07, Dec. 2016), <https://odi.org/en/publications/a-good-gig-the-rise-of-on-demand-domestic-work/>.

⁴⁴² Black Laws Amendment Act of 1952 (S. Afr.), <https://www.gov.za/documents/black-laws-amendment-act-1-jun-2015-0747>. During Apartheid, which officially spans the period 1948 to 1994, domestic workers were subjected to radical racial prejudice and degrading social norms. Efforts to organise were actively obstructed by the government of the time, through legislation such as the Natives (Urban Areas) Act, Act No 21 of 1923, <https://disa.ukzn.ac.za/leg19230614028020021>.

⁴⁴³ Bennett Gwynn, *Overcoming Adversity from All Angles: The Struggle of the Domestic Worker during Apartheid*, SOUTH AFRICAN HISTORY ONLINE, <https://www.sahistory.org.za/article/overcoming-adversity-all-angles-struggle-domestic-worker-during-apartheid-bennett-gwynn> (last visited Nov. 20, 2022).

labour by any black person was made illegal, black South Africans had very limited choices for earning an income and black South African women, in particular, became trapped doing "dirty and undesirable jobs" for whites, while living squalidly in servants' quarters and earning whatever the individual employer thought sufficient.⁴⁴⁴

3.7.2 International Law

South Africa has ratified a wide range of international human rights treaties, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of all forms of Racial Discrimination; the Convention on Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; as well as the core ILO Conventions, including the Convention 189 (C. 189) on Domestic Work and Convention 190 (C. 190) on Violence and Harassment at Work. South Africa has also ratified the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples Rights, and the African Charter on the Rights and Welfare of the Child.

Both the CEDAW Committee and the ICESCR Committee have made recommendations that address domestic workers in South Africa. In 2019, the CEDAW Committee recommended that South Africa ensure that domestic workers enjoy the same labour protection as workers in other sectors in respect of remuneration and conditions of work. It also recommended that this legal regime be enforced through regular and unannounced labour inspections and the acceleration of the adoption of the compensation for occupational injuries and diseases amendment bill.⁴⁴⁵ In 2018, the Committee on Social and Economic Rights, recommended that South Africa extend to domestic workers the application of the Compensation for Occupational Injuries and Diseases Act for occupational injuries and deaths, and also provide legal guidance on the standard of accommodation for live-in domestic workers. It also recommended regularly carrying out unannounced labour inspections in domestic settings (without a notice or warrants), as well as ensuring access to effective complaint mechanisms and raising public awareness of the rights of domestic workers.⁴⁴⁶

⁴⁴⁴ *Id.* Apartheid pass laws effectively made it illegal for black people to be moving around in "white" areas after certain times and is the historical reason significant number of domestic workers lived in. There is a legacy of live-in domestic work in South Africa to this day.

⁴⁴⁵ Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Fifth Periodic Report of South Africa, U.N. Doc. CEDAW/C/ZAF/CO/5 (2021), <https://www.ecoi.net/en/file/local/2064361/N2135234.pdf>.

⁴⁴⁶ Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on the Initial Report of South Africa, U.N. Doc. E/C.12/ZAF/CO/1 (2018), <https://www.ohchr.org/en/documents/concluding-observations/ec->

3.7.3 Constitutional Context

South Africa has a robust and progressive constitution, with a Bill of Rights that is premised on human dignity, equality, and freedom.⁴⁴⁷ Section 8 makes it clear that the provisions of the Bill of Rights apply to both natural and juristic persons. The Bill of Rights contains an extensive equality clause and covers 17 specified grounds on which unfair discrimination is prohibited including race, gender, sex, pregnancy, ethnic or social origin, and colour, among others.⁴⁴⁸ The provision is clear that direct and indirect unfair discrimination, whether by private individuals (horizontal application) or by the state (vertical application), is prohibited.

Section 23 deals with labour relations and protects every worker's right to fair labour practices; the right to unionize, and for unions to be independent and autonomous; the right to strike; and the right to collective bargaining. Under section 38, a wide range of actors may approach a competent court when a right in the Bill of Rights has been infringed or threatened.⁴⁴⁹ Under section 39, courts are enjoined to consider international law, and permitted to consider foreign law, when interpreting the Bill of Rights.

South African courts are not only empowered but obliged to develop all laws to be in line with the provisions of the Constitution. This has produced substantial jurisprudence on the Bill of Rights, particularly the rights to equality and human dignity, which are regarded as inextricably linked. The Constitutional Court has made it clear on multiple occasions in its judgments that the Constitution calls for substantive as opposed to formal equality and has provided extensive guidance on how and when rights may be limited.⁴⁵⁰

Section 34 of the Constitution guarantees for everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. However, access to justice in South Africa remains largely reserved for those who can

afford private legal assistance and representation. While legal representation is not always necessary in a forum, such as the Commission for Conciliation, Mediation and Arbitration (CCMA), which deals exclusively with labour disputes, the more a case escalates through the system, the more important it becomes to have access to legal advice and representation for a fair outcome. In 2020, the budget of the CCMA was reduced by approximately 45 million USD, which has already damaged the capacity of the system to deal with claims efficiently.⁴⁵¹

3.7.4 Cases and Successful Engagement with Law Reform

The generous constitutional framework, alongside an active domestic worker trade union movement, and an equally active public interest sector, have resulted in key successes with impact litigation affecting domestic workers.⁴⁵² Indeed, the 2020 Constitutional Court matter of *Mahlangu v. Minister of Labour*⁴⁵³ represents a constitutional milestone that has informed this research project.⁴⁵⁴

This case involved a challenge to the exclusion of domestic workers from claiming compensation from the Compensation Fund under the Compensation for Occupational Injuries and Diseases Act (COIDA).⁴⁵⁵ In a ground-breaking judgment, the Court found the exclusion unconstitutional and relied on sections 9, 10, and 27(1)(c) of the Constitution and South Africa's obligations under regional and international law. The Court made reference to the ICECR Committee's finding that domestic workers should be included under the Compensation Act. Most significantly, the Court's embraced an intersectional approach to interpreting non-discrimination. It expressly recognized the intersectional vulnerability of domestic workers in South Africa, on the basis of race, gender, social status, and class, and the unavoidable need for intersectional analysis when dealing with domestic workers' rights. In its words, "[t]he cumulative effect of intersectional discrimination exacerbates the already compromised position of domestic workers in society and marginalizes them further."⁴⁵⁶ Moreover, they noted that "...domestic workers are

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⁴⁴⁷ S. AFR. CONST., 1996, §§ 7-39.

⁴⁴⁸ Non-derogable rights notably include, but are not limited to, equality (with respect to unfair discrimination on the grounds of race, colour, ethnic or social origin, sex, religion, or language), human dignity, and the right not to be subjected to slavery and servitude.

⁴⁴⁹ This wide range of actors includes anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

⁴⁵⁰ In practice, a constitutional issue may be raised in any court, but courts that are "competent" to order relief on constitutional issues would typically include High Courts, the Supreme Court of Appeal, and the apex Constitutional Court.

⁴⁵¹ *Massive CCMA Budget Cuts – What it Means for Workers*, BUSINESSTECH (Jan. 24, 2021), <https://businesstech.co.za/news/government/462888/massive-ccma-budget-cuts-what-it-means-for-workers/>. Prior to the advent of democracy in 1994, South Africa did not formally recognise or regulate domestic work. The first domestic workers union, South African Domestic Workers Union (SADWU) was established in 1989, marking the beginning of organised advocacy in the sector.

⁴⁵² Gwynn, *Overcoming Adversity from All Angles*, supra note 453.

⁴⁵³ *Mahlangu* 2020 (2) SA 54 (CC).

⁴⁵⁴ *Id.*

⁴⁵⁵ Compensation for Occupational Injuries and Diseases Act 130 of 1993, § 15.

⁴⁵⁶ *Mahlangu* 2020 (2) SA 54 (CC), at ¶ 18.

predominantly black women. This means discrimination against them constitutes indirect discrimination on the basis of race, sex, and gender... As I will demonstrate below, with these grounds intersecting, not only is the discrimination presumptively unfair but the level of discrimination is aggravated."⁴⁵⁷ Accordingly, "[i]n light of the unique circumstances of domestic workers, this case provides an unprecedented opportunity to expressly consider the application of section 9(3) through the framework of intersectionality."⁴⁵⁸

The matter of *Kente v. Deventer*⁴⁵⁹ was heard in the Equality Court, and brought under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.⁴⁶⁰ The plaintiff, Ms. Kente, complained that as a domestic worker in the home of the defendant, a white Afrikaans man, she had been subjected to racial abuse and harassment over several years, culminating in physical assault and racial hate speech against her. The Friend of the Court in the matter led evidence on the unique vulnerability to violence and discrimination faced by domestic workers who work in private homes, away from public scrutiny. The Court awarded Ms. Kente damages in the amount of R50 000.00.

Both South African Domestic Service and Allied Workers Union (SADSAWU) and the IZWI Alliance domestic worker union have also been at the forefront of the fight for wage parity for domestic workers in South Africa. They were two of the first organisations to make written submissions to the newly established National Minimum Wage Commission in 2019. South Africa's National Minimum Wage Act⁴⁶¹ came into force in January 2019 and set the national minimum wage at R20 per hour,⁴⁶² subject to annual review. In their submissions, SADSAWU and IZWI pointed out that the decision to introduce a tiered phase-in for domestic workers had not included the domestic work sector in prior discussion and was made with no discernible justification, likely a consequence of domestic workers not having a dedicated Bargaining Council. This advocacy move resulted in the Minister confirming in writing that the minimum wage for domestic workers is expected to be fully aligned with the national standard by 2022. The IZWI Alliance advocated successfully in 2020 for all domestic workers, regardless of whether they were registered for UIF or not, to be eligible for the state COVID-19 Temporary Employee Relief Scheme (C19 TERS).⁴⁶³

⁴⁵⁷ *Mahlangu 2020* (2) SA 54 (CC), at ¶ 73.

⁴⁵⁸ *Mahlangu 2020* (2) SA 54 (CC), at ¶ 75.

⁴⁵⁹ unreported case no. EC 9/13 (Oct. 24, 2014)(Cape Town Magistrates Ct.)(S. Afr.).

⁴⁶⁰ Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (S. Afr.).

⁴⁶¹ National Minimum Wage Act 9 of 2018.

⁴⁶² *Id.* at schedule I, item 1.

⁴⁶³ Helena Wasserman, *Domestic Workers Can Now Get Coronavirus Cash from the UIF – Even If They're Not Registered*, BUSINESS INSIDER SOUTH AFRICA (May 27, 2020), <https://www.businessinsider.co.za/do->

3.7.5 Legislative Context

Domestic workers became included in generally applicable labour law, and the corresponding social protections, shortly after South Africa became a democracy. First, domestic workers are protected by the provisions of the Labour Relations Act (LRA)⁴⁶⁴ and the Basic Conditions of Employment Act (BCEA).⁴⁶⁵ Later in 2002, the state also deemed it necessary to provide closer regulation of the sector through the Sectoral Determination 7: Domestic Worker Sector (SD7).⁴⁶⁶ However, domestic workers are not covered by any compulsory pension plan.

The LRA offers domestic workers the same rights and protections as other employees and workers in South Africa in respect of freedom of association, collective bargaining, strikes, unionizing, dispute resolution, and unfair dismissal. The BCEA regulates working hours and rest periods, leave (including maternity leave), the requirement for written terms and conditions of employment, remuneration calculation and information, termination of employment (and corresponding arrangement for employees who live in accommodation provided by the employer). The BCEA also prohibits child labour and sets out provisions for sectoral determinations.⁴⁶⁷

In contrast, Sectoral Determination 7 (SD 7), issued under the BCEA, addresses the particularity of the domestic work sector and expressly regulates issues including wages, written particulars of employment, ordinary hours of work, night work, standby, meal intervals, rest period, payment for work on Sunday, public holidays, annual leave, sick leave, and family responsibility leave. Section 8 of the Determination restricts deductions of not more than 10% of the wage for a room or other accommodation supplied by the employer, as long as the accommodation is weatherproof; in good condition has at least one window and door, which can be locked; and has a toilet and bath or shower, if the domestic worker does not have access to any other bathroom.⁴⁶⁸ It also stipulates that live-in domestic workers are entitled to at least one month's notice to vacate any premises.

Sectoral Determination 7 further provides that a domestic worker is entitled to at least four consecutive months of maternity leave and prohibits employing a child under 15

[mestic-workers-can-now-get-coronavirus-payouts-2020-5.](#)

⁴⁶⁴ Act 66 of 1995.

⁴⁶⁵ Act 75 of 1997.

⁴⁶⁶ 2002.

⁴⁶⁷ In section 59, the BCEA also establishes the Employment Conditions Commission, which advises the relevant minister, and sets up the Labour Inspectorate, which monitors and inspects working conditions. Part C of the BCEA contains specific protections for employees against discrimination and establishes the requirement for being deemed an employee, as opposed to an independent contractor.

⁴⁶⁸ See § 8 (b)(i-iii).

years of age as a domestic worker.⁴⁶⁹ Further, employers are required to register as a domestic worker, who works for more than 24 hours per month, with the Unemployment Insurance Fund (UIF). A domestic worker who works through an employment service is deemed to be employed by that employment service, if the employment service pays the domestic worker.⁴⁷⁰

3.7.6 Doctrinal Gaps

Legally, all the provisions of the BCEA are likewise applicable to domestic workers, unless they work for their employer(s) for less than 24 hours per month. The practical effect of this, however, is that many employers pay no heed to the provisions of the BCEA, given that it is not uncommon for domestic workers in South Africa to work for multiple employers in one month, for less than 24 hours each. This situation means that domestic workers could be working for 45 hours every week (full time), but not for 24 hours per month for any one employer, keeping the applicability of the BCEA out of reach for many domestic workers.

C. 189, which has been ratified by South Africa, defines a domestic worker as “any person engaged in domestic work within an employment relationship.”⁴⁷¹ Article 1(b) makes clear that C. 189 addresses people performing domestic work on an “occupational basis” and does not apply to a “person who performs domestic work occasionally or sporadically.” However, a domestic worker who works for multiple employers, could not be considered a sporadic worker, and should not be excluded from core labour protections. Indeed, under article 14(3) of C. 189, states are obliged to make it easy to pay social security contributions in general, and specifically for workers who have more than one employer. Similarly, under both the South African Constitution and international human rights instruments, rights apply to all people, or all workers.

3.7.7 Constitutional Rights of Live-In Workers

While the Sectoral Determination puts in place minimum standards for employer provided housing when the domestic worker is paying for such housing, there are no minimum standards in place when domestic workers do not pay for their accommodation. Indeed, Sectoral Determination 7 is silent on rights for live-in domestic workers, such as the right to privacy, the right to adequate housing and of food, and the rights of domestic workers to family and freedom of association, which includes receiving visitors.

⁴⁶⁹ §§ 22-23.

⁴⁷⁰ An employment service and the client are jointly and severally liable if the employment service does not comply with SD 7 or the BCEA.

⁴⁷¹ C. 189, *supra* note 7, at art. 1(b).

The absence of provisions in SD7 that contemplate the reality of live-in domestic workers means that direct and indirect discrimination against live-in workers continues to occur. Domestic workers employed in a sectional title housing complex, for example, are subject to the rules of body corporates which frequently prescribe segregation and restrict rights and access of resident domestic workers, their visitors, or their family members. However, C. 189 also requires taking measures to ensure “decent living conditions” for live-in domestic workers, which requires taking measures to ensure that domestic workers are “free to reach agreement with their employer or potential employer on whether to reside in the household ...” Recommendation 201 (R. 201) requires taking measures related to accommodation and food, where this is provided⁴⁷² and taking measures to ensure that domestic workers who reside in the household where they are employed have decent living conditions that respect their privacy.⁴⁷³

Further, under the South African Constitution, individuals have the rights to dignity, privacy, freedom of movement and association, and children have the right to parental care. All these rights apply to domestic workers employed in private houses. The CEDAW Committee has also recommended that South Africa ensure that domestic workers in live-in accommodation enjoy minimum standards of accommodation and decent work conditions.

