

Regulatory Innovation on Decent Work for Domestic Workers in the Light of International Labour Organization Convention No. 189

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The special issue contains two articles prepared for the third biennial Labour Law Research Network Conference, in Toronto in 2017, that examine national regulation on domestic work in the light of the ILO's landmark Decent Work for Domestic Workers Convention, 2011 (Convention No. 189) and its accompanying Recommendation No. 201. (53(1) Int'l Legal Materials 250–266 (2014).) It includes a third contribution, prepared under an International Development Research Centre (IDRC) Small Grant for Research Innovation. The special issue discusses examples of regulatory innovation on decent work for domestic workers from Europe (Germany), Latin America (Argentina, Chile and Paraguay) and Africa (South Africa).

1 AIMS OF THIS SPECIAL ISSUE

The International Labour Conference turned its attention to paid domestic work in labour standard setting as early as 1936, in discussions on holidays with pay. While the International Labour Organization (ILO) adopted periodic resolutions, sponsored a number of studies, and even provided technical cooperation support, little progress on adopting a convention or recommendation was made. Ultimately, decent work for domestic workers – a subject that according to the ILO affects at least 67 million workers worldwide – only moved from the margins to the centre of historic international prioritization once domestic workers themselves mobilized transnationally.¹ In March 2008, the ILO's governing body, rather surprisingly to those who observed traditional standard setting largely grind to a halt, took the historic decision to consider standard setting with a view to adopting a convention, supplemented by a recommendation.

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¹ See Karin Pape, *ILO Convention C189 – A Good Start for the Protection of Domestic Workers: An Insider's View*, 16 *Progress Dev. Stud.* 189 (2016).

Soon after the governing body meeting ended, I got a call from the international official who would become the Representative of the Secretary General in the standard setting and carry the heavy political agenda, Manuela Tomei. On behalf of the Office, she invited me to serve as the ILO's lead expert throughout the standard setting process, and in particular, to write the ILO's law and practice report,² draft the accompanying questionnaire that would become the basis for the new international labour convention and recommendation and provide technical expertise and guidance through a range of meetings as well as the 99th and 100th Sessions of the International Labour Conference. Several ILO and McGill-based researchers collaborated under intense circumstances to expand exponentially the ILO's knowledge base on the state of the law worldwide. I shared the research that I had already been collecting, which turned the spotlight on specific regulatory innovation and an analysis of actual regulatory practice. And we reached out, to build on the collective insights of researchers, policy makers and advocates worldwide.³

In building the ILO's law and practice report, I spotlighted innovative regulatory practices in a growing number of ILO Members. Few argued that decent work for domestic workers was not necessary. However, it was necessary to meet the concern that decent work for domestic workers could be addressed, at least in part, through labour law. It helped immeasurably that the ILO could identify regulatory innovation already underway in Members as disparate – from historical, North–South and regional perspectives – as France, South Africa and Uruguay. The regulatory leadership that could be gleaned from many other states was mapped onto the overview of the regulatory challenges and wed to the insistence that domestic workers themselves were not only workers, but workers who could and did actively organize in favour of their own rights. Joyously, and to the disbelief of many, the ILO made history when it adopted the new Decent Work for Domestic Workers Convention (No. 189) and Recommendation (No. 201) on 16 June 2011. The date has become the International Domestic Workers' Day.

Without missing a beat, domestic workers launched a banner stating, 'now ratify!' The ratification of Convention No. 189 has been swift and enthusiastic, certainly by ILO standards: to have garnered twenty-five ratifications within only seven years is understood by close observers of the standard setting process to be a strong sign of acceptance of the significance of the new instruments.⁴ This is all the

² International Labour Conference, *Report IV:1 Decent Work for Domestic Workers* (2010).

