

THE TRANSFORMATION OF WORK: CHALLENGES AND STRATEGIES



Domestic Workers and Socio-Economic Rights: A South African Case Study



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1. INTRODUCTION

In 1994, shortly after South Africa emerged from Apartheid, the new democratic government began the process of formally recognizing domestic work and including domestic workers within the rubric of labor legislation. To be sure, this was a monumental overhaul that has been described as transforming servants into workers. The irony is that this assignment of legal protection to domestic workers in South Africa correlated surprisingly with the weakening of domestic workers' labor power, and ultimately the collapse and deregistration of the South African Domestic Worker Union. The South African story testifies that legal recognition is but the first step in a complex and often difficult process of protecting domestic worker rights.

Using a South African case study, this paper will explore the difficulties of applying a labor approach—with its focus on worker rights, democratic voice and collective action—to domestic workers. The South African regulatory scheme distinguishes between domestic workers in peri-urban areas, who are singled out for “particular” treatment as domestic workers, and those domestic workers on farms, who are regulated together with farm workers as a class. We will tease out the institutional and substantive challenges faced by domestic workers largely in urban areas, but also to domestic workers in farming areas. South Africa's dual approach to domestic workers on farms and in urban areas raises the question of the relationship between domestic work and work in the informal economy generally, and whether domestic work is in fact wholly unique. This paper will situate these questions within a broader debate about the relationship between human rights, particularly socio-economic rights and labor conceptions and institutions.

Part One of this paper briefly situates the question of domestic work within the parallel universes of international labor law and international human rights law. Since domestic work is often regarded as informal or “indecent” work, an underlying premise of this paper is that not only labor rights are important; equally important is the question of socio-economic guarantees. While both the International Labour Organization (“ILO”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) contain norms dealing with socio-economic matters, the origins and ideologies underpinning the two institutions are distinct. This section argues that even though the ILO arguably was founded on the principle of social justice, its central issue has been that of providing institutional voice to workers in the form of collective bargaining, so that they can be partners in workplace governance. Conversely, the ICESCR is rooted in the post-World War II universe of human rights, and it attempts to entrench certain minimum socio-economic guarantees, which include but are not limited to labor rights, and which ratifying governments have an obligation to not only respect, but also to protect and even fulfill.

Part Two then proceeds to set out the key components of the South African regulatory scheme for recognition of domestic workers, and it argues that the South African approach to regulation of domestic workers is a decidedly labour approach, which prioritizes or foregrounds collective bargaining—and in the absence of collective bargaining, sectoral determinations (laws

promulgated to regulate specific work sectors)—and wages. In fact, the most crucial difference between the respective sectoral determinations regulating domestic workers in farming and urban areas is their wages.

Part Three of this paper looks at the empirical challenges this legislative scheme poses to domestic workers on the ground. Both domestic workers on farms and those in urban areas suffer from low union density and weak inspection by labor inspectors, but evidence suggests that both have utilized the Commission of Conciliation, Mediation and Arbitration (“CCMA”) after dismissal. Part Three concludes that the labor approach, despite formally differentiating between domestic workers on farms and domestic workers in urban areas, does not account for the function of “related” socio-economic rights, such as housing, education, water, electricity.

Part Four discusses the gains to be made if South Africa were to ratify the new ILO Convention on Domestic Workers, and it concludes that while there would be some benefit to ratification, South Africa is largely already in compliance with the central norms of the newest ILO Convention. This leads to the pointed question: if everything is so good in law, then why is it so bad in fact?

Part Five of this paper questions whether an approach to domestic work, which foregrounds socio-economic rights and the “logic” of a positive rights framework, might shift our view of the tiers of governmental obligation with respect to the basic needs of domestic workers and workers in the informal economy.

2. INTERNATIONAL LABOUR ORGANIZATION & INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: TWO APPROACHES TO ESC RIGHTS

Any discussion of domestic workers in the informal economy will find itself situated within the related universes of international labor law and international human rights law. While both the ILO and ICESCR incorporate socio-economic norms, the two significantly diverge in their origins and founding ideologies.

Historically socio-economic rights were largely subsumed within the labor movement and did not form part of a distinct and justiciable set of rights in themselves.¹ When the ILO was established in 1919, by western countries as a response to World War I and the socialist revolution in Russia,² it had as its mandate to abolish “injustice, hardship and privation” of workers and to “guarantee fair and humane conditions of labour.”³ Lying at the heart of the

¹ International Commission of Jurists, Courts and the Legal Enforcement of ESCR, Human Rights and the Rule of Law Series (2008) at 13.

² Gerry Rodgers, Eddy Lee, Lee Swepston, Jasmien Van Daele, *The ILO and the Quest for Social Justice 1919-2009* (2009) at 2.

³ Henry Steiner and Philip Alston (Ed), *International Human Rights in Context* (2000) at 242.

ILO's founding documents are its core principles—social justice, equality and dignity—with these principles also encapsulated in the ILO's credos that “labour is not a commodity” and “poverty anywhere constitutes a danger to prosperity everywhere.”⁴

The basic principles of freedom of association, freedom of expression and the right to collective bargaining have been critical, even hegemonic principles, for the ILO and its member states.⁵ This is evidenced by the establishment of a unique supervisory procedure to ensure compliance with Conventions 87 and 98 on freedom of association and collective bargaining alone. This special procedure can be used among member countries regardless of whether they have ratified the conventions in question. Institutionally, the ILO itself embodies this commitment to freedom of association and collective bargaining in its tripartite structure, which includes workers and employers as equal partners in ILO standard-setting and policy-making.

During the golden years of the welfare state, the predominant approach to satisfying the socio-economic needs of the populace was by ensuring access to decent compensation and working conditions.⁶ In efforts to achieve this, the ILO developed labor standards and rights, such as the rights to be protected against unfair dismissal, to occupational health and safety, to compensation in cases of work injury, to create and join unions, to strike and to collective bargaining.⁷ While the effect of many of the standards set by the ILO might have resulted in the improvement of worker rights, these standards were almost never framed as human rights, but rather in terms of “governments’ obligations to ensure certain outcomes of processes.”⁸

While the roots of ILO lie in the western powers’ response to Socialist Revolution and the horrors of World War I, the ICESCR was drafted in the wake of World War II and traversed a more difficult path to international entrenchment. In contrast to the ILO, which was supported by the West, the ICESCR was vociferously opposed by the western powers and was, until recently, considered a “step-child” of the human rights movement. The western states maintained that only civil/political rights were legally enforceable since the enforcement of socio-economic rights would amount to an interference with internal government policy, and the requirement of positive action would be problematic from a separation of powers perspective.⁹ Conversely, the communist bloc maintained that since formal equality of opportunity does not equate with real equality,¹⁰ economic, cultural and social rights were critical to the actual achievement of substantive equality.¹¹

⁴ See Declaration of Philadelphia, 1944 and *ILO and the Quest for Social Justice*, *supra* note 2 at 7.