3.7.8 Institutional Gaps: Inspection, Enforcement and Collective Bargaining

In terms of the BCEA, the Minister of Employment and Labour may appoint labour inspectors. Labour inspectors are empowered to promote, monitor and enforce compliance with any employment law.⁴⁷⁴

In the context of domestic work, section 65 of the BCEA states that a labour inspector may only enter a private home with the consent of the owner or occupier, or if authorized to do so in writing by the Labour Court. To obtain authorization from the court, an inspector must make a written application and explain, on oath or affirmation, the reasons for the need to enter the home to monitor or enforce compliance with any employment law.⁴⁷⁵ This is a cumbersome and time-consuming process.

SD 7 is unfortunately silent on the issue of labour inspection.

⁴⁷² R. 201, *supra* note 59, at ¶ 7.

⁴⁷³ C. 189, *supra* note 7, at art. 6 and R. 201, *supra* note 59, at 17.

⁴⁷⁴ (a) advising employees and employers of their rights and obligations in terms of employment law; (b) conducting inspections. (c) investigating complaints. (d) endeavoring to secure compliance with an employment law by securing undertakings or issuing compliance orders; and (e) performing any other prescribed function.

⁴⁷⁵ BCEA at § 65.

tions. Employers of domestic workers in South Africa often claim ignorance of SD 7, seemingly with impunity. State monitoring of domestic work conditions is virtually non-existent, and it is largely up to individual workers to lodge complaints with dispute resolution fora. As discussed, domestic workers are not likely to do this if they believe it will jeopardize their job.

Under article 17 of C. 189, each member “shall develop and implement measures for labour inspection, enforcement, and penalties, with due regard for the special characteristics of domestic work, in accordance with national laws and regulations.” Further, 17(3) sets out that “in so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due regard to privacy.”

Yet, the South African approach to labour inspection in homes prioritizes employers’ privacy, with the effect of rendering inspection ineffective. Thus, while SD 7 may appear comprehensive on paper, the reality is that very few domestic workers in South Africa enjoy the full benefit and protection that SD 7, or any other labour law for that matter, is designed to offer. The ongoing failure of the Department of Labour to enforce SD 7 sends a clear signal to employers that there is no danger or consequences for ignoring the law in this regard.

3.7.9 Collective Bargaining and Absence of Consultation with Domestic Worker Trade Unions

Unionization among domestic workers in South Africa is low, with only 0.5% of domestic workers in South Africa unionized in 2017.⁴⁷⁶ However, unions play a critical role in protecting domestic workers’ labour and human rights. As described previously, both SADSAWU and the IZWI Alliance were two of the first organisations to make written submissions to the newly established National Minimum Wage Commission in 2019, arguing that a separate and lower minimum wage for domestic workers, amounted to a form of discrimination, which was unjustifiable. In their submissions, SADSAWU and IZWI pointed out that the decision to introduce a tiered phase-in for domestic workers had not included the domestic work sector in prior discussion and was made with no discernable justification. This absence of consultation of representative domestic worker unions was likely a consequence of domestic workers not having a dedicated Bargaining Council.

C. 189 obliges member states to respect, promote, and realise the right to freedom of association and the effective

right to collective bargaining.⁴⁷⁷ Furthermore, C. 189 repeatedly emphasizes the crucial dimension of consultation with most representative employers’ and workers’ organization through laws, in implementing the convention.⁴⁷⁸

3.7.10 Analysis

South Africa has an expansive constitution and progressive legal framework, which includes the constitutional imperative to interpret constitutional rights in light of international law norms. South Africa has ratified core international human rights instruments, including the ILO C. 189 on Domestic Work and C. 190 on Violence and Harassment at Work. In the landmark case of *Mahlangu*, the Constitutional Court drew on recommendations of international human rights treaty bodies to come to its conclusion that the exclusion of domestic workers from COIDA was not only direct discrimination (because it could not pass a rational connection test), but also amounted to indirect discrimination on the intersectional basis of race, gender, and class, which are presumptively unfair and retrospectively unconstitutional.

Mahlangu provides an important conceptual framework to begin to constitutionally challenge remaining legal gaps, including:

- The effective implementation of workers compensation for domestic workers, including its retrospective application, as set out in *Mahlangu*.
- The gaps in Sectoral Determination 7, which do not address the rights of live-in domestic workers, including the right to privacy, standards for adequate housing in absence of deductions for accommodation, food, and the rights of a live-in domestic workers to family and visitors.
- In the context of Sectional Title Housing, housing rules that frequently limit the rights of domestic workers movement and access to family/visitors.
- Provisions in BCEA that do not apply to those domestic workers who work for less than 24 hours/month for their employers, and thus exclude domestic workers working for multiple employers for less than 24 hours a month for each employer.
- The requirement of consent of the occupier/owner or a court order before inspecting and enforcing labour law compliance in private homes.
- The absence of a dedicated Bargaining Council on Domestic Work.

⁴⁷⁶ Statistics South Africa, LABOUR MARKET DYNAMICS IN SOUTH AFRICA (2017), <https://www.datafirst.uct.ac.za/dataportal/index.php/catalog/727/related-materials>.

⁴⁷⁷ C. 189, *supra* note 7, at art. 3(a).

⁴⁷⁸ C. 189, *supra* note 7, at art. 18.

3.8 Mauritius

3.8.1 Background

In Mauritius, domestic work is considered “women’s work” in a deeply entrenched patriarchal value system, which seeks to protect and preserve ancestral values. Like elsewhere in the world, Mauritian women were for the most part expected to stay home, while men went to work. This changed somewhat during the second phase of industrialization, when women also began working in factories, for example. However, due to rapid mechanization and the rising cost of social protection, Mauritian factory labour became increasingly expensive for employers, and many of the same women found themselves looking to domestic work as their source of income.⁴⁷⁹ Some Mauritians still feel that a woman must have the permission of her husband or family to work, resulting in many women never entering either the formal or informal job market. According to the World Bank, “[i]n Mauritius, the labor force participation rate among females is 43.4% and among males is 70.4% for 2021.”⁴⁸⁰

ILO data indicates that domestic workers make up 4.5% of employed people in Mauritius and that 9.9% of employed women are domestic workers (compared to 1.2% of employed men).⁴⁸¹ This illustrates once again that domestic work is a highly feminized employment sector, including in Mauritius.

Mauritius experienced rapid economic development during its second phase of industrialization. After becoming independent, this economic development quickly enabled it to grow from a low-income to middle-income country, which in turn led to the development of an extensive social welfare system.⁴⁸² This saw a departure from agriculture as the main economic activity towards industrialization, leaving the burden of physical and manual labour, including domestic work, to those in the lower socio-economic classes.

Domestic work in Mauritius is easily accessible to employers, both in terms of the supply of domestic workers, and the price of domestic work. In Mauritius, domestic workers are from a variety of cultures and religions in the country

⁴⁷⁹ Personal communication between a human rights defender from Mauritius and Sanja Bornman, 2021.

⁴⁸⁰ Mauritius, World Bank Gender Data Portal, <https://genderdata.worldbank.org/countries/mauritius/> [https://perma.cc/46MW-2ARR] (last visited Nov. 20, 2022).

⁴⁸¹ Who Are Domestic Workers, ILO <https://www.ilo.org/global/topics/domestic-workers/who/lang--en/index.htm> [https://perma.cc/Z5TV-S3HN] (last visited Nov. 20, 2022).

⁴⁸² François Eyraud & Verena Tandrayen-Ragoobur, ILO, Minimum Wage Fixing Challenges in Mauritius 12 (2014), <http://nationalminimumwage.co.za/wp-content/uploads/2015/09/0165-NMW-IN-MAURITIUS-18.9.14.pdf> [https://perma.cc/764W-HH8A].

and may also be part of the rural population. Due to the small size of the island, there are few live-in domestic workers. It is cheaper for families to pay domestic workers a transport allowance than to arrange live-in quarters.⁴⁸³ The state did not designate domestic work as an essential service, making it difficult for domestic workers to get to and from work during the COVID-19 lockdown, which resulted in the dismissal of domestic workers.⁴⁸⁴

3.8.2 International Law

Mauritius has ratified the core international human rights conventions including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of all Forms of Racial Discrimination; the International Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the rights of Person with Disabilities. Mauritius has also ratified some core ILO Conventions. It was the first African country to ratify the C. 189 Domestic Worker Convention and C. 190 on Violence and Harassment at Work. Mauritius has also ratified the African Charter on Human and Peoples’ Rights; the Protocol on the Rights of Women; the African Charter on the Rights and Welfare of the Child; and the Protocol on the Establishment of the African Court on Human and Peoples’ Rights.

3.8.3 Constitutional Context

Mauritius has a hybrid legal system derived from British common law and French civil law. The Constitution of Mauritius is the supreme law of the country, and where any other law is inconsistent with it, that law is void to the extent of its inconsistency.⁴⁸⁵ It establishes the separation of powers and guarantees the protection of the fundamental rights and freedoms of the individual. These include protection from slavery and forced labour;⁴⁸⁶ freedom of assembly and association;⁴⁸⁷ and under article 16, protection against discrimination by the state or private individuals on the grounds of *race, caste, place of origin, political*

⁴⁸³ Personal communication between a Mauritian political leader and Sanja Bornman, 2021.

⁴⁸⁴ Marlese von Broembsen, *The Impact of COVID-19 Laws on Informal Workers: A Review of 51 Countries*, WIEGO LAW & INFORMALITY INSIGHTS, no. 2, Aug. 2020, wiego.org/sites/default/files/resources/file/WIEGO_LawNewsletter_August_2020_Eng.pdf.

⁴⁸⁵ CONST. OF THE REPUB. OF MAURITIUS, Mar. 12, 1938, § 2 [hereinafter CONST. OF MAURITIUS].

⁴⁸⁶ *Id.* at § 6.

⁴⁸⁷ *Id.* at § 13.

*opinions, colour, creed or sex.*⁴⁸⁸ The Constitution also entrenches the right to protection under the law, without discrimination on the grounds of *race, place of origin, political opinions, colour, creed or sex,* " but subject to respect for the rights and freedoms of others and for the public interest."⁴⁸⁹ It is important to note, that discrimination under article 16, has to relate to one of the enumerated grounds.⁴⁹⁰

Mauritius has a single-structured judicial system consisting of two tiers: the Supreme Court and subordinate courts. Any aggrieved party has the right to approach the Supreme Court to challenge violations of constitutional rights,⁴⁹¹ on the condition that the Supreme Court shall not exercise its powers in this regard if it is satisfied that adequate means of redress are or have been available to the party under any other law.⁴⁹² The Industrial Court was established by section three of the Industrial Court Act.⁴⁹³ It has exclusive civil and criminal jurisdiction to try any matter arising out of a range of employment related acts.⁴⁹⁴

The Constitution of Mauritius contains no indication whether international treaties form part of Mauritian law, nor is there any guidance on this in any other Mauritian legislation. However, where treaties have been domesticated, courts have enforced those provisions. Similarly, Mauritian courts have held that rules of customary law do not require formal incorporation before using customary international law to interpret legislation.⁴⁹⁵ Yet jurisprudence is inconsistent when dealing with the question of whether treaties which have not been domesticated impose domestic obligations on Mauritius.⁴⁹⁶ According to some scholars, in cases of legislative ambiguity, laws should be interpreted to comply with international law. Indeed, courts in Mauritius have made reference to international law, the jurisprudence of the Human Rights Committee and also the European Court of Human Rights.

⁴⁸⁸ *Id.* at § 16.

⁴⁸⁹ *Id.* at § 3.

⁴⁹⁰ In *Matadeen v. Pointu* [Privy Council No. 14 of 1997], the Judicial Committee of the Privy Council observed that if the words "protection of the law" in section 3 of the Constitution were interpreted to create a general principle of equality, that principle would swallow up all the enumerated grounds and much else besides.

⁴⁹¹ CONST. OF MAURITIUS, § 17(1).

⁴⁹² CONST. OF MAURITIUS, § 17(2).

⁴⁹³ Industrial Court Act 68 of 1973.

⁴⁹⁴ i.e., Employment and Training Act, 1963; Labour Act, 1975; Occupational Safety and Health Act, 2005; Passenger Transport Industry (Buses) Retiring Benefits Act, 1977; Workers' Rights Act, 2019; Workmen's Compensation Act 1931.

⁴⁹⁵ Jamil Ddamulira Mujuzi, *The Supreme Court of Mauritius and Its Reliance on International Treaties to Interpret Legislation: Reconciling the Tension Between International Law and Domestic Law*, 39 STATUTE L. REV. 118, 132 (2018).

⁴⁹⁶ *Id.* at 119.

3.8.4 Legislative and Regulatory Context: Protection for Domestic Workers

Domestic workers in Mauritius are governed both by general labour legislation, and sector-specific regulations. The sector-specific regulation is the Domestic Worker (Remuneration) Regulations Act of 2019, while the general labour law provisions can be found in the Workers' Rights Act of 2019. It is important to note that where the Workers' Rights Act and the regulations conflict, the regulations will trump the Act.⁴⁹⁷ This is of particular relevance, because in certain respects, the standards set out in the domestic worker regulations are less protective than those set out in the Workers' Rights Act. Further, while the Mauritian Workers Compensation Act does not exclude domestic workers, it does exclude domestic workers employed and living with family members.⁴⁹⁸

(a) The Workers' Rights Act of 2019 and Domestic Worker Regulations of 2019

The Workers' Rights Act of 2019 guarantees every worker, including domestic workers, a range of rights including a written contract, which must be registered with the supervising officer.⁴⁹⁹ The Act contains generous provisions, including the provision of free transport to and from work,⁵⁰⁰ sick leave, paid leave for civil or religious marriage, as well as family deaths on condition that the worker has worked for the same employer for 12 consecutive months.⁵⁰¹ It provides 14 weeks of paid maternity leave and ⁵⁰² five days of paternity leave.⁵⁰³ Section 114 protects against violence at work, including sexual and other harassment, and being searched by an employer.⁵⁰⁴ It entitles workers to pay slips,

⁴⁹⁷ Domestic Worker (Remuneration) Regulations Act, 2019, No.210, § 3(1) [hereinafter Regulations].

⁴⁹⁸ Section 4 of the Workmen's Compensation Act excludes "a member of the employers family living in his house" from the definition of a workman.

⁴⁹⁹ Workers' Rights Act of 2019, § 11.

⁵⁰⁰ *Id.* at § 59. This will also apply when the worker is required to start or stop work at a time when no public transport service by bus is available.

⁵⁰¹ *Id.* at § 48.

⁵⁰² *Id.* at § 52

⁵⁰³ *Id.* at §§ 53(1)-(2), 110. "[A]nd a gratuity to the legal heirs of the worker irrespective of any benefits the legal heirs may be entitled to under the National Pension Act or any other enactment" There is also the provision of a death grant to their spouse, or the person who has borne the funeral expenses, where a worker had been in continuous employment with the same employer for not less than 12 consecutive months.

⁵⁰⁴ Employers are vicariously liable for violence at work and must investigate and act within 15 days of receiving a report of violence from a worker. Failure to do so is an offence and is subject to a fine not exceeding \$2 350.18 USD and to imprisonment for a term not exceeding 5 years. See *Id.* at § 114(5). Also, the EOC published Guidelines

which indicate the contribution made by the employer to the Portable Retirement Gratuity Fund.⁵⁰⁵ Migrant workers and non-citizens, however, are expressly excluded from eligibility for this fund.⁵⁰⁶ In addition, the National Pensions Act⁵⁰⁷ encourages employers of domestic workers to make contributions to the retirement fund along with the employee.⁵⁰⁸

The most recent Domestic Worker (Remuneration) Regulations⁵⁰⁹ recognize multiple subsectors of domestic work and include definitions of caretaker, cook, domestic employee, driver, gardener, *garde-malade*,⁵¹⁰ household employee, and part-time employee. Those workers whose wages exceed \$14,101.07 USD in a year are not counted among domestic employees.⁵¹¹ It is important to note that where the Workers' Rights Act and the regulations conflict, the regulations will trump the Act.⁵¹² This is of particular relevance, since in some respects, the Domestic Worker Regulations put in place a lower standard for domestic workers than that set out in the Worker Rights Act, which apply broadly to all workers. This disparity conflicts with C. 189, which obliges member countries to ensure that domestic workers enjoy equal treatment to other workers in the country, with respect to working hours, overtime pay, daily and weekly rest periods, and paid annual leave.⁵¹³

Working Hours

A regular work week for workers under the Workers' Rights Act is legislated at 45 hours per week.⁵¹⁴ Under the Do-

for Employers in 2013 set out specific duties on employers to ensure non-discrimination in the workplace.