³ See Special Issue, *Regulating Decent Work for Domestic Workers*, 23(1) *Can. J. Women & L.* 1 (2011). See also Leila Kawar, *Making the Regime Work: Technocratic Engineering of Rights for Domestic Workers at the International Labour Organization*, 21 *Ind. J. Global Legal Stud.* 483 (2014).

⁴ A full list of ratifications can be found at, http://www.ilo.org/dyn/normlex/en/?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460. Last accessed 1 May 2018.

more impressive given the strong labour migration dimension; the ratification of labour migration instruments has tended to be uneven and slow. Ratifiers include developing and post-industrialized market economies; Members with significant cross-border labour migration – including both sending and receiving states; and Members who had actively experimented in the regulation of domestic work prior to ratification, alongside those who heavily solicit ongoing guidance of the ILO. Decent work for domestic workers has become the basis for international solidarity.

Through Convention No. 189 and Recommendation No. 201, domestic workers moved past historical frameworks as ‘servants’, or laden assumptions that they were ‘like one of the family’. Rather, domestic workers received international validation of their status as workers, like any other workers. The specific standard setting was also understood to be for workers like no other, given their central role in the work of social reproduction that makes us at once human, and that is essential to enable markets to function. Specific regulation became a substantive equality-based claim for inclusion into the corpus of labour law.

Convention No. 189 and Recommendation No. 201 extend beyond reaffirmations of fundamental principles and rights at work, turning attention to how they can be made meaningful for domestic workers, in practice. Domestic work is defined broadly, although the introduction of the language of ‘employment relationship’ could affect scope.⁵ Convention No. 189 and Recommendation No. 201 cover the panoply of working conditions, emphasizing the importance of normalizing domestic workers’ time, and ensuring minimum wage protections and payment of wages practices that are equal to those for other workers. Domestic workers’ need for social protection is centred. The migrant work dimensions of domestic work receive special attention, particularly on private employment agencies. The provisions on labour enforcement and labour inspection are tailored to the specificity of the workplace, and emphasized effectiveness and accessibility. The instruments are understood to be deliberately comprehensive: they are not an abstract charter of rights whose pages are to be filled in by courts.⁶ They build on the understanding that mostly domestic workers face de facto exclusions from regulatory frameworks that offer de jure inclusion. Consequently, Convention No. 189 and Recommendation No. 201 offer detailed, substantive guidance to foster meaningful inclusion for domestic workers in labour law. As argued in the law and

⁵ See Adelle Blackett, *The Decent Work for Domestic Workers Convention (No. 189) and Recommendation (No. 201)*, 2011, 106 Am. J. Int’l L. 250 (2012); Sandra Fredman, *Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers*, in *Migrants at Work: Immigration and Vulnerability in Labour Law* 399 (Cathryn Costello & Mark Freedland eds, Oxford University Press 2014).

⁶ See also Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 Emp. Rts. & Emp. Pol’y J. 159 (2011).

practice report, the regulatory approach to decent work for domestic workers was designed to tackle the historical invisibility at the core of a labour market informality understood not to signal a lack of order,⁷ but rather entrenched subordination, through measures that are simple, supportive and smart.

I argue in my forthcoming book⁸ that decent work for domestic workers has become a transnational legal order, that is, ‘a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions’.⁹ Decent work for domestic workers sharpens the theorizing on transnational legal orders, for its attention to historically rooted asymmetry, and how it might be disrupted. Without exacting a causal relationship, a transnational legal order on decent work for domestic workers focuses attention on the nature and quality of legal understandings and practice, and captures signs of settling, diffusion and change.

In this light, Convention No. 189’s impact has extended well beyond ratification. The promise of international standard setting is that it will galvanize actors to promote implementation of Convention No. 189 as supplemented by Recommendation No. 201 in a broad cross-section of governance spaces. The international standard setting took a crucial first step, in that it renders domestic work – and domestic workers’ activism – visible, and spotlights regulatory action. The norms have already been diffused through a wide range of international,¹⁰ regional,¹¹ and domestic¹² fora, and are increasingly the source of close and careful scholarly study.¹³ When a constitutional court refers to ratified Convention No. 189 as a human rights treaty, and more specifically, an equality treaty whose provisions give specific meaning to the notion of equality, and interprets the legislative framework in a manner that diverges from past practice but that is considered to be consistent with Convention No. 189,¹⁴ it is clear that the regulatory landscape is shifting.