⁵ *Id.* at 50.

⁶ *Courts and the Legal Enforcement of ESCR*, *supra* note 1 at 1.

⁷ *Id.*

⁸ *The ILO and the Quest for Social Justice*, *supra* note 2 at 40.

⁹ See Johan De Waal, Ian Currie, Gerhard Erasmus (Ed), *The Bill of Rights Handbook* (fourth edition) (2001) at 432.

¹⁰ *Id.* at 4. See also *The ILO and the Quest for Social Justice*, *supra* note 2 at 39.

¹¹ Daphne Barak-Erez and Aeyal Gross (ed), *Exploring Social Rights between Theory and Practice* at 2.

An ICESCR approach¹² conceptualizes socio-economic rights as inter-related and includes diverse rights such as the rights to: work and just and favorable conditions of work; rest and leisure; form and join trade unions and to strike; social security; special protection for family, mothers and children;¹³ an adequate standard of living, including food, clothing, and housing;¹⁴ physical and mental health; education¹⁵ and the right to participate in cultural life.¹⁶ The basic obligation imposed by the Covenant on member states is “to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the right by all appropriate means, including particularly the adoption of legislative measures.”¹⁷

Increasingly, socio-economic rights are losing their second class status. They have been included in many constitutions, and the conception of socio-economic rights as independently justiciable is being recognized as an important mechanism to hold governments accountable for the plight of their poorest citizens.¹⁸ In South Africa, the debate on whether to constitutionalize socio-economic rights in a new democratic constitution was won by the understanding that not only are civil/political rights fundamental, but also “survival” rights must be entrenched. As Nicholas Haysom put it, the constitution must institutionalize the “promise of both bread and freedom.”¹⁹ On the international playing field, in as early as May 2013, the Optional Protocol on Economic, Social and Cultural Rights will come into force, which will allow individuals and groups, for the first time, to hold their governments accountable for violation of economic, social and cultural (“ESC”) rights.

Similarly, while the ILO for much of its history passed a series of sector specific conventions allowing member states to ratify protections for their preferred sectors without improving the baseline standards for all workers,²⁰ in 1998 it adopted its first explicit comprehensive statement of commitment to human rights, in the form of the Declaration on Fundamental Principles and Rights at Work.²¹ This declaration highlights four principles: (1) freedom of association and the right to collective bargaining; (2) the elimination of forced labor; (3) the elimination of child labor and (4) the elimination of workplace discrimination. These rights were considered “enabling” rights that would allow others, such as occupational health and safety, to be achieved

¹² Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights* 8 South African Journal of Human Rights 449 (1992) at 460.

¹³ International Covenant on Economic, Social and Cultural Rights, art. 6.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 13–14.

¹⁶ *Id.* at 15.

¹⁷ Article 2(1)

¹⁸ For example, South Africa, Columbia, India. See *Courts and the Legal Enforcement of ESCR*, *supra* note 1.

¹⁹ See *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, *supra* note 12 at 454.

²⁰ Lawrence R Helfer, Understanding Change in International Organizations: Globalization and Innovation in the ILO, 59 Vand. L. Rev. 649, 708-11 (2006).

²¹ The ILO and the Quest for Social Justice 1919-2009, *supra* note 2, at 37. The authors note that this was a matter of considerable controversy at the time, particularly amongst the trade ambassadors that the adoption of an ILO commitment to human rights would be used to undermine the ability of developing countries to take advantage of cheap labor to maintain their export markets.

over time.²² Though states are bound by the conventions they ratify, their obligations to the Declaration are looser, as the Declaration does not focus on compliance but on the affirmation of its principles.

To summarize, while the ILO norms and standards were rooted in social justice, its central or foregrounded norms focus on “institutional” rights, which enable workers to participate in workplace governance. However, when viewed through the lens of workers in the informal economy, there are both institutional and substantive blind spots. Institutionally, while the ILO’s tripartite institutional structure is comprised of workers’ and employer’s organizations, they largely represent the formal, rather than the informal economy.²³ Similarly, in terms of substantive norms, there has been little space for the development inside the labor market, of rights, such as the right to health, to food, to adequate housing, partly because they were seen secondary or supplementary to workers’ strong positions.²⁴ Yet, the demise of decent work, and the rise of the informal economy, has meant that work does not necessarily imply freedom from want, and socio-economic rights, in their widest sense, come to the fore. Perhaps in recognition of this, the ILO has begun to move towards an understanding of its core norms as being fundamental human rights. Similarly, the ICESCR, for decades considered the “step-child” of the human rights movement, is increasingly coming of age and being given its due credence.

3. THE SOUTH AFRICAN REGULATORY SCHEME

3.1. Regulation of Domestic Work in South Africa: A Labor Approach

In 1994, the new democratic South African government embarked on a series of legislative enactments aimed at transforming the lot of South African domestic workers and bringing them within the regulatory framework of labor law. The legislative scheme put in place was hailed as not only a first for South Africa, but also for the world, and included a scheme of formal registration of contracts for domestic work, as well as provision for minimum wages, voluntary pensions and unemployment benefits.

The two key cornerstones of this colossal effort are the Labour Relations Act (LRA), which covers all workers (except for those in the military, intelligence, and secret service) and therefore

²² *Id.* at 38.

²³ *Id.* at 17.

²⁴ See *Courts and the Legal Enforcement of ESCR supra* at 1.

covers domestic workers and farm workers,²⁵ and the Basic Conditions of Employment Act (BCEA), which fills in the gaps of the LRA by creating a floor of employment rights.²⁶

The LRA gives effect to many of the rights enshrined in the Constitution, including the Section 23 constitutional right²⁷ to form and join trade unions²⁸ and to participate in the lawful activities of their unions²⁹ or federations.³⁰ The act provides that workers can engage in such protected labor activity without the employer imposing an adverse employment activity such as hiring discrimination or requiring that a worker cease his or union membership.³¹

The LRA further provides that upon recognition, unions have a legal right to collective bargaining, and the law holds collectively bargained agreements to be binding.³² Workers also have a right to strike.³³ While the LRA also establishes bargaining councils that can establish and administer bargaining agreements for entire sectors,³⁴ domestic workers do not yet have a bargaining council.³⁵ The LRA stipulates that in the absence of bargaining councils for domestic and/or farm workers, disputes regarding freedom of association can be referred to the CCMA.³⁶

Among the protections afforded to unions by the LRA, Section 12 allows any union official to “enter the employer’s premises” in order to recruit and communicate with members, to hold off-hours meetings, or to arrange a union election on the employer’s premises.³⁷ Further, Section 16 requires employers to provide unions with requested information necessary for the union to conduct its activities.³⁸ However, Section 17(2)(a) states that such access to the premises does not extend to the employer’s home unless the employer agrees, and Section 17(2)(b) extends none of the disclosure obligations to the domestic sector. Because this section defines “domestic sector” to cover all “employees engaged in domestic work in their employers’ homes or on the property on which the home is situated,” these restrictions also apply to farm workers who work in their employers’ homes.³⁹

²⁵ Labour Relations Act 66 of 1995 § 2, *available at* <https://www.labour.gov.za/legislation/acts/labour-relations/labour-relations-act>.