⁵⁰⁵ *Id.* at § 27(3),

⁵⁰⁶ *Id.* at § 90. Under article 14(3) of C. 189, obligations to ensure the progressive realization of social security for domestic workers includes consideration of payment systems for social security contributions, and bilateral, regional or multiregional agreements to provide for migrant domestic workers access to aid and preservation or portability of social security entitlements.

⁵⁰⁷ Section 2 of the National Pensions Act of 1976 recognizes domestic workers and defines "domestic service" as employment in a private household including employment as a cook, driver, gardener, *garde-malade*, maid, or seamstress. Under section 3 of this Act, a person who has attained the age of 60 shall be qualified to receive a basic retirement pension or a pension where the worker has become disabled and is likely to remain so for at least 12 months

⁵⁰⁸ First schedule. Also private correspondence between Ziona Tanzer and Senior Executive in the Mauritian Ministry of Foreign Affairs, 2022.

⁵⁰⁹ Domestic Workers (Remuneration) Regulations 2019, § 2 [hereinafter DWWR], <https://www.mcci.org/media/230866/the-domestic-workers-remuneration-regulations-2019.pdf>.

⁵¹⁰ *Id.* (i.e., a worker who is specifically employed to look after sick people).

⁵¹¹ *Id.* at 2(b).

⁵¹² *Id.* at § 3(1).

⁵¹³ C. 189, *supra* note 7, at art. 10 (1) and 10 (2).

⁵¹⁴ Workers' Rights Act of 2019, § 20(1).

mestic Work Regulations, the normal working week for a domestic employee is 48 hours.⁵¹⁵ In addition, there are distinctions within the category of domestic employee: A normal working day for a domestic worker is 8 hours, between 6 am and 10 pm.⁵¹⁶ However, a *garde-malade* worker may be required to work for more than 12 hours a day.⁵¹⁷

Further, there is no express provision in the regulation that addresses "standby time," which are "periods during which domestic workers are not free to dispose of the time as they please and remain at the disposal of the household in order to respond to possible calls." This lacuna is inconsistent with article 10(3) of the C. 189 and R. 201.⁵¹⁸

Conditions of Employment and Leave

Under section 45 of the Workers' Rights Act, workers in continuous employment for twelve consecutive months with the same employer are entitled to 20 working days of annual leave. There are other provisions which address the situation where the employer and worker cannot agree on when leave is to be taken, and the Act prescribes "half of the leave period shall be fixed by the employer and the other half by the worker," and further that this leave requires "48 hours" advance written notice" from the worker.

In contrast, the Domestic Worker Regulations stipulate that domestic workers are entitled to leave of 30 days for every 5 consecutive years of continuous employment (except migrant employees).⁵¹⁹ Under section 6(6), a domestic workers must give at least 3 months notice before taking any leave days, which can be taken 6 consecutive days at a time.⁵²⁰ section 7 sets out that where an employer cannot accede to the request, the domestic employee and employer may agree on another period, or in absence of an agreement, the employer shall pay to the domestic employee a normal day's wage in respect to each day's leave applied for. In terms of this section, such leave should be acceded to "subject to reasonable business grounds."

Wages

The Domestic Worker (Remuneration) Regulations of 2019 entitle every domestic worker to the appropriate national minimum wage payable under the National Min-

⁵¹⁵ *Id.* at schedule 1, § 1(1)

⁵¹⁶ *Id.* at schedule 1, § 1(2)

⁵¹⁷ Workers' Rights Act of 2019, § 20(2) of the. A "garde-malade" is a worker who is specifically employed to look after sick people.

⁵¹⁸ ILO, ILC, 109th Sess. Direct Request, Mairtime Labour Convention, 2019—Congo (2021).

⁵¹⁹ Workers' Rights Act of 2019, schedule 1, § 6

⁵²⁰ *Id.* at schedule 1, § 7(1)(a)–(c). Two aprons every year to every household employee, cook or household employee/cook, one pair of boots and 3 pairs of gloves every year to every gardener working under not less than a five-day week contract; and a serviceable flashlight to every watch person performing night duties

imum Wage Regulations, 2017.⁵²¹ Under the domestic worker regulations, the second schedule lists that cooks, gardeners, household employees, and caretakers earn the basic wages of 8900 Mauritian rupees (approximately \$199.93) per month and 45.64 (\$1.03) per hour. While the *Garda Malade* earns a monthly wage of 8900 rupees, but at an hourly rate of only 28.53 rupees (\$0.64). In contrast, a watch person earns 9275 rupees a month (\$114.15) and 44.59 (\$0.55) per hour, and a driver earns 9969 rupees per month (approx. \$122.69) and 47.93 per hour (\$1.08). The national minimum wage for an unskilled worker in the Export Processing Zone is 9,375.00 rupees (\$10.60), and an unskilled factory worker outside the Export Processing Zone is 1,075 rupees per month (\$24.15).⁵²²



Photo © Kate Holt / Solidarity Center

C. 189 requires member states to apply its national minimum to domestic workers, as well. Such remuneration must be without discrimination based on sex.⁵²³ Secondly, member states must ensure that domestic workers are paid their wages in cash at least once a month. Similarly, the ICECR Committee has recommended that one national minimum wage be applied. In the comparative South African context, the unions successfully argued that a separate and lower tier minimum wage for domestic workers

⁵²¹ DWRR, at § 4.

⁵²² Minimum Wage – Mauritius, MYWAGE.ORG, <https://mywage.org/mauritius/salary/minimum-wages> (last visited Nov. 20, 2022).

⁵²³ C. 189, *supra* note 7, at arts. 3(2)(d); and R. 201, *supra* note 59, at ¶¶ 3(a)–(c). Must be read with ILO conventions and recommendations, including: Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 [C. 100]; ILO, EQUAL REMUNERATION RECOMMENDATION (1951) [R. 90]; Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 [C. 111]; ILO, DISCRIMINATION (EMPLOYMENT AND OCCUPATION) RECOMMENDATION (1958) [R. 111]; ILO, HIV AND AIDS RECOMMENDATION (2010) [R. 200]; Convention (No. 183) Concerning the Revision of the Maternity Protection Convention (Revised), 1952, June 15, 2000, 2181 U.N.T.S. 253 [C. 183]; ILO, MATERNITY PROTECTION RECOMMENDATION (2000) [R. 191].

amounted to unjustifiable gender discrimination.

Payment for Work during Holidays

Under section 24 of the Workers' Rights Act, a worker who works during working hours, on a public holiday, must be paid not less than twice the rate of regular remuneration; and after normal working hours, not less than three times the rate of regular pay. In the situation where a worker works on a weekday for more than normal hours, the employer must pay the worker not less than one and a half times the regular rate.

In contrast, under the Domestic Work regulations, a domestic employee, other than a watchperson and *garde-malade*, must be paid one and a half times the basic rate for work done in excess of 8 hours or after 10pm on any day other than a public holiday; and twice the basic rate for the first 8 hours work performed on a public holiday before 10 pm; and 3 times the basic rate after 10 pm on a public holiday.

Trade Unions

While the Workers' Rights Act, does not address the right to freedom of association and collective bargaining, there is a constitutional right to join or refuse to join a trade union. Further, the Employment Relations Act 2008, sets out that every worker shall have the right to be a member of a trade union.

There are three primary trade unions in the country, but none are specific to domestic work due to the small size of the island.⁵²⁴ The ILO Committee has repeatedly requested information on whether article 15(2) consultations are taking place with representatives of domestic workers and migrant domestic workers. In its 2021 report, the ILO requested information on the measures taken to ensure that both regular and irregular domestic workers are able to exercise the right to establish trade unions of their choosing; and also, on the ways in which adequate representation of domestic workers in social dialogue is ensured.⁵²⁵

Labour Inspection and Complaints

Under section 117 of the Act, the Ministry is responsible for

⁵²⁴ Press release, ILO, A New Step Towards Trade Union Unity in Mauritius (Oct. 31, 2016), https://www.ilo.org/actrav/media-center/pr/WCMS_533889/lang-en/index.htm. The Mauritius Labour Congress (MLC), the Mauritius Trade Union Congress (MTUC); the National Trade Union Confederation (NTUC), which has affiliate organisations and members form virtually all economic sectors, including but not limited to: the Agricultural Research and Extension Unit Workers Union; the General Purpose Teachers Union; the Mauritius Airline Pilots Association; the Mauritius Telecom Employees Association; and the Sugar Industry Workers Association. Trade unions collaborate under the Trade Unions Council (TUC), which was established at a conference held in Port-Louis from 17 to 19 October 2016.

⁵²⁵ ILO, ILC, 109th Sess. Direct Request, Domestic Workers Convention, 2019 (No. 189)—Mauritius (2021).

maintaining a labour inspection service that must ensure compliance with the Act and any other relevant labour or employment law. In this regard, a supervising officer has the power to make enquiries to summon persons by written notice to provide information, and to issue compliance notices to employers. Most labour disputes allegedly become resolved at this level.⁵²⁶ However, a supervisory officer may not enter a private residence without the consent of the occupier, which poses a challenge for the investigation of domestic work.

Under article 17, each member “shall develop and implement measures for labour inspection, enforcement and penalties, with due regard for the special characteristics of domestic work, in accordance with national laws and regulations.” Further, 17(3) sets out that “in so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due regard to privacy.”

Indeed, in the (2021) CEAR comments, they found that according to the government reports there have been no inspections carried out for domestic workers.⁵²⁷ Further, the Committee on Economic, Social and Cultural Rights (2019) expressed concern about the large number of complaints filed by domestic workers regarding their working conditions and that the labour inspectorate’s inability to effectively monitor the situation of domestic workers.⁵²⁸ The Committee recommended that Mauritius ensure that all complaints received from domestic workers about working conditions are duly investigated and, where appropriate, penalties are applied and that the state party take the measures necessary to enable the labour inspectorate to effectively monitor the working conditions of domestic workers.⁵²⁹

Dispute Resolution Through Magistrate Courts

The approach to dispute resolution in the domestic work sector is predominantly informal: labour offices around the island entertain complaints by domestic workers against employers, and both are called in to assess the issue. This informal approach to resolution of disputes also allows a person to apply to a magistrate at the Industrial Court for advice or help in an out-of-court settlement, in respect of a matter within the jurisdiction of the Court,

even though no action has been launched or complaint made.⁵³⁰ The magistrate must apply their best efforts to secure a settlement out of court between the parties to an existing or likely dispute,⁵³¹ and this functions as an alternative dispute resolution mechanism, which ensures that very few labour disputes reach the level of the courts. Indeed, it does not appear that the Supreme Court or any other court in Mauritius has had an opportunity to deal with any matter specifically regarding domestic work.

C. 189 requires establishing enforcement mechanisms and penalties generally. However, states must also take measures to ensure that all domestic workers have effective access to courts, tribunals or other dispute resolution mechanisms, and establish effective complaints mechanisms.⁵³²

(b) The Equal Opportunities Act and Legally Permissible Discrimination Against Domestic Workers

The Equal Opportunities Act is designed to prohibit discrimination and promote equal opportunity between people, and it includes a prohibition against direct and indirect discrimination, including discrimination in employment settings.⁵³³ Sections 10–13 prohibit an employer or prospective employer from discriminating in the employment process and terms of employment. However, the Act has a proviso under section 13(5)(c), which permits a person to discriminate “in determining who should be offered employment in relation to the provision of domestic or personal services or in relation to any person’s home.”

This permission to discriminate with respect to domestic workers runs counter to C. 189, which obliges member countries to ensure that domestic workers enjoy equal treatment to other workers in the country. It also runs afoul of most anti-discrimination international conventions ratified by Mauritius, which do not contain a proviso that discrimination with respect to domestic workers or work in the home is permissible. Similarly, this permission to discriminate would be constitutionally troubling under Mauritius’ own constitutional commitments to non-discrimination “by the state or private individuals.” Indeed, the ILO has requested the Mauritian government to take the necessary measures to ensure that domestic workers, who are

⁵²⁶ Personal communication between a Senior Counsel at the Mauritian Bar and Sanja Bornman, 2021.

⁵²⁷ ILO, ILC, 109th Sess. Direct Request, Domestic Workers Convention, 2019 (No. 189)—Mauritius (2021).

⁵²⁸ Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on the Fifth Periodic Report of Mauritius, U.N. Doc. E/C.12/MUS/CO/5 (2019).

⁵²⁹ *Id.* (including by exercising the powers of the Permanent Secretary provided for in sections 61–62 of the Employment Rights Act 2008 and in sections 24–27 of the Occupational Safety and Health Act 2005).

⁵³⁰ Industrial Court Act 1973, § 5(1)(a)(Mauritius).

⁵³¹ *Id.* at § 5(1)(b).

⁵³² C. 189, *supra* note 7, at arts. 16–17. These measures should include consultation with the most representative organizations of employers and workers to provide adequate and appropriate systems of inspection and adequate penalties for violations. See also R. 201, *supra* note 59, at ¶¶ 7, 19, 21, 24. Read with Convention (No. 81) Concerning Labour Inspection in Industry and Commerce, adopted July 11, 1947, 54 U.N.T.S. 3 [C. 81]; Protocol of 1995 to the Labour Inspection Convention, 1947 [P. 01]; ILO, LABOUR INSPECTION RECOMMENDATION (1947)[R. 81].

⁵³³ Equal Opportunities Act of 2008, §§ 5–6.

particularly vulnerable to discrimination, enjoy the same protections against discrimination as other workers.⁵³⁴

3.8.5 Analysis

Mauritius is a mixed civil/common law legal system that does have a constitution which entrenches rights to non-discrimination: Under article 16, there is a protection against discrimination by the state or private individuals on grounds including race, sex, and cast. However, it does not have an active body of public interest constitutional rights case law.

Mauritius has ratified most international conventions, including the ILO C. 189 Domestic Worker Convention. Significantly, there is precedent for ratified conventions being used to interpret both legislation and the Constitution. This precedent is critical to making the argument that the lower standard of regulation found in the Domestic Worker Regulations versus those found in generalized labour law amounts to a violation of constitutional commitments to non-discrimination. This argument is strengthened when the Constitution is interpreted in light of C. 189 obligations, which ensure that member countries treat domestic workers as they treat other workers in the country.

Similarly, the carved out exceptions found Mauritian regulations of domestic workers *working in private homes*—specifically, that labour inspectors cannot inspect the working conditions in a home without the occupier's consent—arguably preclude effective enforcement of the laws. The part of the domestic worker regulations has been recognized as problematic by both the ILO CEAR Committee and the ICESCR Committee.

Further, the legal permission to discriminate against domestic workers and those who work in the home, under the Equal Opportunities Act, arguably permits discrimination in a predominantly female and economically vulnerable sector, and, therefore, amounts to a form of discrimination on intersectional grounds of race and sex.

Accordingly, the following provisions in the Domestic Workers Regulations, which put in place a lower standard for domestic workers than other workers could be challenged in the Supreme Court under article 16 of the Constitution, interpreted in light of C. 189:

- Higher weekly hours of work for domestic workers, with a requirement that garde-malade workers be permitted to work more than 12 hours/day.
- The absence of provisions regulating “standby” work.
- The disparity in and the lower amount of leave domestic workers are entitled to; the rules that

determine when leave be taken; and the amount of prior notice required by employees who are domestic workers.

- Sector specific wages with lower wages for domestic workers.
- Disparate and lower remuneration for working on holidays, outside of regular hours, and overtime pay.
- Permission to discriminate against domestic workers with reference to terms and process of employment under section 13 (5)(c) of the Equal Opportunities Act.
- Exclusion of family members employed and dwelling in employers' home from claiming Workmen's Compensation.