⁷ Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom, *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford University Press 2006).

⁸ Adelle Blackett (2019). *Everyday Transgressions: Domestic Workers’ Transnational Challenge to International Labour Law* (Cornell University Press, forthcoming 2019).

⁹ Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *Transnational Legal Orders* 11 (Cambridge University Press 2015).

¹⁰ See e.g. UN Committee on Migrant Workers, General Comment No. 1, UN Doc. CMW/C/GC/1.

¹¹ See e.g. European Parliament, *Resolution on Women Domestic Workers and Carers in the EU*, 2015/2094 (INI).

¹² See e.g. Gabriela Medici & Adelle Blackett, *Ratification as International Solidarity: Reflections on Switzerland and Decent Work for Domestic Workers*, 31 Conn. J. Int’l L. 187 (2016).

¹³ See most recently Claudia Patricia Alvarado Bedoya, *El trabajo doméstico y del cuidado: informalidad y fronteras de laboralidad*, Doctoral Thesis defended on 27 Nov. 2017 at Universidad Pompeu Fabra, Barcelona (Supervisor: Professor Julia Lopez).

¹⁴ See Colombian Constitutional Court, Sentencia C871de 2014, <http://www.corteconstitucional.gov.co/relatoria/2014/C-871-14.htm>.

A peril that I understood while the international standard setting was in progress is that a new convention and recommendation might simply lead to a superimposition of one or more layers of state-based law, without actually reaching the specific places where domestic work norms are mediated. The peril is reflected in the troubling, persisting gap in the existing legal knowledge of the regulation of domestic work. The gap is perhaps masked by the abundant literature on the exploitation faced by this particularly marginalized category of workers, compellingly elucidating the North–South dimension of domestic work, and the extent to which the global economy depends on transnational, subsidized care extraction. The transnational character is belied by the ‘everydayness’ of the personal interactions of the South of the North in individualized households. But the transnational character is interactive. The formation, settling and diffusion of an alternative, transnational legal order is a continuing struggle of social practice.¹⁵ Moreover, the panoply of relevant regulatory action includes the spaces that have been held open for collective action, particularly from social movements from below.¹⁶ They use the counter-hegemonic potential of the transnational, to disrupt hard divisions between governance levels, and foster ongoing struggle and change.¹⁷

This special issue is one contribution to fostering greater knowledge about the settling and diffusion of a transnational legal order on decent work for domestic workers. It focuses on states that have ratified Convention No. 189; each contribution reviews regulatory innovation that has taken place not necessarily because of – but certainly in the light of – the emergent transnational legal order on decent work for domestic workers. It reviews state labour law. In the questions that each contributor raises, there is acceptance of the premise that assessments of implementation must go beyond compiling state laws, particularly those of general application, as they run the risk of masking the informal norms that pervade domestic work, and that govern the household workplace with starkly unequal, but mediated power relationships often beyond the gaze of state regulation and enforcement.

2 THE CONTRIBUTIONS

The first contribution, by *Anne Trebilcock*, is entitled ‘Challenges in Germany’s Implementation of the ILO Decent Work for Domestic Workers Convention’.

¹⁵ Jutta Brunnée & Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* 22 (Cambridge University Press 2010).

¹⁶ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* 47 (Cambridge University Press 2003).

¹⁷ Adelle Blackett & Anne Trebilcock, *Conceptualizing Transnational Labour Law*, in *Research Handbook on Transnational Labour Law* 3 (Edward Elgar 2015).