²⁶ Basic Conditions of Employment Act 75 of 1997 § 2(a), *available at* <https://www.labour.gov.za/legislation/acts/basic-conditions-of-employment/read-online/amended-basic-conditions-of-employment-act>.

²⁷ S. Afr. Const., 1996 § 23.

²⁸ LRA at 4(1).

²⁹ *Id.* at 4(2).

³⁰ *Id.* at 4(3).

³¹ *Id.* at 5.

³² *Id.* at 23.

³³ *Id.* at 64–77 (regulating workers’ right to strike and employers’ right to lock out).

³⁴ *Id.* at 27–34.

³⁵ *Domestic Workers Summit Held on 27-28 August 2011*, *supra* note 3 (demanding the establishment of a council).

³⁶ *Id.* at 9. *See also id.* at 112-126 (governing the administration of the Commission).

³⁷ LRA § 12.

³⁸ *Id.* at 16.

³⁹ *Id.* at 17(1).

While these limitations are designed to protect the privacy interests of homeowners who employ domestic workers, it poses challenges to unions because many domestic workers live in their employers' households. It also reveals a tension between section fourteen of the South African Constitution, guaranteeing a right to privacy, and section twenty-three, guaranteeing "every worker" freedom of association, a right to collectively bargain, and a right to strike.⁴⁰

3.2. The Basic Conditions of Employment Act

The BCEA does not exclude domestic or farm workers in any way, and the Unemployment Insurance Act ("UIF")⁴¹ was recently amended to include domestic workers. The BCEA creates a floor of employment rights that includes the regulation of hours, leave, remuneration, and termination. It also prohibits forced and child labor, lays the groundwork for sectoral determinations, and governs workplace inspections.

The BCEA caps hours at forty-five per week,⁴² with one and one-half times pay for every hour of overtime.⁴³ While the BCEA requires a twelve-hour daily rest period and a thirty-six hour weekly rest period, the daily rest period may be only ten hours if the employee lives on the work premises and takes a meal interval lasting at least three hours.⁴⁴ The BCEA also allows for annual leave,⁴⁵ sick leave,⁴⁶ maternity leave,⁴⁷ and family responsibility leave.⁴⁸

The BCEA also calls for the appointment of labour inspectors, who may enter a workplace without warrant or notice.⁴⁹ However, this inspector can only enter a home with the consent of the owner or the authorization from the Labour Court.⁵⁰

⁴⁰ This strikes at the very heart of the issue of "horizontal" application of constitutional rights, entrenched in section 8 of the Constitution of the republic of South Africa.

⁴¹ Unemployment Insurance (UIF) Act 63 of 2001, *available at* <https://www.labour.gov.za/legislation/acts/unemployment-insurance-fund/read-online/amended-unemployment-insurance-uif-act>.

⁴² BCEA at 9(1) (adding that the employee can work nine hours in one day if he or she works five or fewer days that week, and eight hours if he or she works more than five days that week). The sectoral determinations impose requirements identical to the BCEA statute. *See* Sectoral Determination 7, Domestic Workers § 10; Sectoral Determination 13, Farm Workers § 11.

⁴³ *Id.* at 10 (allowing an exception where the employer does not pay extra for overtime but either allows the employee a thirty-minute break with full pay for every overtime hour, or a ninety minute paid break for every overtime hour).

⁴⁴ *Id.* at 15. *See also* Sectoral Determination 7 § 16; Sectoral Determination 13 § 19.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 22–24 (noting that such sick leave does not cover occupational accidents or diseases, which receive coverage under a different law).

⁴⁷ *Id.* at 25.

⁴⁸ *Id.* at 27.

⁴⁹ *Id.* at 65(1).

⁵⁰ *Id.* at 65(2)–(3). A comparison between Article 65(2) and (3) of the BCEA and Article 12(2) of the LRA indicate that, unlike the government, labor unions cannot receive authorization from the Labor Court to enter a home without the employer's consent.

3.2.1. Sectoral Determinations 7 and 13

The BCEA grants the Minister of Labour the power to create sectoral determinations,⁵¹ and indeed the Minister has passed two sectoral determinations impacting domestic workers: Sectoral Determinations 7 and 13.

Determination 7 regulates all domestic workers who are neither employed on farms nor covered by another sectoral determination.⁵² Its scope includes persons “employed or supplied by employment services” and persons “employed as independent contractors.”⁵³ Determination 13, by contrast, regulates farm workers performing farming activities who are neither covered by another Sectoral Determination nor a bargaining council agreement.⁵⁴ This farm worker classification includes “domestic worker[s] employed in a home on a farm.”⁵⁵ In determining whether Sectoral Determination 7 or 13 applies to a particular worker, the population or income of a region is irrelevant; all that matters is the legal characterization of the work, whether it is domestic work or farm work.⁵⁶

Sectoral Determinations 7 and 13 each establish employment conditions for their respective sectors; of these, the most important differences are in minimum wage.⁵⁷ Determination 13 establishes one minimum wage for all farm workers (including domestic workers on farms), regardless of the region or number of hours worked, while Determination 7’s minimum wage for domestic workers depends both on region and number of hours of work.

The minimum wages of both Determinations are listed in the table below.⁵⁸

⁵¹ *BCEA* at 51–58 (governing the process of investigations by the Director-General, the creation of the actual determination, and the determination’s binding legal effect).

⁵² *Government Gazette* 23732, GN 1068, Aug. 15, 2002, §§ 1–2(b) (S. Afr.). It also does not apply to persons who are “covered by an agreement of a bargaining council in terms of the Labor Relations Act, 1995.” *Id.* at 2(c).

⁵³ *Id.* at §§ 1(1)(a)–(b); admin, *Sectoral Determination 7: Domestic Workers*, Dep’t of Labour, Repub. of S. Africa (June 28, 2012), <https://www.labour.gov.za/legislation/sectoral-determinations/sectoral-determination-7-domestic-workers/>.