3.9 Ghana

Ghana is a country with a population of over 24 million.⁵³⁵ This population is predominantly youthful, living in 5,467,136 households, according to the 2010 Ghana Census report.⁵³⁶ The Ghana Living Standard Survey Seven (GLSS7) estimates that 0.5 percent of the workforce aged between 15 and 35 were employed in households as domestic workers.⁵³⁷ These domestic workers are predominantly female, totaling 0.7 percent.⁵³⁸ A 2003 study by Leadership and Advocacy for Women in Africa—Ghana (LAWA-Ghana) estimates that each Ghanaian household has at least one domestic worker, with affluent or large houses having up to six domestic workers.⁵³⁹ This level of employment makes domestic work a popular form of work and domestic workers a crucial segment of the workforce in Ghana.

⁵³⁵ Ghana Stat. Serv., 2010 POPULATION & HOUSING CENSUS 1 (2013). Unofficial reports put Ghana's current national population at approximately 31 million people. *Ghana 2021 Population and Housing Census: History of Ghana Population and Housing Census since 1891*, BBC NEWS PIDGIN (June 24, 2021), <https://www.bbc.com/pidgin/tori-57592395>.

⁵³⁶ *Id.* at 2–3. The 2021 Population and Housing Census reports are forthcoming as at the writing of this case study.

⁵³⁷ Ghana Stat. Serv., GHANA LIVING STANDARD SURVEY (GLSS) 7: MAIN REPORT 103 (2018).

⁵³⁸ *Id.* at 10. *See also* Leadership and Advocacy for Women in Africa-Ghana (LAWA-Ghana), DOMESTIC WORKERS IN GHANA: FIRST TO RISE AND LAST TO SLEEP (2003). Despite giant strides made in collating the research data above relating to domestic workers, accurate data on domestic workers is not readily available or is outdated due to the specificity of domestic work and the high levels of informality associated with the sector.

⁵³⁹ Leadership and Advocacy for Women in Africa-Ghana (LAWA-Ghana), DOMESTIC WORKERS IN GHANA: FIRST TO RISE AND LAST TO SLEEP (2003). This data is not supported by any official statistics but by understanding of domestic arrangements in Ghanaian households.

⁵³⁴ ILO, Int'l Lab. Conf., 109th sess., Direct Request, Domestic Workers Convention, 2019 (No. 189)—Mauritius (2021).

Akin to the domestic work sector in most developing countries, domestic workers in Ghana remain invisible, and domestic work is mostly not regarded as work by most Ghanaians due to cultural norms.⁵⁴⁰ However, official census data capture “domestic employee (house help)” as one of its eight employment status categories. Domestic workers are generally employed to perform various household tasks like cooking, washing, cleaning, doing the laundry, child care, caring for the sick and elderly in the household, chauffeuring, gardening, and security.⁵⁴¹ In some cases, the duties of domestic workers may include assisting with family businesses outside the home.⁵⁴² These workers comprise adults, children and migrant domestic workers from the rural parts of the country and from neighboring countries and are primarily live-in domestic workers. Most domestic workers are women with little or no education and are from economically-deprived households or low socio-economic backgrounds. Migrant domestic workers are predominantly undocumented or unregistered with the relevant authorities. The undocumented entry of these migrant domestic workers makes abuse and trafficking a common occurrence in the domestic work sector.

Ghana’s colonial past and cultural practice of fosterage,⁵⁴³ reciprocity and interdependence between relatives in most communities are among other factors that contribute immensely to the “hidden” nature of Ghanaian domestic workers and the prevalence of child domestic work. As a British colony, domestic work in Ghana was performed predominantly by men who served either European or African urban workers, missionaries, or civil servants who served the colonial economy.⁵⁴⁴ Traditionally, women were left in rural communities to take care of the household and children, while the men with no or some education went to the serve colonial officers, missionaries, and other highly placed civil servants and elite. In cases of fosterage, children are sent to relatives, friends or community members

to carry out domestic chores for households that are not theirs for cash, education, to learn a trade or for upkeep. The key features of both domestic work arrangements are that they are formed in conditions of informality and based on verbal agreements, which often leads to the creation of fictive-kin relationships between the domestic worker and the employer.

3.9.1 International Law

Ghana is an active player in the international community and a signatory to international instruments and treaties that protect the rights of domestic workers. These include Universal Declaration of Human Rights (UDHR); International Covenant on Economic, Social and Cultural Rights (ICESCR); The Convention on the Elimination of Discrimination Against Women (CEDAW); Convention Against Torture and other cruel inhuman or degrading treatment or punishment; Convention on the Rights of the Child (CRC); and Convention on the protection of the Rights of all Migrant Workers and members of their families.

The eight ILO core labour standards Conventions,⁵⁴⁵ as well as ILO’s Labour Inspection⁵⁴⁶ and Maternity Protection⁵⁴⁷ conventions, have been ratified by Ghana. Ghana has not yet ratified the ILO Domestic Workers Convention. Ghana is also a signatory to the African Charter on Human and People’s Rights (ACHPR), Women’s Rights (2003), and the ECOWAS Free Movement Protocol. Ghana has also ratified the Article 34 Protocol, entitling NGO’s and individuals to bring cases directly to the African Court.

3.9.2 Constitution and Legal Framework

The 1992 Constitution as a *Grund norm* provides a back-

⁵⁴⁰ Domestic work is perceived as work traditionally performed by women in the household without pay.

⁵⁴¹ Dzodzi Tsikata, ILO, DOMESTIC WORK AND DOMESTIC WORKERS IN GHANA: AN OVERVIEW OF THE LEGAL REGIME AND PRACTICE 1 (2009).

⁵⁴² Clara Osei-Boateng & Prince Asafu Adjaye, Women in Informal Employment: Globalizing and Organizing (WIEGO), REPORT ON DOMESTIC WORKERS IN GHANA (2012).

⁵⁴³ Child fosterage is a traditional practice prevalent in some African societies that parents initiate to provide their children with an alternative residence with extended family members to provide educational or other opportunities. This traditional practice has been targeted by informal agents who offer families the false promise of fosterage, while instead engaging in the trafficking of children for domestic work. Nana Araba Apt, UNICEF, A STUDY OF CHILD DOMESTIC WORK AND FOSTERAGE IN NORTHERN AND UPPER EAST REGION OF GHANA (2005); Jack Goody, PRODUCTION AND REPRODUCTION: A COMPARATIVE STUDY OF THE DOMESTIC DOMAIN (1977); Uche C. Isiugo-Abanihe, *Child Fosterage in West Africa*, 11 POPULATION & DEV. REV. 53 (1985).

⁵⁴⁴ Josef Gugler, *Women Stay on the Farm No More: Changing Patterns of Rural-Urban Migration in Sub-Saharan Africa*, 27 J. MOD. AFR. STUD. 347 (1989).

⁵⁴⁵ The Core ILO conventions are the following: Convention Concerning Forced or Compulsory Labour, *adopted* June 28, 1930, 39 U.N.T.S. 55. [C. 29]; Convention (No. 97) Concerning Freedom of Association and Protection of the Right to Organise, *adopted* July 9, 1948, 68 U.N.T.S. 17 [C. 97]; Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *adopted* July 1, 1949, 96 U.N.T.S. 257 [C. 98]; Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 [C. 100]; Convention (No. 105) Concerning the Abolition of Forced Labour, *adopted* Jun. 25, 1957, 320 U.N.T.S. 291 [C. 105]; Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, *adopted* June 25, 1958, 362 U.N.T.S. 31 [C. 111]; Convention (No. 138) Concerning Minimum Age for Admissions to Employment, *adopted* June 26, 1973, 1015 U.N.T.S. 297 [C. 138]; Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *adopted* June 17, 1999, 2133 U.N.T.S. 161 [C. 182].

⁵⁴⁶ Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week, *adopted* Nov. 28, 1919, 38 U.N.T.S. 17 [C. 1].

⁵⁴⁷ Convention (No. 103) Concerning Maternity Protection (Revised 1952), *adopted* June 28, 1952, 214 U.N.T.S. 2907 [C. 103].

ground for regulating work conditions for domestic workers. Article 17(1) provides equality for everyone before the law and contains non-discrimination provisions on the basis of gender, race, colour, ethnic origin, religion, creed, or social or economic status. Article 17(2) defines discriminate

to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

Article 24(1) states that “every person has the right to work under satisfactory, safe and healthy conditions, and shall receive equal pay for equal work without distinction of any kind.” Article 35(5) places a duty on the state to promote integration and prohibit discrimination.

Under the Directive Principles of State Policy in the Constitution, article 36(1) imposes a duty on the state to “take all necessary action to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy.” This includes the article 36(6) provision that the state “shall afford equality of economic opportunity to all citizens; and, in particular, the state shall take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana.” The state has a duty to safeguard the health, safety, and welfare of all persons in employment.⁵⁴⁸ It is required to encourage the workers’ participation in the decision-making processes at their workplaces.⁵⁴⁹

The courts are vested with the power to ensure that these fundamental rights are protected by article 33 and 130 of the Constitution. Article 33(1) states that anyone whose rights have been contravened may bring an action in the High Court seeking redress. The implementation of these articles safeguards against direct and indirect discrimination through the system of the courts.

While the Constitution does not address international law, both customary international law and domesticated treaties, are enforceable in Ghanaian courts.⁵⁵⁰ In its jurisprudence, the Supreme Court has interpreted article 33(5) of the Constitution, which guarantees other rights, duties, declarations not specifically mentioned in the Constitu-

tion, “as applicable by (our) courts in order to ensure the dignity of the human race.”⁵⁵¹

The Ghanaian High and Appeal Courts have been responsive to non-discrimination and gender equality issues. Of relevance to the value of domestic work, albeit unpaid and performed by a spouse, is the 2012 Supreme Court case on the division of marital property on divorce.⁵⁵² In the Mensah case, the Supreme Court adopted what it termed a “jurisprudence of equality” and with respect to division of marital property, the “equality is equity” principle. The Court ordered an equitable division of property, even though the wife had not contributed directly to the accumulation of property during the marriage, because “this court recognizes the valuable contributions made by her in the marriage like the performance of household chores referred to supra, and the maintenance of a congenial domestic environment for the respondent to operate and acquire properties.”

Significantly, the court in *Mensah* invoked article 35(3) to make reference to both the UDHR and CEDAW’s definition of discrimination against women, emphasizing “the need to eradicate customary and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women.”

The case of *Commission on Human Rights and Administrative Justice v. Ghana National Firefighter Service*,⁵⁵³ was the first case in which the High Court addressed discrimination on the grounds of gender. This case concerned the dismissal of women firefighters from the Ghana National Fire Service (GNFS) for getting pregnant within the first three years of employment, in contravention of Regulation 33(6)⁵⁵⁴ of the Conditions of Service of the GNFS. The Court found that since it did not have any precedent, it would look to international human rights and comparative jurisprudence as a guide to interpret article 33(5) of the Constitution. Drawing on Canadian jurisprudence, the Court constructs a test for discrimination by asking (1) are

⁵⁵¹ *Mensah v. Mensah* [2012] GHASC 8, <https://ghalii.org/gh/judgment/supreme-court/2012/8>.

⁵⁵² *Id.*

⁵⁵³ [2018] Suit No. HR 0063/2017 (unreported judgment) [hereinafter CHRAJ v. GNFS].

⁵⁵⁴ Regulation 33(6) prohibits women in the GNFS from getting pregnant within the first three years of employment. The Court per Justice Anthony Yeboah ruled that it was an archaic regulation and “an institutional onslaught on the Claimants fundamental rights to work and freedom of discrimination.” This case was prosecuted by the Commission on Human Rights and Administrative Justice (CHRAJ) under the powers granted to it under article 216 of Ghana’s Constitution. CHRAJ’s duties include the “investigation of complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties; as well as complaints concerning practices and actions by persons, private enterprises, and other institutions where those complaints allege violations of fundamental rights and freedoms under this Constitution.”

⁵⁴⁸ GHANA CONST. 1992, art. 36(10).

⁵⁴⁹ GHANA CONST. 1992, art. 36(11).

⁵⁵⁰ Christian N. Okeke, *The Use of International Law in the Domestic Courts of Ghana and Nigeria*, 32 ARIZ. J. INT’L. & COMP. L. 371 (2015).

the persons protected by article 17 on non-discrimination? and (2) have they been subject to adverse treatment? It found that the group of female firefighters are protected against discrimination on the grounds of gender and sex, and being dismissed because of pregnancy amounts to adverse treatment.

In this case, the government argued that firefighters require at least three years of rigorous physical training, which would endanger pregnancies. The Court then asks whether the differentiation is reasonable, objective, and legitimate under CEDAW, and whether the measures adopted are proportionate. In determining whether the objective was reasonable, the Court cited CEDAW provisions requiring states to prohibit dismissals due to pregnancy and to provide special protection during pregnancy. On the facts, it found that the dismissal of pregnant firefighters because of training concerns is not a legitimate aim, and that the government has not satisfied the burden of proving why training could not resume after pregnancy. The High Court ordered the reinstatement of the female firefighters and awarded costs of GHC50,000 to each claimant⁵⁵⁵.

3.9.3 Legislative Context for Regulation of Domestic Work

Nationally, the legal framework for the regulation of domestic work includes the 1992 Constitution, the Labour Act of 2003 (Act 651), Labour Regulations of 2007 (L.I 1833), Labour (Domestic Workers) Regulations of 2020 (L.I 2408), the Children's Act of 1998 (Act 560), the Domestic Violence Act of 2007 (Act 732) and the Pensions Act of 2008 (Act 766). Domestic workers are included in the national minimum wage and are not excluded from collective labour rights under the Labour Act.

(a) The Labour Act

Domestic Workers who are Family Members

The Labour Act of 2003 applies to all workers, and, therefore, also covers domestic workers.⁵⁵⁶ However, under section 175, a "domestic worker" is defined as "a person who is not a member of the family of a person who employs him or her as a house-help." This definition is not as exhaustive of all forms of domestic work found in the ILO's definition of domestic work in C. 189, which defines a domestic worker as "any person engaged in domestic work within an employment relationship."

⁵⁵⁵ CHRAJ v. GNFS [2018] Suit No. HR 0063/2017.

⁵⁵⁶ Labour Act of 2003 (Act 651), § 1 ("except the Armed Forces, the Police Service, the Prison Service and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act, 1996 (Act 526).") [hereinafter "Labour Act"].

Conditions of Work

The Labour Act sets out the maximum hours of work provisions in section 33, requiring a worker to work eight hours a day or forty hours a week. Sections 40 through 43 address rest periods. In normal hours that are continuous, there should be at least 30 minutes break. Where work is performed in two parts, the break should not be less than an hour. The Labor Act sets out daily rest periods (at least 12 hours between consecutive days), weekly rest periods (at least 48 consecutive hours per week, preferably from Saturday to Sunday) and stipulates that rest periods don't include public holidays. However, section 44, provides for the specific exclusion of domestic workers in private homes from the limits on maximum hours of work and requirements of specific rest periods.⁵⁵⁷

This exclusion is inconstant with C. 189, which obliges member countries to ensure that domestic workers enjoy equal treatment to other workers in the country, with respect to working hours, overtime pay, daily and weekly rest periods, and paid annual leave.⁵⁵⁸ This exclusion is particularly egregious in light of the reality that domestic workers generally work long and unpredictable hours.⁵⁵⁹

Employment of Young Persons

Section 58 of the Labour Act prohibits the employment of a young person "in any type of employment or work likely to expose the person to physical or moral hazard" and 58(3) provides that an employer "shall not employ a young person in underground mining work." Under 58(4), contravention of these provisions renders the offender liable for a fine not exceeding 100 penalty units. Section 60 requires employers of young people in industrial undertakings to keep a register, which includes their dates of birth.