Convention No. 189 came into force in Germany on 20 September 2013, making Germany an early ratifier in Europe.¹⁸ Germany contended that it did not need to undertake any legislative change in order to ratify. But as Trebilcock demonstrates, challenges turned out to be quite significant. Trebilcock spotlights a few of those challenges, including a rather stark but formalized arrangement in which domestic workers – typically women from Poland, Bulgaria, Romania, Slovakia, within the EU, and from outside the EU, the Ukraine and some Balkan states – can legally assume a 24-hour live-in work arrangement as carers for the elderly. Despite agency involvement, many of these workers are treated as ‘self-employed’ and would appear to elide coverage under EU Directives and under German implementing law. Trebilcock underscores that ‘the Government has attracted criticism for offering far too little support for those seeking such care, while simply turning a blind eye to the workers who provide it’¹⁹ and that it has been roundly condemned by a range of civil society actors. The 24-hour live-in arrangement calls starkly into question the meaning of formalization. But Trebilcock’s text foregrounds a critical feature of ratification – supervision by the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CEACR issued one of the first two comments on Convention No. 189, addressed to Germany.²⁰ The CEACR’s review is comprehensive and attentive to ensuring Germany’s compliance with the broad panoply of commitments under Convention No. 189. It offers a critical read of Germany’s questionable exclusion of all live in workers from the scope of Convention No. 189, pursuant to Article 2(2)(b). Trebilcock narrates the CEACR’s call for Germany both to provide reasons for its claimed exclusion, and to specify measures for future inclusion. This supervision is part of how the transnational legal order is formed, and settles, but what are the risks of enabling such a blanket exclusion to persist? Trebilcock suggests that ratification was the right decision, and now Germany needs to acknowledge the challenges it faces, and remain receptive to solutions from a range of transnational actors.

The second contribution, by *Lorena Poblete*, discusses three of the fourteen Members in Latin America and the Caribbean to have ratified Convention No. 189.²¹ Poblete’s contribution is entitled ‘The Influence of the ILO Domestic Workers

¹⁸ In Europe, Italy ratified first, on 22 Jan. 2013. Other European countries to have ratified as of 8 Mar. 2018 are Belgium, Finland, Ireland, Portugal and Switzerland.

¹⁹ Anne Trebilcock, *Challenges in Germany’s Implementation of the ILO Decent Work for Domestic Workers Convention*, 34 Int’l J. Comp. Lab. L. & Indus. Rel. 149 (2018).

²⁰ See Direct Request (CEACR) – adopted 2016, published 106th International Labour Conference session (2017), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3300808:NO. Other reports have been requested from countries that have ratified Convention No. 189 in 2015. See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:14001:0::NO::P14001_INSTRUMENT_ID:2551460.

²¹ As of 8 Mar. 2018, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guyana, Jamaica, Nicaragua, Panama, Paraguay, and Uruguay had ratified Convention No.

Convention in Argentina, Chile and Paraguay'. Her article teases out the complexity of embracing the specificity of domestic work, while seeking to ensure that domestic workers' rights are substantively equal to those of other workers. The article engages closely with how each Member has approached national regulatory change in light of ratified Convention No. 189's provisions. She characterizes the differences as broad reform in Argentina, gradual reform in Chile, and ambitious reform in Paraguay. For Poblete, what emerges is not necessarily a story of incoherence or incompatibility as between three states in the same region. To the contrary, each tackles common challenges – notably formalization – with distinct but complementary strategies: a guiding principle in Paraguay, regulatory innovation including measures to address occupational hazards, and a family allowances scheme in Argentina, and a focus on labour inspection in Chile. While Convention No. 189 is understood, interpreted and ultimately implemented differently in each, there is a degree of acceptance and settling of the relevant international norms. Poblete ends her contribution with a distinct, unanswered and critical question that cuts across all three approaches: 'can the law transform labour practices like those associated with domestic work where the law is not acknowledged as the governing principle?'²² This is precisely the question of overlapping legal orders with which transnational labour law concerns itself.