⁵⁴ *Government Gazette* 28518, GN 149, Feb. 17, 2006, §§ 1(1), 1(4). “Farming activities” include “primary and secondary agriculture, mixed farming, horticulture, aqua farming and the farming of animal products or field crops excluding the Forestry Sector.” *Id.* at § 1(2).

⁵⁵ *Id.* at § 1(3)(a). Farm workers also include “a security guard employed to guard a farm or other premises where farming activities are conducted, who is not employed in the private industry” *Id.* at § 1(3)(b).

⁵⁶ See *Government Gazette* 28518, *supra* note 54, at § 1; *Government Gazette* 23732, *supra* note 52, at § 1. Further illustrating this point is that, until 2008, both laws listed several of the same regions in their respective salary tables. Cf. *Government Gazette* 23732, *supra* note 52, at tbls. 1–2 with *Government Gazette* 28518, *supra* note 54, at tbl. 1; see also Dep’t of Labour, Repub. of S. Africa, Making of Sectoral Determinations 10, *available at* <https://www.labour.gov.za/downloads/documents/useful-documents/employment-equity/Useful%20document%20-%20Report%20of%20the%20Employment%20Conditions%20Commission%20-%20part2%20.pdf> (highlighting the decision to remove region as a determinant of the minimum wage in Sectoral Determination 13).

⁵⁷ *Id.* at 1.

⁵⁸ *Government Gazette* 34797, GN 986, Nov. 28, 2011, § 1, tbls. 1–2 (S. Afr.) (providing updated wages for Sectoral Determination 7); *Government Gazette* 34946, *supra* note 61, at §§ 1–3, tbl. 1 (S. Afr.) (providing updated wages for Sectoral Determination 13).

Sec. Determination	Hourly Min. (R)	Weekly Min. (R)	Monthly Min. (R)
SD7, Area A, ≤ 45 ordinary hours worked per week	8.34	375.19	1625.70
SD7, Area B, ≤ 45	7.06	317.62	1376.25
SD7, Area A, ≤ 27	9.85	265.94	1152.32
SD7, Area B, ≤ 27	8.33	224.9	974.99
SD13	7.71	374.10	1503.90

Originally, both Sectoral Determinations 7 and 13 mandated a minimum wage that varied by region.⁵⁹ Generally, this variance was due to differing degrees of urbanization, with more urbanized areas earning higher minimum wages due to higher costs of living.⁶⁰ Now, however, only Determination 7's minimum wage varies by region.⁶¹

Sectoral Determination 13 establishes a higher minimum wage for numerous regions, classifying those regions as "Area A," and a lower minimum wage for all areas not mentioned in Area A, termed "Area B."⁶² What divides Area A and Area B regions is average annual household income, with Area A regions earning at least R27,000 per year and Area B regions earning less than that.⁶³

These minimum wage variations are not only one of the few substantive differences between Determinations 7 and 13; they are the most important. Minimum wage regulations have been

⁵⁹ See *Government Gazette* 23732, *supra* note 52, at tbls. 1–2; *Government Gazette* 28518, *supra* note 54, at tbl. 1.

⁶⁰ Development Pol'y Research Unit, Minimum Wages, Employment and Household Poverty: Investigating the Impact of Sectoral Determinations 13 (2008), *available at* <https://www.labour.gov.za/downloads/documents/research-documents/Sectoral%20determinations%20POLICY%20VERSION%20v4.pdf>.

⁶¹ Determination 13 now has a uniform minimum wage across all South Africa. Dep't of Labor, Making of Sectoral Determinations, *supra* note **Error! Bookmark not defined.**, at 10; *see also* *Government Gazette* 34946, GN 29, Jan. 18, 2012, §§ 1–3, tbl.1 (S. Afr.).

⁶² See *Government Gazette* 23732, *supra* note 52, at tbls. 1–2.

⁶³ Dep't of Labor, Making of Sectoral Determinations, *supra* note **Error! Bookmark not defined.**, at 9–10.

noted as the most important provision in Sectoral Determinations,⁶⁴ and this is borne out by the fact that the different minimum wages for Determinations 7 and 13 is the primary factor in distinguishing the two determinations. When it comes to wages, the “better” Determination for a worker depends on whether the regulation characterizes her as a “domestic worker” or a “farm worker.” For example, a farm worker is guaranteed a minimum hourly wage of R7.71, which is more than the hourly wage for a domestic worker working more than 27 hours per week in low-income region Area B (R7.06), but less than the wage for a similar worker in high-income region Area A (8.35).

Besides the varying minimum wages demonstrated in the table, Sectoral Determinations 7 and 13 are largely the same, with most variances only minor. For example, both determinations call for overtime remuneration, but Sectoral Determination 13 does not apply overtime rules to “work which is required to be done without delay.”⁶⁵ And while both establish the same limitations on overtime,⁶⁶ farm workers and their employers are allowed to conclude a written agreement extending ordinary work hours by five per week.⁶⁷ As another example, though both determinations allow employers to deduct up to 10% of wages for providing living accommodations, Determination 13 requires that the farm worker have her own independent housing for the deduction to apply, but Determination 7 does not specify whether domestic workers’ accommodation must be an independent structure or merely a room.⁶⁸ As a final example of minor variances, Determination 7 allows the employer to require an employee to acknowledge the receipt of a written document describing the employment,⁶⁹ whereas Determination 13 does not.⁷⁰

Similarly, UIF applies to all employees, and has included domestic workers and seasonal workers since April 1, 2003.⁷¹ The UIF allows contributors and their dependents entitlement to the fund for unemployment, illness, maternity, adoption, and dependent’s benefits.⁷² In considering domestic workers with multiple employers, the UIF states that, if such a worker is terminated by at least one employer and is still employed, that worker is nonetheless entitled to benefits if the income “falls below the benefit level that the contributor would have received if he or she had become wholly unemployed.”⁷³ Additionally, in laying out some of the conditions

⁶⁴ See *supra* note 57 and accompanying main text.

⁶⁵ Sectoral Determination 13 § 10(1).

⁶⁶ Both prevent the employer from requiring or permitting the worker to work overtime without the worker’s agreement, to work more than fifteen hours overtime in one week, and to work over twelve hours overtime in one day. Sectoral Determination 13 § 13; Sectoral Determination 7 § 11.

⁶⁷ Sectoral Determination 13 § 12.

⁶⁸ Compare Sectoral Determination 13 § 8(3) with Sectoral Determination 7 § 8(b).

⁶⁹ *Government Gazette* 23732, *supra* note 52, at § 9(5).

⁷⁰ See *Government Gazette* 28518, *supra* note 54, at § 9.

⁷¹ UIF at 1 (explaining that a “domestic worker . . . includes a . . . person who takes care of any person in that home, but does not include a farm worker”).

⁷² UIF at 12(1).