While the Labour Act does not address domestic work in children, section 87 of the Children's Act (Act 560) prohibits exploitative child labour, which "deprives the child of its health, education or development." Section 89 of the Children's Act prescribes the minimum age for employment to be 15 years, and for "light work," 13 years. Light work is defined as "work which is not likely to be harmful to the health or development of [the] child and does not affect the child's attendance at school or the capacity of the child to benefit from schoolwork."

Under section 93 of the Children's Act, employers in industrial undertakings are required to keep a register of children and young persons employed. Enforcement in the formal sector is through labour office enquiry, whereas enforcement in the informal sector occurs by the social services

⁵⁵⁷ "This Sub-Part and Sections 33 and 34 do not apply to task workers or domestic workers in private homes."

⁵⁵⁸ C. 189, *supra* note 7, at art. 10(1)–(2).

⁵⁵⁹ Claire Hobden, ILO, WORKING TIME FOR LIVE-IN DOMESTIC WORKERS, *supra* note 38.

department.⁵⁶⁰

This provision essentially removes child domestic workers from the purview of the labour inspectorate and puts them in the jurisdiction of the social services (and possibly criminal law enforcement) department. However, C. 189 requires establishing enforcement mechanisms and penalties for violations. These mechanisms function as a deterrent, even when the actions in question do not necessarily rise to criminal conduct.

(b) The Domestic Worker Regulations of 2020

In 2020, the Labour (Domestic Workers) Regulations of 2020 (L.I. 2408) was passed (hereinafter Regulations).⁵⁶¹ Despite Ghana's failure to ratify C. 189, the Regulations cover vital thematic areas for the protection of domestic workers and counteract the critical gaps and systemic exclusion of domestic workers in the Labour Act. However, it is important to note that since the Regulations are "*subject*" to the Act, and the Labour Act has not been amended, in instances of inconsistency, the Act would prevail over the Regulations.

Definition of Domestic Worker

The 2020 Regulations explicitly defines "domestic work" to include domestic chores performed in any home or domestic setting; informal work performed by a domestic worker who also performs household chores in the home of an individual; assistance in petty commercial activity; security services; and gardening.⁵⁶²

Section two of the Regulations does not contain the caveat contained in the Labour Act—that a domestic worker who is a family member is excluded from the Act. However, since the exclusion in the Labour Act has not been repealed, the effect of the absence of the caveat in section two is unclear.⁵⁶³

Written Contracts

Secondly, the Regulations formalize the employment re-

⁵⁶⁰ CHILDREN'S ACT, § 95 (2016)(Act 937).

⁵⁶¹ These regulations were signed on 11th June 2020 and entered into force on 23rd July 2020. Under section 174 of the Labour Act, the minister is empowered to make regulations which are "subject to the provisions of the Act...(a) for securing compliance in this country with the provisions of any international conventions relating to labour made applicable to Ghana whether before or after the commencement of the Act.... (e) on specific measures to be taken by the employers to safeguard the health and safety of the workers."

⁵⁶² Labour (Domestic Workers) Regulations 2020 (L.I. 2408), § 22 [hereinafter Regulations].

⁵⁶³ Article 1 of C. 189, *supra* note 7, defines domestic work for legal and policy purposes as "work performed in or for a household or households" This definition covers domestic workers working on a part-time basis, those working with multiple employers; those in live-in and live-out living arrangements; nationals and non-nationals; and migrants and non-migrants.

lationship for domestic workers with a strict requirement for written employment contracts, which must stipulate the particular responsibilities of the domestic worker, and places an additional responsibility on the employer to "deposit the written contract with the District Labour Officer."⁵⁶⁴ The elimination of verbal employment arrangements is critical, since they are widely used by informal agents and private employment agencies, in addition to individual households. These provisions also cover domestic workers without formal education by stating that section 3 of the Illiterates Protection Act of 1912 shall apply in the execution of their employment contracts.

However, C. 189 requires that member states take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable, and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations, or collective agreements.⁵⁶⁵ In other words, written contracts are certainly a critical dimension to this obligation, the other crucial obligation is explaining the terms and conditions in an understandable way.

Content of Contract

Section 3(2) of the Regulations delineates that a contract of employment shall provide for: the emoluments, the frequency and mode of the payment of wages, whether lodging and meal are to be provided, hours of work, rest periods, overtime work, pre- and post-employment medical examinations to be undertaken, etc. Section 21 of the Regulations further provides that where a provision of a contract of employment provides for a term that is inconsistent with the regulations, the provision is void to the extent that it denies a domestic worker the minimum benefits provided by the Regulations.

However, under C. 189, the contractual provisions would need to comply with certain minimum requirements, such as those setting out that domestic workers are paid their wages in cash at least once a month.⁵⁶⁶ Further, with respect to pre-employment medical examinations, article 9(2) of the Maternity Protection Convention, ratified by Ghana, prohibits the requirement of pre-employment pregnancy testing. Further, while section 21 provides that where a contract and the Regulations conflict, the Regulations would prevail, it does not address the situation where there is disparity between the standards set out in the Regulations, which are lower than those set out in the Labour Act.

Rest Period

The exclusion of workers from rest periods under the Labour Act does not appear in the Regulations. Indeed, reg-

⁵⁶⁴ Regulations, § 3-4.

⁵⁶⁵ C. 189, *supra* note 7, at art. 7.

⁵⁶⁶ *Id.* at art. 12(1).

ulation 9, stipulates that a domestic worker is entitled to a rest period of at least 8 consecutive hours per day. The section goes on to provide that where the normal hours of work are continuous, a domestic worker is entitled to at least 30 minutes rest in the course of work; where the normal hours of work are *in two parts, the rest shall not be less than 30 minutes*; and that there shall be daily rest period of at least eight consecutive hours, and weekly a rest period of at least 24 hours in one week.

However, many of these provisions on rest periods are lower than that provided to other workers under the Labour Act. Under the Labour Act, if normal hours of work are in two parts, the break should not be of less than *one hour duration*.⁵⁶⁷ Further under section 41 of the general labour law, a worker shall be granted “a daily continuous rest of at least twelve hours duration between two consecutive workdays.”⁵⁶⁸ While under article 42 of the general labour law, 48 consecutive hours rest per week is afforded to workers generally.⁵⁶⁹

While the provision of 24 hours weekly rest is in line with the provisions of article 10 of C. 189, the provisions do not afford protections equal to those enjoyed by other workers in Ghana.

Maternity Protection or More

Other areas covered by the 2020 Regulations include paid leave periods,⁵⁷⁰ including paid maternity leave which is “in accordance with section 20 of the Act.”

While section 20 of the Labour Act does indeed stipulate paid maternity leave, it also goes beyond this issue to provide protection from dismissal and breast-feeding breaks. Since section 20 does not make all these issues explicitly apply to domestic workers, it is unclear whether these provisions also cover domestic workers. For example, section 55 of the Labour Act prohibits assigning night work to a pregnant worker between the hours of 10.00 pm and 7.00am in the morning; or engaging for overtime a pregnant worker or a mother of a child less than 8 months old. It is unclear whether this provision also applies to domestic workers.

Sexual Harassment

Section 17(1) of the Regulations provides that an employer of a domestic worker shall ensure that the domestic worker is not subject to any form of sexual harassment or violence at the place of work of the domestic worker, and 17(2) sets out that cases can be taken to the District

Labour Office, Police service, as well as CHARJ.⁵⁷¹ This is consistent with C. 189, which obliges states to provide effective protection against all forms of abuse, harassment, and violence, which should include the establishment of complaint and other mechanisms.⁵⁷²

However, article 17(3) further sets out that “a domestic worker shall not perpetuate sexual harassment or domestic violence against the employer of the domestic worker, a dependent of the employer, or an occupant of the household of the employer.”⁵⁷³ This section is anomalous given that the stated purpose of the Act is “to protect the rights of domestic workers,” and given the power disparities within the context of working in a home, this clause could chill complaints of sexual harassment from domestic workers, out of fear that they will be accused of the same conduct. Furthermore, there is no analogous sections in the Labour Act setting out that workers generally not sexually harass employers, which implies that domestic workers alone are inclined to sexually harass their employers.

Further, section 18(3) of the Regulations reference section 63 of the Labour Act, which provides that a contract of employment will be deemed to be unfairly terminated, if it terminates because of the ill-treatment of the worker by the employer and the “failure of the employer to take action on repeated complaints of sexual harassment of the domestic worker by the employer or a dependent of that employer or an occupant of the household of the employer.”⁵⁷⁴ The requirement of “repeated complaints of sexual harassment” is more onerous than the framing in C. 189 of “all forms of abuse and harassment.” Further under ILO C. 190, sexual harassment need not be repeated to constitute violence and harassment.

Social Protection: Pensions and Health

Regulation 7(2) extends the National Pensions Act, 2008 (Act 766) to domestic workers and provides that employers “may” register their domestic workers as prescribed

⁵⁷¹ To ensure easy access to justice, the Domestic Violence and Victims Support Unit (DOVVSU) of the Ghana Police Service has a toll-free helpline to report cases of sexual harassment and domestic violence.

⁵⁷² C. 189, *supra* note 7, at art. 5; R. 201, *supra* note 59, at ¶ 7; see also Convention Concerning the Elimination of Violence and Harassment in the World of Work, adopted June 21, 2019, 58 I.L.M. 1170 [hereinafter C. 190]; ILO, VIOLENCE AND HARASSMENT RECOMMENDATION (2019) [hereinafter R. 206], https://www.ilo.org/dyn/normlex/en/f?p=NORML-EXPUB:12100:0::NO::P12100_ILO_CODE:R206.

⁵⁷³ The Domestic Violence Act in section 2(1)(h) recognizes “households” as a domestic relationship. It prohibits all forms of domestic violence, abuse, economic abuse, physical assault and sexual harassment against domestic workers. The remedy provided is a protection order, which may not make sense in contexts.

⁵⁷⁴ Under section 5 of the Regulations, the employer in these circumstances shall pay any outstanding remuneration, a minimum of two months’ salary, lodging expenses for one month if the domestic worker is live-in; and any other benefit determined by the district labour officer.

⁵⁶⁷ Labour Act, § 40.

⁵⁶⁸ *Id.* at § 41(2).

⁵⁶⁹ Regulations, § 9.2(c). ILO, MAKING DECENT WORK A REALITY, *supra* note 450, at 85.

⁵⁷⁰ Annual Leave; sick and medical Leave; maternity leave and protection; and public holidays.

under Act 766 and make monthly pension contributions accordingly. Section 64 of the National Pensions Act, 2008 imposes a penalty⁵⁷⁵ on employers for non-payment of their employee's pension or social security contributions. Similar provisions apply in the registration of domestic workers under a Health Insurance Scheme.⁵⁷⁶

However, provisions on pensions and healthcare in the domestic work sector appear to impose an optional rather than mandatory obligation on employers. C. 189 imposes the obligation to take measures to ensure the progressive realization of occupational health and safety for all domestic workers, and to take appropriate measures to progressively ensure that domestic workers enjoy the same conditions as other workers generally in respect of social security protection.

(c) Workers Compensation

Section one of the Workmen's Compensation Act of 1987 (Act 187) applies to all employees except those in the armed forces. However, the definition of "employee" excludes "a member of the employer's family dwelling in the employer's house or compound." The Workmen's Compensation Act guarantees the payment of compensation to injured employees or, in cases where the injury leads to the death of the employee, for the benefit of the employee's dependent.⁵⁷⁷

Yet, the 2015 Labour Force Report⁵⁷⁸ shows that 1,944 domestic workers reported that they sustained occupational injuries in employment. Of this number, none stated that they received compensation from their employers, even though the Labour Act imposes a duty on employers to "take all practicable steps to ensure that the worker is free from risk of personal injury or damage to his or her health during and in the course of the worker's employment or while lawfully on the employer's premises."

Article 13 of C. 190 provides that worker's compensation should include consideration of payment systems for social security contributions, and bilateral, regional or multilateral agreements to provide for migrant domestic workers' access to and preservation or portability of social security entitlements. Furthermore, member states must make it easy to pay social security contributions in general and, more specifically, for workers who have more than one employer.

Inspection after Complaints

Section 19 of the 2020 Regulations state that "upon re-

⁵⁷⁵ Where payments are not made within 14 days, a sum equal to three percent per month of the contribution payable shall be added to the contribution as penalty.

⁵⁷⁶ Regulations, § 3(2)(m).

⁵⁷⁷ Workmen's Compensation Act, 1987 (Act 187), § 10.

⁵⁷⁸ Ghana Stat. Serv., 2015 LABOUR FORCE REPORT 143 (2016).

ceiving a complaint from a domestic worker, the District Labour Officer shall inspect the respective household within the district to ascertain compliance by an employer with the provisions of these Regulations." While this provision improves previous legislative efforts, labour inspections for the domestic work sector should be carried out routinely and not subject only to the "receipt of a complaint from a domestic worker." In contrast to the Regulations, under section 124 of the Labour Act, "an inspector has the power to enter freely at any hour of the day or night to inspect any workplace during working hours."

Sanctions

The Labour Act and Labour (Domestic Workers) Regulations do not contain any sanctions or penalties for non-compliance. Article 17(2) of the ILO C. 189 requires states to "develop and implement measures for labour inspection, enforcement, and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations." The unique characteristics of domestic work may create limited opportunities for the submission of complaints by domestic workers. Therefore, sector-specific inspection strategies, training, methods, and tools should be made available to District Labour Officers, which will guide them on indicators to investigate to promote effective compliance.

3.9.4 Analysis

Ghana has quite recently passed regulations to govern the domestic work sector, most obviously because of glaring gaps in the Labour Act, which excludes domestic workers who are family members from the protection of the labour act and also excludes domestic workers from its requirements on maximum hours of work and rest periods.

However, these domestic worker regulations are "subject" to the Labour Act, and the provisions of the Labour Act have not been amended, which suggests that the Act still prevails. Therefore, the Act's provisions—excluding family members who are domestic workers from protection of the Act, and also excluding domestic workers from restrictions on working hours and breaks—remain on the books and could be subject to constitutional challenge on the basis of discrimination against domestic workers, on the basis of gender, race, and economic status.

There are also further tensions between the relationship between the Domestic Worker Regulations and the Labour Act, since the Regulations also, in many respects, impose lower standards than those found in the Labour Act: rest periods for domestic workers are 30 minutes; and one hour for other workers; domestic workers are entitled to 24-hour consecutive rest, while other workers are entitled to 48 hours consecutive rest.

While in other respects, the Regulations are under-inclu-

sive, incorporating only one dimension of a broader right: the regulation puts in place paid maternity leave, but does not seem to import other related provisions in the Labour Act, including breast-feeding, prohibition on night work/overtime for pregnant women/young mothers, etc.

In other places, the Regulations add anomalously onerous provisions that are not found in the Labour Act. For example, the section 17(3) provision that a domestic worker shall not perpetuate sexual harassment or domestic violence against the employer, their dependents, and/or an occupant of the household, where there is no analogous provision in the Labour Act. Given that the central aim of Labour Law is to counterbalance employer power over workers, this provision is anomalous and would likely chill complaints by domestic workers for fear of themselves being accused of sexual harassment.

Additionally, under the Labour Act, a contract of employment will be deemed to be unfairly terminated, if there is ill-treatment of the worker having regard to the circumstances. The Regulation adds an additional provision that would make a termination unlawful: “[T]he failure of the employer to take action on repeated complaints of sexual harassment by the worker.” The requirement of “repeated complaints” runs counter ILO Convention 190 on Violence and Harassment, which envisages that even one act of harassment suffices to constitute sexual harassment.

Further, the Regulations provide that the labour inspector shall inspect, “after receiving a complaint from the domestic worker.” This provision falls short because it stands to reason that routine inspections would be more effective than only inspections upon request, especially in light of the large-scale ignorance of rights contained in the Regulations. Indeed, labour inspectors operating under the Labour Act are allowed much more latitude in when and how they carry out their inspections.

However, Article 17(1) of the Ghanaian Constitution protects against discrimination on grounds including gender, race, and social or economic status. It understands discrimination as a system which affording benefits or advantages or restrictions to some, but not others. Its Directive Principles of State Policy impose positive obligations to ensure the full integration of women into the mainstream economic life of Ghana.