The third and final contribution, by *Adelle Blackett* and *Thierry Galani*, is entitled 'Regulatory Innovation in the Governance of Decent Work for Domestic Workers in South Africa: Access to Justice and the Commission on Conciliation, Mediation and Arbitration'. South Africa played a leadership role throughout standard setting on decent work for domestic workers, and was the second ILO Member from the African continent to ratify Convention No. 189.²³ The article provides an overview of regulatory change in South Africa, but proffers a close, qualitative appraisal of South Africa's innovative Commission on Conciliation, Mediation and Arbitration (CCMA). Its goal is to glean insights into the domestic work relationship itself, and the operation of institutions and actors on how to change it. Through a small sample of interviews and participant observation at the CCMA, as well as engagement with a range of ethnographic sources, the article draws to the foreground the mediating role of the CCMA – and its commissioners – who appear subtly but steadfastly to help to shift the law of the household workplace toward decent work for domestic workers. The shift predates Convention No. 189, and is not even explicitly

189 in Latin America and the Caribbean. Uruguay was the first ILO Member to ratify Convention No. 189.

²² Lorena Poblete, *The Influence of the ILO Domestic Workers Convention in Argentina, Chile and Paraguay*, 34 *Int'l J. Comp. Lab. L. & Indus. Rel.* 177 (2018)

²³ Mauritius offered the first African ratification, on 13 Sept. 2012. Guinea ratified on 25 Apr. 2017. However, the majority of African Members have not ratified Convention No. 189. The Philippines is the only ILO Member in Asia to have ratified, and none of the three North American states has ratified Convention No. 189.

conducted through Convention No. 189. Yet South Africa inspired and helped to build the transnational legal order. Its approach to dispute settlement made a provision like Article 16 of Convention No. 189 on ‘effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally’ seem plausible for domestic workers. By foregrounding the relational dynamic, the authors show that ‘[t]he CCMA is an institution through which it is possible to catch a glimpse of how regulatory change is lived’.²⁴

Each article raises hard questions about the dynamic – yet indeterminate – nature of the emerging transnational legal order on decent work for domestic workers. What does regulatory reform on decent work for historically marginalized workers look like when faced with neoliberal impulses?²⁵ Is this emerging transnational legal order nimble enough to resist the allure of quick justice, or strong enough to push back against the kind of capture that the exclusion of 24-hour live-in migrant workers suggests? These urgent questions must continue to follow appraisals of Convention No. 189 and its accompanying Recommendation No. 201. They also follow transnational law’s methodological turn,²⁶ affecting what ‘law’ we care about, and how we purport to understand structural transformation.

Throughout this special issue, it has been possible to glean the importance of the space that ratification of Convention No. 189 cultivates for Members: they become part of a community of learning. Not only can they learn from the ILO; their regulatory experimentation can be shared in the ILO’s learning community, through dialogue across governance levels and with a range of institutions – like the CEACR and the CCMA – and actors – including first and foremost, domestic workers themselves. For this and many more reasons, regulatory innovation on decent work for domestic workers merits ongoing, careful study, as it is at the core of labour law’s *raison d’être*, and transnational labour law’s future.

²⁴ Adelle Blackett & Thierry Galani, *Regulatory Innovation in the Governance of Decent Work for Domestic Workers in South Africa: Access to Justice and the Commission on Conciliation, Mediation and Arbitration*, 34 *Int’l J. Comp. Lab. L. & Indus. Rel.* 203 (2018).

²⁵ See D’Arcy du Toit ed., *Exploited, Undervalued – And Essential: Domestic Workers and the Realization of Their Rights* (Pretoria University Law Press 2013).

²⁶ See Peer Zumbansen, *Transnational Legal Pluralism*, 1 *Transnat’l Legal Theory* 141 (2010).