⁷³ *Id.* at 12(1A).

under which a contributor can receive unemployment benefits for longer than fourteen days, domestic workers can receive a longer period of benefits if their termination of employment is because of the death of the employer.

4. ASSESSING THE REGULATORY SCHEME

This section considers some of the challenges encountered to the scheme by domestic workers on the ground. We will look closely at three dimensions to the law reform: (1) trade unionism; (2) collective bargaining and wages; and (3) socio-economic rights. In the final part of this section we will consider the “institutional” apparatus in the form of the CCMA and Department of Labour, charged with administering labor laws. This section relies on both published empirical literature and primary interviews, in order to determine the ways in which domestic workers on farms and in urban areas engage with these institutions. This section argues that while both domestic workers and farm workers have faced similar “institutional” challenges in realizing their rights to trade unionism and collective bargaining, there are also significant differences in the ways in which key socio-economic factors, such as housing, are constructed and function in the different contexts of domestic workers on farms and in urban areas. What also becomes apparent from this section is that domestic workers on farms are often part-time domestic workers or seasonal workers.

4.1. Trade Unionism

One of the most significant components of South African law reform was the inclusion of domestic workers within the machinery of unionization and collective bargaining, affirming the notion that domestic work is indeed “work” like all other work. Yet, the irony is that at the apex of apartheid, the South African Domestic Worker Union (SADWU) serviced an estimated 350,000 workers, but by 1997, the union had disbanded in financial disarray.⁷⁴ This decline has led writers such as Shireen Ally to argue the reason for this demise was that the state displaced the unions as protector of worker rights.⁷⁵ According to her analysis of the demise of SADWU, the state depoliticized domestic worker unions and they are now state adjuncts, with no real role.⁷⁶

In 2000, a new domestic workers’ union, South African Services and Allied Workers Union (SADSAWU), was launched, and it has achieved some success in the form of advocating for domestic workers’ coverage by the new unemployment insurance law.⁷⁷ On the international scene, the union has achieved significant recognition; its General Secretary was both elected to be the first chairperson of the International Domestic Workers Network and a leading proponent

⁷⁴ See Domestic Work, *Draft Discussion Paper*, Cosatu Gender Conference (2012) at para 2.3.

⁷⁵ Shireen Ally, *From Servants to Workers: South African Domestic Workers and the Democratic State* (2009) 85-93.

⁷⁶ *Id.*

⁷⁷ Cosatu Gender Conference, *supra* note 78 at para 2.3.

of the ILO Convention 189 on Domestic Work, adopted in June 2011.⁷⁸ Despite this international acclaim, in March 2011, SADSAWU received notification from the Registrar of Labour Relations of their intention to cancel its registration as a trade union, for failure to comply with the requirements of the Labour Relations Act.⁷⁹

Studies show that currently, only 4 to 5% of domestic workers are unionized,⁸⁰ and 32.3% are aware the union exists.⁸¹ SADSAWU possesses 25,000 registered members.⁸² Of these, only 10,500 pay dues.⁸³ Because of such low membership, the union has little funds and is unable to provide extensive support services.⁸⁴ For example, in Johannesburg, there is only one fulltime organizer. This shortage of funds also means that it was almost impossible for SADSAWU to pay for basic transportation required to enable them to recruit in further out regions.⁸⁵

Low membership could be attributed to the realities of domestic work, where domestic workers are usually isolated from each other, lacking a common employer, thus making it difficult to organize.⁸⁶ This diminishes many benefits of unions, because the power that usually comes from collective bargaining with a select few employers may not be effective when the number of employers rivals the number of workers.⁸⁷

⁷⁸ *Id*

⁷⁹ *Id.*

⁸⁰ Social Law Project, *Enforcing the Unenforceable? FROM ENFORCEMENT TO COMPLIANCE* (2009) at 37, available at http://www.dwrp.org.za/images/stories/DWRP_Research/chapter_2.pdf (hereinafter SOCIAL LAW PROJECT, *ENFORCING THE UNENFORCEABLE*) at 33; Social Law Project, *Advancing Domestic Workers' Rights in a context of transformative constitutionalism* (2009) at 15–16, available at http://www.dwrp.org.za/images/stories/DWRP_Research/chapter_1.pdf (hereinafter social law project, *advancing workers' rights*).

⁸¹ Social Law Project, *Advancing Domestic Workers' Rights*, *supra* note 84 at 16.

⁸² Ellen Sjöberg, *Enforcement of Laws Regulating Domestic Work – A Case Study of South Africa* 36, 48 (Spring 2012)(unpublished Master thesis) available at <http://lup.lu.se/luur/download?func=downloadFile&recordId=2158754&fileId=2164686> at 41 (citing S. Ally, *From servants to workers: South African domestic workers and the democratic state* at 153); *see also* Nandi Vanqa-Mgijima, *Rural Bosses and their Domestic Workers*, 63 *WORKERS WORLD NEWS* (2011) (“There is only one trade union, SADSAWU, organising domestic workers in all three largest metropolitan areas – Cape Town, Durban and Johannesburg. There is at present nothing in the rural areas.”)

⁸³ Sjöberg, *supra* note 87 at 41 (reporting on author’s interview with the general secretary of the union and on focus group results).

⁸⁴ *Id.* at 42.

⁸⁵ Interview Engilinah Moloantoa; Also interview with Themba Khumalo, Department of Labour, Johannesburg.

⁸⁶ José Maria Ramirez-Machado, *Domestic Work, Conditions of Work and Employment: A Legal Perspective* 4 (2003), available at http://www.ilo.int/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_7.pdf.

⁸⁷ Pamhidzai Bamu, *Turning Rights into Reality: Building a Culture of Compliance with Domestic Worker Rights in South Africa* 26-27 (Jan. 19, 2012) (unpublished), available at http://dwrp.org.za/images/stories/DWRP_Research/turning_rights_into_reality_19jan2012.pdf at 42 (“It is difficult to reconcile the traditional model of trade unionism with individual employment relationships that characterize the domestic worker sector: how to effectively bargain or exercise collective power against individual employers?”); *see also* Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 39–40 (discussing the difficulties of applying the right of freedom of association to domestic workers); Social Law Project, *Organising for Empowerment: New Forms of Organising and Empowering Domestic Workers* 94–96 (2009), available at http://www.dwrp.org.za/images/stories/DWRP_Research/chapter_4.pdf chapter_4 (same).