Further, Ghanaian courts have adopted a generous approach to international human rights norms contained in both ratified and unratified treaties and embrace what it calls “a jurisprudence of equality,” which includes the recognition of equity as an important component of equality. Courts have also adopted a robust analytical approach to gender discrimination at work, which draws on comparative jurisprudence. This approach could prove helpful in using C. 189, although unratified by Ghana, as an interpretive tool in domestic worker rights litigation. In addition, other provisions in C. 189, its requirement that domestic work-

ers be afforded conditions of work that are equal to those of other workers could prove useful to domestic workers, since domestic workers are excluded from the protection of the Labour Act.

Since Ghana has also ratified the Protocol establishing the African Court on Human and Peoples’ Rights and is one of only nine countries that have made a special declaration allowing individuals and NGOs to submit cases directly to the court, it would be well positioned to engage that court on these discrimination and workers’ rights issues.

Cumulatively, the following specific regulations, entrench a lower standard of rights for domestic workers than other workers, which amounts to *prima facie* discrimination, and could be constitutionally challenged in the High Court:

- Section 175 of the Labour Act excludes of a person employed by a family member as a house help.
- The Workman’s Compensation Act excludes “a member of the employer’s family dwelling in the employee’s house or compound” from the definition of employee.
- Section 44 of the Labour Act’s excludes domestic workers from provisions on maximum hours of work and rest periods.
- The Labour Act lacks provisions addressing child domestic work, which is especially problematic when coupled with article 89 of the Children’s Act, which sets the minimum age for “light work” at 13 and is enforceable though the social services department rather than the labour inspectorate.
- Domestic Worker Regulations provisions impose a lower standard than the labour law—rest periods for domestic workers are 30 minutes and are one hour for other workers; domestic workers are entitled to 24-hour consecutive rest, while other workers are entitled to 48 hours consecutive rest.
- In other respects, the Regulations are under-inclusive. They incorporate only one dimension of a broader right—the Regulations puts in place paid maternity leave, but does not seem to import other related provisions in the Labour Act, including breast-feeding and the prohibition on night and overtime work for pregnant women and recent mothers, etc.
- Section 17(3) states that a domestic worker shall not perpetuate sexual harassment or domestic violence against the employer, their dependents, and/or an occupant of the household, while there is no analogous provision in the Labour Act. Given that the central aim of Labour Law is to counterbalance employer power over workers, this provision is anomalous and would likely act to chill

complaints by domestic workers for fear of themselves being accused of sexual harassment.

- The Regulations state that a contract of employment will be deemed to be unfairly terminated on the failure of the employer to take action on repeated complaints of sexual harassment by the domestic worker, whereas the Labour act provides for this remedy where “there is ill-treatment of the worker having regard to the circumstances.” The Regulations provision on sexual harassment would also run counter to ILO convention 190 on violence and harassment, which envisages that even one act of harassment suffices to constitute sexual harassment.
- The regulation provision that the labour inspector shall inspect, “after receiving a complaint from the domestic worker,” sets a lower standard for inspecting domestic work, when compared when compared to inspection of other workplaces, which are carried out regularly. Having labour inspections upon request is particularly ineffective in view of the large-scale ignorance of rights contained in the Regulations. Further, the complete absence of any penalties for non-compliance renders the Regulations almost impossible to enforce.

4. Conclusion: Global Norms on Domestic Workers

The global norms on domestic workers continue to evolve. The ILO Domestic Worker Convention (C. 189) is the sole instrument that exclusively addresses the specificities of domestic work, and as such is the most comprehensive standard on domestic work. Its starting point is a commitment to non-discrimination, that is, that domestic worker should be treated no worse than other workers. It also sets out special provisions in recognition of the specifics of the sector, including its informality and the power imbalances which exacerbate inequality. However, C. 189 has currently been ratified by only 31 states. Of these, only five are African states. Of the nine case studies, conducted in this paper, South Africa and Mauritius are the only two countries to have ratified C. 189. Nevertheless, C. 189 represents an important normative standard and as such has import beyond those countries that have ratified it.

In contrast, the core UN Human Rights conventions have been widely ratified. The UN Human Rights treaty bodies have increasingly addressed in concluding observations discrete human rights violations of domestic workers. With respect to some issues, they have gone further than the ILO Domestic Worker norms, such as in recommendations that countries unreservedly (and with no reference to progressive realization) include domestic workers in social protection, such as occupational health, maternity protection, that labour inspectors be mandated to inspect private homes, without warning or prior authorization, and that domestic workers be included in one national minimum wage. The Convention on the Rights of the Child broadens the notion of harmful work to ensure that not only is hazardous work out-of-bounds, but also work that interferes with a child's education or is harmful to the child's health, physical, spiritual, moral, or social development. These concluding observations of treaty bodies have become increasingly significant and can be understood as an emerging normative consensus on domestic work as a site of significant human rights violations.

The African Human Rights Charter is widely ratified on the African continent. While it has not directly addressed domestic workers issues, there is an evolving jurisprudence on non-discrimination and gender equality. Most recently, the African Court on Human Rights, has demonstrated a willingness to confront discriminatory gender norms, even if they are widely practiced and entrenched in laws, and that it will do so using not only African instruments and injunctions to eliminate practices or traditions harmful to women, but also global human rights norms contained in instruments like CEDAW. The African Committee of Ex-

perts on the Welfare of the Child has also dealt with domestic servitude in slavery-like circumstances and has similarly found these circumstances to be a violation of child labour and the obligation to eliminate harmful traditional practices. Of critical importance is the broad definition of exploitation and defining a child as anyone under 18.

This evolving international jurisprudence is entirely relevant to adjudicating domestic worker rights, which are equally tied up in discriminatory gender norms and traditional practices. Indeed, customary laws and norms frequently affect many dimensions of the domestic worker employment relationship, from the mode of recruitment of domestic workers (including the recruitment of children by informal agents or through family arrangements) to dispute resolution in cases of abuse and exploitation. Cultural practices foster informality and frequently undermine attempts at the formalization of the employment relationship.

4.1 Broad Approaches: Constitutionalism, Non-Discrimination, and Human Rights

Comparative and international jurisprudence is increasingly having direct bearing on domestic constitutional adjudication in many jurisdictions in Africa. Indeed, in all of the nine case studies, courts use both international human rights law and comparative law, in some form, to interpret constitutional provisions.

As a key starting point, all the selected countries are constitutional democracies. While most countries surveyed in this paper have not ratified ILO C. 189, all entrench, in some form, constitutional rights to equality and non-discrimination with a list of enumerated grounds. For example, the Ghanaian Constitution protects against discrimination on grounds including gender, race, social, or economic status, while the Mauritian Constitution, protects against discrimination on grounds including race, sex, and caste. These non-discrimination clauses frequently extend beyond formal conceptions of equality, such as in the case of article 25 of the Ethiopian Constitution which guarantees "equal and effective protection" from discrimination "on the basis of race, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or status." Many of these non-discrimination clauses apply to both state action and private conduct, and explicitly include not only direct, but indirect discrimination.

For example, article 7 of the Kenyan Constitution prohibits both the state and "other persons from discriminating either directly or indirectly" on a number of grounds, while the South African Constitution too prohibits both the state and other persons from discriminating either directly or indirectly.

Significantly, most of these constitutions incorporate positive measures that are sometimes directory in nature and obligate the legislature to take special measures to protect groups that have been historically disadvantaged, notably women. In this vein, article 35 of the Ethiopian Constitution recognizes "the historic legacy of inequality and discrimination suffered by women in Ethiopia" and entitles them to affirmative measures "to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions." Under article 32 of Uganda's constitution, the state is obliged to take affirmative action in favor of groups marginalized on grounds including gender and age, or "any other reason created by history, tradition or custom...."⁵⁷⁹

International human rights treaties and jurisprudence are also incorporated into domestic law through constitutional provisions. For example, in Kenya, which is monist, the Constitution provides that any treaty or convention ratified by Kenya forms part of the law. While in dualist countries like Nigeria, courts have held that where there is a conflict between a domestic law and a domesticated treaty, the latter trumps the former, and that the African Charter has super-law status. The Industrial Court in Nigeria is empowered to apply unratified labour conventions, where relevant. In contrast, in countries such as Malawi, courts are constitutionally required to use international law norms and comparative law to interpret constitutional rights.

In these ways, international human rights law and jurisprudence is increasingly having direct bearing in domestic constitutional adjudication in many jurisdictions in Africa. Ugandan courts have demonstrated a willingness to consider the normative impact of international and regional human rights, as well as comparative jurisprudence in adjudications, including those dealing with colonial era laws that discriminate against women. Its courts have adopted a generous approach to international human rights norms contained in both ratified and unratified treaties and embraced what it calls "a jurisprudence of equality," which includes the recognition of equity as an important component of equality. Similarly, courts in Lesotho have endorsed the adoption of "positive measures" to enable historically disadvantaged groups to enjoy substantive equality and have given municipal status to provisions of international treaties ratified by Lesotho.

⁵⁷⁹ Similarly, in its directive principles, Ghana puts in place positive obligations to ensure the full integration of women into the mainstream economic life of Ghana. Malawi also requires the state to pass laws and policies to promote the full participation of women in all spheres of society and to prohibit non-discrimination and exploitation.

These constitutional frameworks and approaches, which recognize both the negative and positive dimensions to non-discrimination and incorporate international human rights norms, could lay the groundwork for courts to adopt an intersectional and historically situated conception of non-discrimination and equality.

4.2 Legal Regulation of Domestic Workers

This paper has identified three broad approaches to the regulation of domestic work in particular countries, all of which engage non-discrimination frameworks:

- (1) The complete exclusion of "domestic workers" as a category from labour law entirely, or alternatively the inclusion of domestic workers within general labour laws but with explicit exclusions of the category of "domestic workers" or a particular group of domestic workers (e.g., family members or children) from particular provisions. For example, in Ethiopia, the Labour Proclamation expressly excludes domestic workers from its scope and applications. There are also countries like Uganda. While the scope of its current Employment Act does not expressly exclude domestic workers, the provision on recruitment permits under section 38 expressly excludes domestic workers.
- (2) The inclusion of domestic workers within general labour law, but structural exclusions exist for critical provisions that requiring a threshold number of employees from which domestic workers, who are frequently the sole employee in a workplace, are precluded. For example, in Nigeria, domestic workers are excluded from the national minimum wage provisions. This exclusion occurs because of other provisions which state that the requirement to pay national minimum wages shall not apply to an establishment in which less than fifty workers are employed.⁵⁸⁰
- (3) The inclusion of domestic workers in general labour laws and also passing specific regulations to address the particularities of domestic work in order to establish a floor for minimum protection in the sector. The ILO has recognized that the special conditions under which domestic work is carried out make it desirable to supplement the general standards with standards specific to domestic workers, so as to enable them to enjoy their rights fully.⁵⁸¹ This can be seen in sector specific regulations passed in South Africa, Mauritius, and Ghana.

However, the adoption of the varied approaches in the regulation of domestic work does not mean that domestic workers enjoy equal rights with other workers. The legal

⁵⁸⁰ National Minimum wage (Amendment) Act, 2019, § 4.

⁵⁸¹ C. 189, *supra* note 7, at preamble.

coverage is simply an indicator of the extent to which the law is beginning to provide domestic workers with rights and protection.

In mapping out the legal regulation of domestic work, a key assumption adopted in this review is that unless domestic workers are expressly excluded from the scope of labour legislation, they are included within it. This assumption is important as it ensures the protection of domestic workers. Such an assumption has been the basis upon which domestic workers in Kenya have asserted their rights. In Kenya, the Employment Act of 2007 does not expressly mention domestic workers and neither does it exclude them in its scope and ambit. In the case of *Lundu v. Nderitu*,⁵⁸² the Court held that the Employment Act applies to domestic workers and that even without ratification of ILO Convention 189, the minimum labour standards defined under the Convention are already part of the law of Kenya. However, the value of implicit inclusion can be overstated. It is crucial to note that the inclusion of domestic workers in the scope of labour law does not necessarily indicate legal coverage that the workers enjoy.

These country case studies highlight the range of issues that are at stake in the national regulation of domestic work. For instance, the assumption that the absence of exclusion of domestic works from labour laws, means they are included, belies the ways in which broad rights, such as collective rights and labour inspection, will not be effective if they are not adapted or tailored to the specifics of the sector.

(i) Definition of a domestic worker: Degrees of Exclusion

Mauritius, South Africa, Nigeria and Ghana provide express definitions of domestic work in the general labour code or the specific acts regulating domestic work. Other countries do not provide a definition of domestic work. For example, in Ethiopia, the Civil Code uses the term domestic servant, but does not provide the definition of what a domestic servant is.⁵⁸³ Similarly, in Kenya no definition of domestic worker is provided. However, under the minimum wage provisions, domestic workers are categorised under general labourers as a category of work which includes, "cleaners, children's ayah and house servants."⁵⁸⁴ In Nigeria, Lesotho, Ethiopia, and Nigeria domestic workers are legally referred to as servants.

The continued use of the term "domestic servant" can be viewed as an extension of the historical and systematic marginalisation of women since the majority of the domestic workers in the selected countries are women.⁵⁸⁵ For those countries without a definition of domestic work, the assumption is that effectively, domestic workers have the same rights and responsibilities as other employees, and the regulation of employment is tacitly included in the labour legislation.

Table: Laws Regulating Domestic Work in Selected Countries

Country	Covered under general labour laws	Covered by subordinate regulations and general labour laws	Excluded from the labour laws
Ethiopia			X
Malawi	X		
Ghana	X	X	
Lesotho	X		
Kenya	X		
Mauritius	X	X	
Nigeria	X		
South Africa		X	
Uganda	X		

⁵⁸² *Lundu v. Nderitu*, No. 759 of 1013, [2014] eKLR ¶ 7 (Indust. Ct. Nairobi)(Kenya), <http://kenyalaw.org/caselaw/cases/view/93963>.

⁵⁸³ Gebremedhin, *Procrastination in Recognizing the Rights of Domestic Workers in Ethiopia*, *supra* note 221, at 43.

⁵⁸⁴ C. 189, *supra* note 7, at art. 12(2).

⁵⁸⁵ ILO, A SITUATIONAL ANALYSIS OF DOMESTIC WORKERS IN THE UNITED REPUBLIC OF TANZANIA (2016).

(ii) Regulation of wages.

The selected countries have adopted different approaches in the regulation of minimum wages. Only two of the nine countries surveyed—South Africa and Ghana—set out a national minimum wage which applies to all workers. In South Africa, the inclusion of domestic workers within the national minimum wage followed a submission by unions and workers associations arguing that a tiered wage system, which placed domestic work at the lowest tier, amounted to discrimination. Ethiopia has no express legislation governing minimum wages, in general and for domestic workers in particular. In Nigeria, domestic workers are expressly excluded from the national minimum wage provisions under section 4 of the National Minimum Wage (Amendment) Act of 2019, which states that the requirements to pay national minimum wages shall not apply to an establishment in which less than twenty-five workers are employed. The exclusion of domestic workers from the national minimum wage provision is in direct conflict with the provisions of ILO Convention 189 (C. 189).⁵⁸⁶

Other countries set out sector level regulation of wages which include the provision of specific wages for domestic workers. For example, Uganda, Malawi, Kenya, Mauritius, and Lesotho set separate sector level minimum wages for domestic workers. To the extent that these provisions are lower than the minimum wage for other sectors, they would raise issues of an occupation-based undervaluation of domestic work and a discriminatory gender wage gap.⁵⁸⁷

Setting separate and lower minimum wages for domestic workers reproduces the existing under-valuation of this type of work in the labour market.⁵⁸⁸

It is clear that in most of the selected countries minimum wages for domestic workers are generally lower than the national minimum wage. While in most countries surveyed, domestic workers, like other workers must be paid on a monthly basis. In Ethiopia, wages of domestic workers living with the employer must be paid every three months.⁵⁸⁹ Statutory minimum wages are supposed to bridge the gap and provide protection to the most vulnerable workers, yet the legislative framework is further promoting and perpetuating the undervaluation of domestic work. A brief assessment of literature and the general wellbeing of domestic workers in these countries shows that there is high non-compliance with the set minimum wages.

However, C. 189 obliges member states who have ratified the Convention to put in place a number of working conditions relating to wages. Firstly, if there is a minimum wage in their country, it must apply to domestic workers, as well.⁵⁹⁰ Secondly, member states must ensure that domestic workers are paid their wages in cash, at least once a month.⁵⁹¹ Thirdly, if there are in-kind payments, these are just a small part of their compensation, the value of the in-kind is fair and reasonable, and the in-kind payment helps them.⁵⁹² Further both the ICECR, CERD and CEDAW Committees have recommended to states that there be one national minimum wage that cuts across sectors.

Table: Gender disparity in minimum wage rates in selected countries.

Country	Domestic Work	Other Sectors/ national minimum wage
Ethiopia	Under Civil Code wages can be paid every three months for live-in domestic workers	
Lesotho	LSL 644.00 per month for employees under 12 months; LSL 689.00 over 12 months	LSL 1,620.00 per month under 12 months SL 1,786.00 over 12 months
Uganda	1.6 USD in 1984	
Kenya	Separate (urban/rural) Regulations of Wage Order; 15,200 Kenyan shillings/urban	
Nigeria	Excludes establishments where under 24 people are employed	
Malawi	K 1,461.54 per day	MKW 1,923.08 per day; MWK 50,000.00 per month
South Africa		Domestic workers included in National Minimum Wage from 2022
Mauritius	household employee: 8900 per month; 45.64 per hour Garda Malade, 8900 per month; 28.53 per hour	Watchperson: 9275 per month; 44.95 per hour Driver: 9.96 per month; 47.93 per hour
Ghana		Domestic workers included in National Minimum Wage

⁵⁸⁸ *Id.*

⁵⁸⁹ CIVIL CODE § 2604(1) (Eth.).

⁵⁹⁰ C. 189, *supra* note 7, at art. 11.

⁵⁹¹ C. 189, *supra* note 7, at art. 12(1).

⁵⁹² *Id.*

⁵⁸⁶ C. 189, *supra* note 7, at art. 11.

⁵⁸⁷ Martin Oelz & Uma Rani, Domestic work wages and gender equality: Lessons from developing countries (ILO Working Paper No. 5, 2015).

(iii) Regulation of other working conditions

Convention 189 (C. 189) obliges ratifying states to make sure that the working hours, overtime pay, daily and weekly rest periods, and paid annual leave of domestic workers are **similar** to other workers in the country. According to the ILO, domestic workers generally work long and unpredictable hours. In the countries where specific regulation is provided for domestic workers, the working times for domestic workers are generally longer than those of other workers.

The table below shows some of the disparity in the working hours.

Where the working hours are regulated by specific sectoral regulations there is a disparity in the hours of work of domestic workers compared to other general workers. Not only is there a disparity in the hours of work, but there is also disparity in the provisions regulating weekly rest periods. For example, in Ghana the regulation applicable to domestic workers provides for a weekly rest period of at least 24 consecutive hours. However, this falls short of the 48 hours afforded to workers generally.⁵⁹³ While the provision of 24 hours weekly rest is in line with the provisions of article 10 of C. 189, the provisions do not afford protections equal to those enjoyed by other workers in the specific country.

In some countries, there is a disparity in the annual leave provisions for domestic workers. For example, in Mauritius, domestic workers are entitled to 14 days annual leave, while ordinary workers are entitled to 20 days.⁵⁹⁴ The Mauritian regulations do provide that domestic workers who

have worked for a continuous period of 10 years for the same employer are entitled to two months of vacation leave. While this provision is generous, it does not rescue the inequity faced by domestic workers who work for less than 10 years, who enjoy five days less leave than other workers. Also, it is unlikely that many domestic workers remain employed by the same employer for a 10-year period in Mauritius.

In the Lesotho Labour Code, the only provisions explicitly addressing domestic workers are exemptions of employers of domestic workers who are family members from restrictions on hours of work and mandatory rest periods. In Malawi, employers of domestic workers are structurally excluded from the requirement of providing a written statement of particulars of employment, which includes rates of work and normal hours of work.⁵⁹⁵ The provision of a written contract is critical to proving employment in any subsequent litigation and would regulate terms of employment.

For the countries, where there is no specific regulation of the sector, and where domestic workers are impliedly included in labour protection, such as Kenya and Uganda, the assumption is that the standard provisions on regular working hours include domestic workers. It must, however, be noted that live-out domestic workers have some control over their hours of work in comparison to live-in domestic workers. Where hours of work are regulated under general laws, live-in domestic workers are left in a precarious position.

Table: Disparity in the regulated maximum working hours of domestic workers in selected countries

Country	Domestic Workers	Ordinary Workers
Mauritius	48 hours Gard Malade permitted to work more than 12 hours per day	45 hours a week
Ethiopia	No provision in Civil Code	45 hours
Nigeria		Regular hours of work by mutual agreement/collective bargaining/Industrial Wage Board. Max: 10 hours per day
Ghana	-Labour Act excludes domestic workers from maximum hours and work and rest periods. -Labour Regulations require 8 hours of rest per day; 30-minute rest break; and 24 hour weekly rest time.	12 hours per day continuous rest period; 48 hours of rest per week; breaks of one hour duration
Lesotho	Exempts undertakings in which up to 5 members of the employees' family, including the employer, are employed from working hours (§§ 117-18 of Labour Code)	Weekly rest of at least 24 continuous hours including Sunday; § 118 - 45 hours per week; max 9 hours per day; overtime pay

⁵⁹³ Regulations, § 9.2(c). ILO, Making Decent Work a Reality, *supra* note 450, at 85.

⁵⁹⁴ Regulations, second schedule; Workers' Rights Act, § 45.

⁵⁹⁵ Employment Act, § 27.

(iv) Protection against Harassment

Domestic workers face significant risk of violence and harassment in the workplace. The fact that domestic workers work in isolation makes them particularly vulnerable to abuse. Besides protection under C. 189, domestic workers are particularly protected from violence and harassment by ILO's Violence and Harassment Convention, 2019 (C.190), which applies to both the formal and informal economy and includes domestic workers.⁵⁹⁶ C. 190 obliges ratifying states to put in place laws and policies to address violence and harassment, strengthen enforcement and monitoring, and ensure access to remedies and support for victims.⁵⁹⁷ Of the selected countries in this study, only South Africa and Mauritius have ratified C. 190.

The selected countries have adopted different approaches in regulating violence and harassment in the world of work. However, even in jurisdictions that impliedly include domestic workers in their labour laws, they can be structurally excluded by making preventative measures only apply to larger workplaces, such as in Kenya, which excludes employers with under twenty employees from obligations with respect to sexual harassment policies. Similarly, in Ghana, there are no preventative obligations to prevent sexual harassment for workplaces employing under 25 workers. In Ethiopia, sexual harassment is addressed in the Labour Proclamation, which entirely excludes domestic workers from its purview.

Ghanaian regulation on domestic work explicitly addresses sexual harassment in the domestic work sector. However, in Ghana, the regulation adds additional provisions applicable to domestic workers not found in the Labour Act. For

example, section 17(3) states that a domestic worker shall not perpetrate sexual harassment or domestic violence against the employer, their dependent, and/or an occupant of the household. Given that the domestic workers largely work in isolation, and according to the ILO, "frequently suffer forms of violence and harassment, exploitation, coercion, ranging from verbal abuse to sexual violence and sometimes even death," this provision, is anomalous, and would likely chill complaints by domestic workers for fear of themselves being accused of sexual harassment.⁵⁹⁸

To the extent that a country addresses sexual harassment in its labour laws, and does not explicitly or structurally exclude domestic workers, they are presumed to be included. For example, in South Africa, there is a Code of Good Practice on Handling Sexual Harassment in the workplace. In Mauritius, there are provisions addressing sexual harassment at work in the labour laws, which apply to all workers and would include domestic workers in its ambit. Similarly, in Lesotho, domestic workers are not excluded from sexual harassment provisions in the labour laws.

While this inclusion is important, these laws and codes are designed with reference to formal workplaces and are likely to have disciplinary policies in place that are unsuited to the domestic work context. For example, although the revised Code of Good Practice on the Prevention and Elimination of Harassment, which came into effect in South Africa in March 2022 and applies to domestic workers, the preventative provisions set out include risk assessments, implementing policies and conducting training and awareness programs, which are suited to the formal rather than the informal sectors. However, C. 190 recognizes the need for sector specific responsive mechanisms to address sexual harassment and gender-based violence.

Table : Sexual Harassment in selected countries.

Country	General Inclusion	Exclusion
Ethiopia		Excluded from sexual harassment provisions in Labour Proclamation
Lesotho	Included in sexual harassment provisions in Lesotho Labour Code	
Uganda		No preventive measures for >25 employees
Kenya		No preventative measures for >20 employees in Employment Act; Sexual Offences Act of 2006 prohibits sexual harassment.
Nigeria	The Violence against Persons (Prohibition) Act of 2015	
Malawi	Gender Equality Act 2013 requires sexual harassment policies and procedures	
South Africa	Labour Relations Act, Employment Equity Act	
Mauritius	Included in Workers' Rights Act	
Ghana	Yes- but with provisions on sexual harassment perpetrated by domestic worker	

⁵⁹⁶ Convention Concerning the Elimination of Violence and Harassment in the World of Work, adopted June 21, 2019, art. 3(a), 58 I.L.M. 1170 [hereinafter C. 190].

⁵⁹⁷ *Id.* at art. 4.

⁵⁹⁸ *Recognizing the Rights of Domestic Workers*, *supra* note 347.

(v) Maternity Protection

Given that most domestic workers are women, the regulation of maternity benefits is critical. In Ethiopia, domestic workers are excluded from maternity protection provisions found in the Labour Proclamation, while in Nigeria's maternity protection laws implicitly exclude domestic workers from its ambit. In Lesotho, domestic workers are included in non-discrimination provisions with respect to maternity protection, but employers are not required to provide to paid leave, an exclusion that is not unique to the sector.⁵⁹⁹

Uganda implicitly includes domestic workers in general maternity and paternity protections found in the Employ-

ment Act, as does the Kenyan Employment Act, which provides three months of paid maternity leave for employees. In South Africa, a domestic worker is entitled to at least four consecutive months of maternity leave under Sectoral Determination 7. Similarly, in Mauritius, domestic workers are entitled to 14 weeks of paid maternity leave.

In Ghana, the Domestic Worker Regulations incorporates a broader right in the Labour Act to paid maternity leave, but it is not clear whether the other maternity related provisions in the Labour Act, including breast-feeding and the prohibition on night work and overtime for pregnant women/young mothers similarly apply to the domestic work sector.

Table : Maternity Protection in selected countries.

Country	General Inclusion	Exclusion
Ethiopia		Excluded from maternity protection provisions of the Labour Proclamation
Lesotho	Unpaid maternity leave under the Labour Code	
Uganda	Included in Employment Act	
Kenya	Included in Employment Act	
Nigeria		Excluded under Labour Act, which makes provisions only apply to industrial, commercial or agricultural undertaking
Malawi	Entitled to full 8-week maternity leave every three years under the Employment Act	
South Africa	4 months maternity leave, but must work at least 24 hrs per month for her employer; paid 60% of salary, but must have made contributions under the Unemployment Insurance Act	
Mauritius	12 weeks paid maternity leave, are working for 12 consecutive months for the same employer under Employment Act	
Ghana	12 weeks paid maternity leave but breast-feeding/nightwork for domestic workers unclear	

⁵⁹⁹ LABOUR CODE § 54(1) (Lesotho).

(vi) Workers Compensation⁶⁰⁰

There are a wide range of exclusions of the domestic work sector, as a whole, from workers compensation, as well as exclusions of family members employed as domestic workers. In Ethiopia and Lesotho, domestic workers (and herd boys) are also explicitly excluded from workers compensation law, in much the same way as domestic workers were excluded in South Africa, prior to the *Mahlangu* case. In Nigeria, Mauritius, Malawi, and Kenya domestic workers who are employed by their family members, and living with the employer, are excluded from the Workmen's Compensation Act. In Mauritius, migrant workers are also excluded from eligibility to make such claims. In South Africa, as a result of the *Mahlangu* decision, domestic workers are now

included in workers compensation and can claim from the compensation fund. In Ghana, domestic workers are not excluded from the Workmen's Compensation Fund.

Given that injuries and death do occur in the domestic sector from cuts, burns, diseases, rashes, respiratory diseases, and falls these exclusions are egregious. They also impact disproportionately on impoverished girls and women from rural areas employed by family members. Since many of these exclusions apply to family members that work and live in the home of the employer, they would implicate the rights of live-in domestic workers. However, according to C. 189, live-in domestic workers are an especially vulnerable group, and require special measures, rather than exclusion from protection.

Table: Workers Compensation in selected countries.

Included	Excluded
	Ethiopia: Excluded from Labour Proclamation
	Lesotho: Excludes Domestic Workers from the Workmen's Compensation Fund, 1977
Uganda	
Kenya	Kenya: Work Injury Benefits Act excludes a family member "dwelling in the employer's house or cartilage thereof and not for the purpose of employment."
Nigeria	Nigeria: Excludes family members
Malawi	Malawi: Excludes family member living in home from the Workers Compensation Act
South Africa	
Mauritius	Mauritius: Excludes family members employed and living in employers' home, as well as migrants
Ghana	

⁶⁰⁰ In most of the case studies, such as Nigeria, Ghana, Mauritius, and South Africa, employers of domestic workers are not obliged to contribute to a pension but can voluntarily do so. In Malawi, the Pension Act excludes workers earning below K10 000.

(vii) Labour Enforcement

Labour enforcement in private homes in the context of domestic work is one of the most critical issues and the linchpin for the realization of worker rights in the sector. Of the countries surveyed, most defer in their approach to a homeowner/occupier's privacy, and do not adequately attempt to balance this with domestic worker rights.

In Ethiopia, labour inspectors are not empowered to inspect private homes at all. While in Lesotho, no night inspection is permitted in homes, and day inspection requires the consent of owner/occupier. In Mauritius, under section 117 of the Labour Act, the labour inspectorate is empowered to make enquiries, to summons persons by written notice, and to issue compliance orders to employers. However, a supervisory officer may not enter a private residence without the consent of the owner.

In South Africa and Malawi, inspection in private homes is only permitted with the consent of the occupier or a court order. In Mauritius, a labour inspector cannot enter the

home without the occupier's consent. While in In Ghana, the Regulations provides that the labour inspector shall inspect, "after receiving a complaint from the domestic worker." This has been criticized for not amounting to regular/routine labour checks, and complaints driven inspection would be particularly ineffective in view of the large-scale ignorance of rights contained in the regulation.

In Uganda and Nigeria, inspection in private homes is not addressed in labour laws. In Uganda, neither the Employment Act nor the Labour Regulations, address labour inspection when the workplace is a private home. This absence captures the limits of applying and implementing the generalized labour laws to protect the rights of domestic workers. While the Labour Regulations apply to all workplaces and even list the types of workplaces, a private house is not included in this list.

CEDAW and ICECR have in their concluding observations recommended that labour inspections in private homes be conducted without prior notice or warrant.

Table: Labour Enforcement in selected countries.

Country	Labor Enforcement
Ethiopia	None
Lesotho	No night inspection; requires consent of owner/occupier for day inspections (no provision for court order)
Uganda	No provisions on inspecting homes, although § 2 of the Employment Regulations does not include a home as workplace.
Kenya	Inspection authorized in § 49 of Employment Act; does not exclude the home from inspection
Nigeria	No provisions on inspecting homes and labour inspectors can "enter, inspect and examine by day or night any labour encampment, farm, Factory or land or workplace whatsoever, if he has reasonable cause to believe that any worker is employed therein."
Malawi	With consent of employer or magistrate court order
South Africa	With consent or court order
Mauritius	With consent of owner
Ghana	On complaint from domestic worker

(viii) Family Members Excluded from Provisions

Family members employed as domestic workers are generally live-in workers who come from rural areas to work in the homes of better resourced family members. They are also frequently youth and children. According to the ILO, approximately two thirds of child domestic workers are in child labour, and the "hidden, isolated and inaccessible nature of the workplace, the deceptive family setting and the fictive family relationships and subservient equality of work relations...create risks of rights violations and exploitative relationships."⁶⁰¹

C. 189 recognizes the particular vulnerability of live-in, migrant and child domestic workers and contains no exemption of family members from its obligations. Nevertheless, the exclusion of family members employed as domestic workers is well-entrenched in legal systems. Of the countries surveyed, there are wide-spread exemptions of employers of family members from labour protection.