In interviews with SADSAWU members in Johannesburg, they were adamant that fear of dismissal was the most significant reason for low union density.⁸⁸ However, this does not adequately explain why union membership was so high in the 1980s, during the height of Apartheid repression. Other governmental interviewees commented that even in the situation when domestic workers were included in road shows of the Department of Labour and had access to domestic workers to recruit, they failed to successfully recruit new domestic workers to their union.⁸⁹

SADSAWU members also stated that when they are consulted by a domestic worker, they will sometimes call the employer, in order to try and mediate the matter over the phone.⁹⁰ If the matter involves unemployment insurance, they refer the matter to the Department of Labour; while if it is a case of unfair dismissal, they will give the domestic worker a copy of the CCMA application.⁹¹ Presumably since they are no longer a registered union, they do not have the ability to accompany or represent the domestic worker in the CCMA.

Farm workers face similar challenges to their unionization, as they are one of the most poorly organized sectors, with union density estimated as 3%.⁹² Although in past union organizers sometimes joined labor inspectors going to farms, the Department of Labour agreed to prohibit this practice due to farmer's protestations.⁹³ We were told of many cases of union organizers being threatened or intimidated, and that farmers sometimes establish workers committees to address problems between farm workers and employers, in order to circumvent unions.⁹⁴ According to Ntokoza Nzimande, from Nkuzi Development Trust, farm workers fear reprisals because most farms employ few workers and the majority of evictions occur because farmers hire illegal immigrants.⁹⁵

4.2. Wages and Collective Bargaining

At the outset, in terms of the subject matter of the Sectoral Determinations, we were told in our interviews that the reason that Sectoral Determination 7 did not cover domestic workers on farms was because that worker does not engage exclusively in domestic work, but instead works seasonally on the farm as well. Further, her rights to reside on the farm in all likelihood rest on the rights of a male head of household.⁹⁶ In other words, the domestic worker on the farm is often an informal worker, and her biggest threat is of being evicted.⁹⁷ The difference in wages

⁸⁸ Interview with Eunice Dhladla, at SADSAWU offices, October 2012.

⁸⁹ Interview Themba Khumalo, Department of Labour, Johannesburg, 10 December 2012.

⁹⁰ Interview with Eunice Dhladla at SADSAWU offices, October 2012.

⁹¹ *Id.*

⁹² Human Rights Watch, *Ripe with Abuse: Human Rights Conditions in South Africa's Fruit and Wine Industries*, August 2011 at 72.

⁹³ *Id.*

⁹⁴ *Id.* at 73.

⁹⁵ Interview Ntokoza Nzimande, from Nkuzi Development Trust, 13 December 2012.

⁹⁶ *Id.*

⁹⁷ *Id.*

for domestic workers (urban areas) and those on farms was thought unjustified because the work of a domestic worker on a farm is more difficult than that in an urban area, as there is more dust, farm houses are generally larger, and domestic workers on farms work more with their hands and less with machines.⁹⁸

While the Sectoral Determination was put in place to ensure minimum standards in a sector lacking organization, on the ground we heard that domestic workers sought a “living wage,” not a sectoral determination. The critique was that the minimum wage is arbitrary and then unenforced as well.⁹⁹ The methodology of determining minimum wage was similarly criticized in that two geographic areas can be right alongside each other, with almost no variance in socio-economic conditions, but yet have different minimum wages.¹⁰⁰ There was also the flip side to minimum wage law, where employers who were paying more than the minimum wage would lower wages after reading the Department of Labour publication on Domestic Worker Rights and the minimum wage regulation in it.¹⁰¹ One interviewee referred to this as a critical problem of treating minimum wage as the maximum wage.¹⁰²

Although the inclusion of domestic workers in the system of unemployment insurance (UIF) is one of the most significant components of the law reform, there was the critique that even if employers register the domestic workers with the UIF, they do not follow up with monthly payments. Further, with undocumented migrant domestic workers, there is no possibility of registering or obtaining UIF. This means that the migrant domestic workers are totally outside of any scheme of social protection. Yet, even in the situation where the employer does pay UIF, in the event of unemployment, the domestic worker has 6 months to apply for UIF. In addition, in the event that the domestic worker had used UIF to cover salary loss during pregnancy, the benefits available to her are proportionately reduced.¹⁰³

Similarly, there is little compliance with minimum wage law on farms, and most farmworkers do not receive contracts of employment.¹⁰⁴ Women working on farms as domestic workers and/or general farm workers, suffer unique forms of discrimination, since they earn less than their male farmworkers, are likely to be dismissed upon pregnancy, and are less likely to have their own independent residence rights on farms.¹⁰⁵ This exacerbates their dependence on their husbands,

⁹⁸ Interview Engelina Moloantoa, Domestic Worker and SADSAWU member, 22 December 2012 (migrant worker from Lesotho).

⁹⁹ *Id.*

¹⁰⁰ Telephone Interview Sonto Shelle, Eastern Cape Agricultural Research Project, December 2012.

¹⁰¹ Interview Engelina Moloantoa, *supra* note 103. She described the publication as being a “voice” for domestic workers and referred to instances where SADSAWU members had given the publication to their employers, and through this, were able to negotiate better wages and conditions of work.

¹⁰² Interview Sonto Shelle, *Supra* note 105.

¹⁰³ Interview Thokozile Maisa, domestic worker and SADSAWU member, 13 December 2012.

¹⁰⁴ Interview with Ntokozi Nzimande, *Supra* note 100.

¹⁰⁵ Interview with Ntokozi Nzimande, *supra* note 100; also Sonto Shelle, *supra* note 105; *see also* Human Rights Watch, Ripe with Abuse: Human Rights Conditions in South Africa’s Fruit and Wine Industries, August 2011 at 29.

and despite very high rates of domestic violence on farms, women elect to stay on farms because they have nowhere to go.¹⁰⁶

4.3. The Socio-economic Dimension: When Your Workplace is Your Home

Yet, an approach that focuses exclusively on traditional labor categories, such as minimum wage and collective bargaining, often overlooks the importance of socio-economic factors, such as housing, to domestic workers. This is particularly true for those who live on their employers' premises, whose home and workplace are the same. And because domestic workers earn amongst the lowest pay in the formalized work sector, they often do not earn enough to pay for more than food and occasional clothing.¹⁰⁷ Though these dire socio-economic conditions are common to both domestic workers on farms and those in urban houses, the two groups experience and construct the workplace/home dichotomy in different ways.

For the domestic worker working in urban areas, the "backyard" room is more often than not associated with exploitation, rather than refuge. Perhaps this is because domestic workers work more overtime (sometimes working over 60 hours per week when living on their employers' premises),¹⁰⁸ and often such overtime "work" is invisible (e.g., "just finish washing dishes after dinner"). Similarly, we heard that domestic workers who live-in were less likely to join a union because they were more fearful, isolated and also more vulnerable than those who live-out. More than once we heard that the "backroom should be abolished."¹⁰⁹ Correspondingly, we were told that it was migrants who would accept lower wages and would be most willing to work as live-in domestic workers, since they had nowhere else to reside.¹¹⁰ One SADSAWU member, and full-time domestic worker, noted that domestic workers living in homes were not allowed to have visitors in their backrooms, and for years her granddaughter had not been allowed to visit her.¹¹¹ This suggests that the backroom is often perceived as a place of isolation and alienation from family.

In contrast, for domestic workers on farms, the threat of eviction from the farm predominates. This is because in most cases domestic workers live on farms together with their families, and many have done so for generations. The farm is the locus of work, family and often even of culture. The government has recognized this and passed specialized legislation dealing with land tenure, in the form of the Extension of Security of Tenure Act (ESTA), which regulates evictions

¹⁰⁶ *Id* Human Rights Watch, *Ripe with Abuse: Human Rights Conditions in South Africa's Fruit and Wine Industries*; SOCIAL SURVEYS AND NKUZI DEVELOPMENT ASSOCIATION, *STILL SEARCHING FOR SECURITY: THE REALITY OF FARM DWELLOR EVICTIONS IN SOUTH AFRICA* (2005) http://nkuzi.org.za/images/stories/evictions_Survey.pdf (hereinafter *STILL SEARCHING FOR SECURITY*).

¹⁰⁷ Engelinah Moloantoa, *supra* note 103.

¹⁰⁸ Themba Khumalo, *supra* note 104.

¹⁰⁹ Meeting with Eunice Dhladla, SADSAWU, October, 2012.

¹¹⁰ Engelinah Moloantoa, *supra* note 103.

¹¹¹ Thokozile Maisa, *supra* note 108. She commented that recently her grand-daughter is now permitted to visit her, but that her employer will not greet the granddaughter. She commented that "change comes slowly."

on farms. This legislation requires a court to consider, before issuing an eviction order, whether it is “just and equitable to do so”, and whether there is suitable alternate accommodation.¹¹² ESTA also contains provisions protecting family life of an occupier, including the right to receive bona fide visitors “at reasonable times and for reasonable periods,” as well as the right to a family life in accordance with the culture of that family.¹¹³ Section 6 (4) of ESTA goes as far as to grant a person the right to visit and maintain family graves on private property.¹¹⁴ We were informed that in reality farm owners use other tactics, such as cutting electricity and water, harassing farm dwellers, to putatively “evict.”

In terms of Sectoral Determination 13, when farm workers live in employer provided housing for which they have wages deducted, the farmer must ensure that the house meets the basic standards set forth in the Sectoral Determination. However, when farm workers live in employer-provided housing but do not pay in the form of a deduction, farmers are not specifically obligated to ensure that the housing meets any minimum stipulated conditions. Sectoral Determination 7 has an analogous provision regulating housing standards, similarly limited to applying only where there is a deduction.

Despite these limited protections, we were informed that even where farm workers pay rent for land, they live in mud dwellings or zinc structures and their tenure is extremely insecure.¹¹⁵ In the recently proposed amendments to ESTA, there has been a proposal to create agri-villages, situated outside farms, in order to try to find a solution to the problems of security of tenure. However, these villages have been criticized by farm workers since the agri-villages contain joint grazing land, rather than separate like occurring on a farm. Also, farm workers would have to pay for their own electricity, water and lights.¹¹⁶

While the law recognizes domestic work as work and domestic workers as workers, it has trouble conceptualizing the home as a workplace. For instance, domestic workers are excluded from claiming worker compensation benefits for on the job accidents under the Compensation for Occupational Injuries and Diseases Act (COIDA). Similarly, there is no legal provision for an employer to provide protective gear such as overalls or gloves. We heard of situations where domestic workers had injured themselves by falling from ladders or being burned by electrical appliances, yet they were not entitled to compensation from either the fund or from their employers.¹¹⁷ Also, safety concerns arise in situations where a domestic worker regularly cleaned up dog feces, washed cars or used strong chemical cleaners.¹¹⁸ Farm workers too are often exposed to pesticides without adequate safety equipment, and broadly speaking their

¹¹² Human Rights Watch Report, *Supra* note 110 at 37. Interview with Ntokozi Nzimande, *Supra* note 100.

¹¹³ Extension of Security of Tenure Act 62 of 1997 (ESTA), see Section 6.

¹¹⁴ *Id.*

¹¹⁵ Interview with Ntokoza Nzimande, *Supra* note 100.

¹¹⁶ *Id.*

¹¹⁷ Interview with Eunice Dhladla *Supra* note 114; Interview with Thokozile Maisa, *supra* note 108.

¹¹⁸ Engelina Moloantoa, *supra* note 103.

environment cannot be designated as safe if they have no access to clean drinking water or do not get sick leave.¹¹⁹

There are other dimensions to the health and safety, since working in the isolated space of a private home can render domestic workers vulnerable to abuse and sexual harassment.¹²⁰ In addition, the reality of the existing of AIDS/HIV amongst the domestic worker population in South Africa has important implications for discrimination. Some domestic workers reported that when their employers found out about their HIV positive status, they would no longer permit them to prepare food or cook, or even feed the family.¹²¹ Yet, we also heard that the only forum where there was dialogue between domestic workers and their employers, in absence of collective bargaining in the sector, was in discussions around AIDS/HIV and domestic work.¹²²

How do both Sectoral Determinations deal with “end” of work and/or old age? A domestic worker can be dismissed under Sectoral Determination 7 upon one months’ notice if she has been employed for over 6 months. The consequence of this for a live-in domestic worker is she must vacate the employers’ premises within one month. Although there have been attempts to create a voluntary domestic worker pension, very few domestic workers have them, and most find themselves in a crisis situation at the end of their employment. One SADSAWU member described the situation of “domestics dying in the backyard” and their children getting nothing.¹²³ Suggestions have been made to create housing co-operatives for retired domestic workers and training them in sewing and crafts.¹²⁴

When it comes to formal socio-economic protections, farm workers/dwellers fare better than domestic workers. This is because, except in limited cases, farmers cannot terminate the residence rights of persons who have lived on their land for at least ten years and either (1) reaches the age of 60 or (2) is the farmer’s employee or former employee and cannot work due to ill health, injury or disability.¹²⁵ However, when a farm worker does not satisfy that requirement and stops working on the farm, the farmer can terminate the workers’ rights of residence, thus starting the eviction process.¹²⁶ The termination must meet the requirements of the LRA and the farmer must provide notice and apply to courts for an eviction order.

¹¹⁹ Human Rights Watch Report, *supra* note 110 at 37: STILL SEARCHING FOR SECURITY *supra* note 111.

¹²⁰ Eunice Dhladla, *supra* note 114.

¹²¹ Engelina Moloantoa, *supra* note 103.