In Ethiopia, by dint of the exclusion of the sector from labour regulation, family members employed as domestic workers are equally unprotected. In Kenya, employers' dependents are excluded from the Labour Act, where they are the only employees in the undertaking; Nigeria and Ghana have a broader exclusion for family members living in the employer's household and employed as a domestic worker from protection. In Uganda, the Employment Act does not apply to employers and their dependents where the dependents are the only employees in an undertaking, as long as the total number does not exceed five. In Lesotho, family members employed as domestic workers are excluded from particular labour provisions on rest periods and time limits, provided there are no more than five other family members employed in the home/business. In Mauritius, family member employed are excluded from claiming workers compensation, whereas in South Africa and Malawi there are no exemptions or exclusions for family members who might be employed as domestic workers.

Table: Family Members Included in Labour Protection in selected countries

Country	Included	Excluded
Ethiopia		Domestic workers excluded from Labour Proclamation
Lesotho		>5 family members, excluded from certain provisions
Uganda		>(5) family members employed, excluded from Act
Kenya		Excludes employers' dependents where only employees in family undertaking
Nigeria		Excludes from Labour Act family members living in employer's household and employed as domestic workers
Malawi	Fully included	
South Africa	South Africa:(except domestic workers employed under 24 hours/month)	
Mauritius		Excludes family members living and working in employers' home from claiming workers compensation
		Excludes member of employer's family who employs him/her as a house-help under Labour Act

⁶⁰¹ Amelita King Dejardin & Bijoy Raychaudhuri, ILO, PRACTICAL GUIDE TO ENDING CHILD LABOUR AND PROTECTING YOUNG WORKERS IN DOMESTIC WORK 3 (2017).

(ix) Child Domestic Workers

Aside from Mauritius and South Africa, which prohibit the employment of children under 15, and regulate employment between 15 and 18 years old, the remaining countries do not adequately address the potential perils of children working in the domestic work sector. In Ethiopia, the minimum age of employment is 14 in the Labour Proclamation, but this provision does not include domestic workers. Lesotho similarly prohibits children below 14 from working in factories, mines, and hazardous work, but this protection does not extend to the domestic work sector. The Ugandan Employment Act prohibition on employing children below 12 in business, undertaking, or workplace, similarly excludes domestic workers, and further provisions permit the employment of children under 14 in "light work." In Kenya too, children between 13 and 16 can be employed in light work. Nigeria permits a child under the age of 12 to be employed as a domestic worker. While in Malawi, prohibitions on employing children under 14 in agriculture and industry do not include work done in a household.

Furthermore, in Lesotho, there are provisions permitting the employment of children as domestic workers at night, with no obligation that they be permitted to return to their families/residential homes at night. In Nigeria, the Labour Act explicit excludes child domestic workers from provisions requiring child workers to be returned to their homes at night and from restrictions on work hours, which enables exploitation, servitude, and slavery-like conditions.

The ILO estimates that some 248 million children aged 5 to 17 years are engaged in child labour around the world.⁶⁰² It also estimates that domestic work is the largest employment category for girls under the age of 16 in the world.⁶⁰³ ILO's Convention 189 (C. 189) requires member states to set a minimum age for domestic workers consistent with the provisions of the Minimum Age Convention and the Worst Forms of Child Labour Convention and not lower than that established by national laws and regulations for workers generally.⁶⁰⁴ Further, both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child define a child as any person under the age of 18.

Table: Regulation of Child Domestic Workers in selected countries

Country	Included	Excluded
Ethiopia		Under article 89 the Labour Proclamation, which excludes domestic workers, the minimum age of employment is 14.
Lesotho		Labour Code prohibits employment of a child below the age of 14 in a factory, mine or hazardous work. No restriction on night work/returning to residence for domestic workers under 16
Uganda		Employment Act child labour protections excludes domestic workers; other provisions permit children under 14 to engage in "light work"
Kenya	Children between 13 and 16 can be employed in "light work."	
Nigeria		Permits a child under age 12 to work in domestic work; excludes employer of domestic worker under 14 from needing to be returned to parental home at night; no restriction on employing domestic workers under 16 on working 4 consecutive hours or more than 8 hours per day
Malawi		Prohibits employment of children under 14 in certain sectors, but does not include work done in a household or regulate children; permits work of children ages 14-18 in domestic work.
South Africa	BCEA prohibits employment of child under 15, prohibits employment of children between 15 and under 18, if employment is inappropriate or child's age or places child's well-being or development at risk.	
Mauritius	The Labour Act sets the minimum age of employment at 15 years. Young persons between 15 and 18 are not allowed to work in activities that are harmful to health, dangerous or otherwise unsuitable for young persons.	
Ghana	Unaddressed in Labour Law; limited provisions in Children's Act, permits children of 13 to be employed in "light" work, provide it doesn't affect child's schooling.	

⁶⁰² *Child Labour in Africa*, ILO, <https://www.ilo.org/africa/areas-of-work/child-labour/lang-en/index.htm> (last visited Nov. 20, 2022).

⁶⁰³ UNICEF, Child Domestic Work, Innocenti Digest No. 5, 1999, <https://www.unicef-irc.org/publications/265-child-domestic-work.html>.

⁶⁰⁴ C. 189, *supra* note 7, at art. 4(1).

(x) Collective Bargaining

ILO Convention 189 (C. 189) obliges the ratifying countries to respect, promote, and realize the right to freedom of association and the effective right to collective bargaining.⁶⁰⁵ C. 189 provides that each member state shall implement the provisions of this convention—in consultation with most representative employers' and workers' organization—through laws, regulations and collective agreements.⁶⁰⁶

Collective bargaining is regarded as an essential tool for balancing the otherwise unbalanced relationship between the employers and the employees. Yet, domestic work departs from the traditional industrial relations model, and the collective bargaining paradigm has had limited effectiveness in a sector characterised by individual employment relationships. The view that the domestic worker sector is essentially unorganisable is reflected in article 42 of the Ethiopian Constitution, where the right to form and join a trade union and collectively bargain is limited to “factory and service workers, farmers, farm labourer’s, other rural workers and government employees.”

Outside of the explicit exclusions in the Ethiopian Constitution, most of the selected countries, collective bargaining is provided for under general labour legislation, which domestic workers are not excluded from. For example, in

South Africa, the Labour Relations Act of 1995 regulates the constitutionally enshrined rights to form and join trade unions. This is similarly the case in Lesotho, Uganda, Kenya, Nigeria, Malawi, Mauritius, and Ghana.

However, the implicit inclusion of domestic workers in rights to unionisation, without any further adaptation of laws and structures to the context of individuals working in a private home, is often insufficient to enable the full realisation of this right. The limited effectiveness of the collective model for domestic workers in private homes can be seen in the absence of a dedicated bargaining council for the domestic sector in any of the countries surveyed. The consequences of the absence of a dedicated bargaining council for the sector has resulted in domestic workers being excluded from consultations impacting their sector.

Other consequences of implicit inclusion without further adaptation to the sector can also be seen in South Africa, where the Labour Relations Act provides union members with the general rights to enter into the employer’s premises to recruit and communicate with members. However, section 17(2)(a) limits the right of domestic worker unions to access the premises of employment, and states that access to the premises does not extend to the employer’s home, unless the employer agrees.

Table: Inclusion of Domestic Workers in Collective Labour Rights in selected countries.

Included	Excluded
	Ethiopia
Lesotho	
Uganda	
Kenya	
Nigeria	
Malawi	
South Africa	
Mauritius	
Ghana	

⁶⁰⁵ C. 189, *supra* note 7, at art. 3(a).

⁶⁰⁶ C. 189, *supra* note 7, at art. 18.

(xi) Provisions addressing the Specificity of the Sector

But beyond explicit exclusions and structural exclusions, which effectively exclude domestic workers from key protections enjoyed by other workers, labour laws do not adequately (or at all) address the specific conditions faced by domestic workers who live and work in the private homes of employers.⁶⁰⁷ In Ethiopia, under the Civil Code, employers are enjoined to “take all reasonable steps to safeguard the health and moral well-being” of live-in domestic workers “with respect to living quarters, food, times of work and rest.”⁶⁰⁸ But these provisions do not impose any baseline standard for these provisions and their content is left to the good will of the employer.

In those countries which have passed sectoral specific regulations for the sector, such as South Africa, Mauritius and Ghana, there are positive developments, such as provisions in the South African Sectoral Determination entitling a domestic worker to at least one month’s notice to vacate the premises. In Mauritius, the employer is obliged to provide a worker with free transportation from her residence to the place of work and back. Under Ghana’s 2020 Regulations, an employer is obliged to provide good living conditions that guarantee safety and privacy, including access to the toilet and bath facilities.

However, these do not go far enough to address the specific vulnerabilities of the sector. While in South Africa, Sectoral Determination 7 does not adequately address the constitutional rights of live-in domestic workers including their rights to privacy, adequate housing and food, and the right to see family and visitors. In the context of Sectional Title housing, housing rules frequently limit the rights of domestic workers movement and access to family/visitors.

In those jurisdictions where domestic workers are included by implication in general labour laws, there are almost no provisions addressing the specific challenges of the sector. For example, domestic workers in Malawi have reported that their employers do not always give them enough to eat, do not allow them to receive visitors including their own family members, deprive them of adequate rest and sleep, and do not allow them to go to worship in a church or mosque.⁶⁰⁹ These issues have not been addressed in the Employment Act, which was not designed to address the particularities of working in a private home, and would require sector-specific regulations to address many of these issues.

Nevertheless, these infringements, would bring into play constitutional rights, such as dignity, privacy, freedom of religion, and movement, albeit in the context of countervailing constitutional rights of private employers.

Table: Regulating Specifics of Live-in Domestic Workers in selected countries.

Ethiopia	Wide employer discretion
Lesotho	None
Uganda	None
Kenya	None
Nigeria	None
Malawi	None
South Africa	One month notice to vacate premises; § 8 provides that where there are deductions for accommodation, it must be weatherproof, in good condition, with at least one window and a door that can be locked, and access to a toilet, bath/shower.
Mauritius	None
Ghana	§ 8 of the Regulations requires employer of live-in domestic workers to provide decent living conditions that guarantee privacy and safety, access to toilet and bath facilities, and adequate food, if provided.

⁶⁰⁷ Pandame, *supra* note 406, at 7.

⁶⁰⁸ CIVIL CODE OF ETHIOPIA, ART. 2601.

⁶⁰⁹ Mkandawire-Valhmu, *Surviving Life as a Women*, *supra* note 400, at 795

4.3 The Constitutional Promise: Indirect Intersectional Discrimination and Substantive Equality

These nine country case studies make clear that notwithstanding some significant positive developments, the regulatory landscape in which domestic work takes place, is to varying degrees still characterised by legislative exclusion.

Yet, underpinning ILO Convention 189 (C. 189) is a commitment to ensuring domestic workers enjoy same legal treatment as other workers do in the country. While C. 189 addresses the specificity of the sector, the *Mahlangu* judgment draws attention to the specificity of the group—domestic workers—in the context of post-Apartheid and post-colonial South Africa. The *Mahlangu* judgment makes clear, that an intersectional approach to understanding non-discrimination, requires an analysis of the historical context of systematic discrimination, and the harm wrought by invisibility and nonrecognition by the law.

In *Mahlangu*, the Court found that exclusion of domestic workers as a sector from workers compensation, was not rational, and amounted to direct discrimination. It went further to find, that discrimination against domestic workers as a category, amounted to indirect, intersectional discrimination on the basis of race, class, and gender, since domestic workers are predominantly black women. The identification of the occupational category of domestic work as a stand-in for categories of race, gender, and class, is critical.

Indeed, most of the exclusions in the nine country case studies are either explicitly based on the domestic work sector or a segment of that sector, or amount to a form of structural exclusion, which essentially grants employers of small workplaces the legal permission to discriminate. These regulations are all facially neutral, and do not explicitly purport to be discriminating on the basis of race, gender, and class, but in effect, they are cases of indirect intersectional discrimination, much the same as the facts in *Mahlangu*.

The case studies demonstrate the ways in which not unlike domestic workers in South Africa, domestic workers in Africa have been subject to patterns of discrimination and marginalisation, and that ways in which legal exclusions continue to render domestic workers vulnerable to exploitation and even servitude. However, these studies also vindicate the findings of the United Nations Special Rapporteur on Contemporary forms of Slavery, Urmila Bhoola, that not all domestic workers are equally vulnerable—family members employed as domestic workers are frequently entirely outside of the protection of labour laws. Similarly, child domestic workers are largely unregulated and permitted without any or without adequate regulative safeguards.

These legal exclusions, exemptions, and relaxations, reveal the critical ways in which domestic work is tied up with family and traditional customary norms which affects not only its normativity, but also the way it is carried out: from the manner of recruitment, including of children through family arrangements, as well as dispute resolution in cases of exploitation and abuse. In Ghana, the cultural practices foster informality and undermine the attempts of labour regulation to formalize the employment relationship. While in Uganda, the domestic worker ranks are mainly constituted by distant relatives and friends from rural areas. Malawi is one of the poorest countries in the world, and women and children are brought from rural areas to work as live-in domestic workers in urban homes. However, in many of these cases studies, domestic workers employed as part of extended families are entirely excluded from the protection of labour laws.

The *Mahlangu* paradigm of indirect intersectional discrimination—and bringing historical context into the conversation—could provide the conceptual tools to respond to the degrees of exclusion and could pave the way to greater recognition of the context in which domestic workers function. This framework for interpreting discrimination, alongside an increasing willingness of African national and regional courts to strike down discriminatory laws, even those that are widely practiced and well entrenched in religious or customary systems, but which they have considered harmful to women, bodes well for any future domestic worker litigation that might similarly require employing conceptions of substantive equality to confront intransigent social norms.

However, solely removing discriminatory exclusions from the law, would not be sufficient to ensure equality. Even in absence of explicit exclusions, there remain significant difficulties with impliedly including domestic workers in general labour protection, without further adaptation. For example, in almost all the case studies, domestic workers are impliedly included in collective labour rights provisions (see collective bargaining table above). However, across the board, unionization in the domestic work sector is low and unions are weak. In none of the studies, do domestic worker unions have a dedicated bargaining council and, as a consequence, they are not consulted in decisions impacting the sector. Similarly, almost all the case studies point to the near impossibility of enforcing the labour laws in context of the absence of the ability of labour inspectors to enter private homes without court orders or owner consent. The same can be said of organizing in the context of domestic work in the private home. These rights cannot be adequately realized through implied inclusion in general labour laws; they require effective accommodation to the context of domestic work in a private home.

Further, solely removing discriminatory exclusions from the law would also not be sufficient to address conditions of work unique to live-in domestic work, such as violations

of personal privacy, adequate standards of employer-provided accommodation, provision of food, freedom of movement, as well as the right to see family and visitors, which would also need to be reflected in specific regulations (see table above on regulating Specifics of Live-in Domestic Workers in selected countries)

These gaps, both institutional and the doctrinal in the form of exclusion of family workers from labour protections, perhaps points to a larger and more fundamental challenge in securing domestic worker rights—that is an intransigent public-private divide that legal systems have not yet been fully willing (or able) to traverse, but which essentially blunts the edifice of recognition, and keeps domestic workers at the periphery of both labour and non-discrimination law.

The International Lawyers Assisting Workers (ILAW) Network is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be. Please contact us at admin@ilawnetwork.com with any missing or new judgments, as well as links to any academic analysis or commentary and we will be sure to include them in subsequent issues.