¹²² Engelina Moloantoa, *supra* note 103.

¹²³ Thokozila Maisa *supra* note 108.

¹²⁴ See SANGO.

¹²⁵ See Extension of Security of Tenure Act 62 of 1997 (ESTA).

¹²⁶ *Id.*

4.4. Institutions of Law Enforcement

4.4.1. Department of Labour

The Department of Labour enforces labor laws through “blitz” inspections, which are random inspections within a geographic area. According to the Department of Labour Annual Reports, in 2011 to 2012 the Department inspected the workplaces of 1,913 domestic workers in 2 areas.¹²⁷ In 2010 to 2011 that number was 4,931 in 9 areas.¹²⁸

In conducting these inspections, the department faces legal, practical and sociological obstacles. Legally, the employer’s right to privacy fetters the labor department’s right to inspect homes. Practically, given that there are 800 inspectors in total, the department just cannot inspect 800,000 households.¹²⁹ Sociologically, even if these inspections did occur, it’s not clear if domestic workers would expose their employers’ violations.

A domestic worker’s workplace is the home. Homes, unlike other workplaces, have more restrictive rules for conducting labor inspections.¹³⁰ Namely, an inspection requires either (1) the homeowner or occupier’s consent or (2) the Labour Court authorizing the inspection in writing.¹³¹ Such an authorization requires that a labor inspector state, under oath, “the reasons for the need to enter a place in order to monitor or enforce compliance with any employment law.”¹³² In a random inspection with no or minimal knowledge of any ongoing violations, obtaining this authorization is unlikely.¹³³ Thus, no consent usually means no inspection.¹³⁴

¹²⁷ Dep’t of Labour, Annual Report of the Department of Labour: 1 April 2011 – 31 March 2012 41 (2012), available at <https://www.labour.gov.za/downloads/documents/annual-reports/departamental-annual-reports/2012/pfma2012.pdf>.

¹²⁸ Dep’t of Labour, Annual Report of the Department of Labour: 1 April 2010 – 31 March 2012 42 (2012), available at https://www.labour.gov.za/downloads/documents/annual-reports/departamental-annual-reports/2011/PFMA%20Report_2011part2.pdf.

¹²⁹ Interview Themba Khumalo, Department of Labour, *supra* note 104.

¹³⁰ See Basic Conditions for Employment Act §§ 65(2) (S. Afr.), available at <https://www.labour.gov.za/legislation/acts/basic-conditions-of-employment/read-online/amended-basic-conditions-of-employment-act>. The reason for the difference is different constitutional rights analyses. See Sjöberg, *supra* note 87 at 34. Though domestic workers still have a constitutional right to fair labor, their employers—who are home owners or occupiers—have a constitutional right not present in other workplaces: a constitutional right to privacy. Constitution of the Republic of South Africa arts. 13–14, 23; see also Sjöberg, *supra* note 87 at 47 (discussing how the corresponding privacy rights in human rights treaties produces the same effect limiting inspections).

¹³¹ Basic Conditions for Employment Act, *supra* note 130, at §§ 65(2)–(3).

¹³² *Id.* at 65(3). Even if this requirement is satisfied, the Labour Court is not obligated to authorize the inspection. *Id.* (stating that “The Labour Court *may* issue an authorisation”) (emphasis added); see also Sjöberg, *supra* note 87 at 45 (“Labour Courts will only authorize entry to private homes if the inspector has good reasons to suspect that a specific household is in breach with labour legislation on the issue.”).

¹³³ Sjöberg, *supra* note 87 at 48 (“It is unlikely that a labour inspector will be able to show such reasons when conducting inspections in randomly chosen households.”); Social Law Project, Enforcing the Unenforceable, *supra* note 84 at 36 (“The effect is that, without the owner’s permission, an inspector will be unable to conduct an urgent inspection—even though it is public knowledge that these places are the scenes of startling numbers of labour law violations.”).

In meeting with the Department of Labour, they reported that in terms of Section 69 of the BCEA, they have a four stage enforcement procedure, revolving around the issuing of various levels of compliance order to an employer. If there is still no compliance after 7 days, the employer has a further fourteen days to comply. After 21 days of non-compliance, the matter goes to the Labour Court. However, it could take up to 3 years before the matter is heard there.¹³⁵ One interviewee thought that the answer to this cumbersome procedure was that labor inspectors should have powers similar to traffic officers, who are able to impose “spot fines.”¹³⁶

Labor inspectors do, however, have an alternative to seeking consent or a court order. They can summon employers or domestic workers to a location outside the home and then conduct their inspection at that location.¹³⁷ It is unclear how often labor inspectors employ this option.¹³⁸ Practically, the capacity for inspections is limited, as the Department of Labour cannot commit the resources to credibly inspect the estimated 800,000 households employing domestic workers.¹³⁹ In addition to the sheer quantity, several constraints make it difficult to even inspect the houses selected for inspection.¹⁴⁰ Because relatively few houses can be inspected and domestic workers are often isolated from each other, many domestic workers do not even know such inspections occur.¹⁴¹ Lack of awareness makes investigations inadequate as a primary

¹³⁴ According to a staff member at the Western Cape Department of Labour Inspectorate, labor inspectors rarely seek court authorization, reserving it for the most egregious violations of labor rights. Sjöberg, *supra* note 87 at 34 (reporting on author’s interview with Anthony Rudman of the Western Cape Department of Labour Inspectorate).

¹³⁵ Interview Themba Khumalo, *supra* note 104.

¹³⁶ *Id.*

¹³⁷ Sjöberg, *supra* note 87 at 35; *see* Basic Conditions for Employment Act, *supra* note 130, at § 66(1)

¹³⁸ *See* Sjöberg, *supra* note 87 at 35 (stating that inspectors in the Western Cape “sometimes” employ this option).

¹³⁹ Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 34–35; *see also* Statistics South Africa, *Quarterly Labour Force Survey: Quarter 2, 2012 xi* (2012), *available at* <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2012.pdf> (finding that there are 913,000 domestic workers employed in South Africa). Such a task would “require approximately [2,200] inspectors working full-time on this task alone—that is, well over double the total number of inspectors employed by the Department—over and above the larger responsibilities of the Department in monitoring other sectors of the economy where the vast majority of workers are employed.”); Sjöberg, *supra* note 87 at 36.

¹⁴⁰ Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 31–32. This list of constraints include: “Employers are predominantly not available during the day time; [l]ack of communication from the Unemployment Insurance Commissioner’s office to employers; [o]n night inspections the domestic employees are not available; [d]omestic employees were scared to allow the inspector to access the household; [t]he list of employer details as previously provided from SIYAYA69 was outdated and the majority of employers did not employ anyone, although the system still showed an active employer status[:]; . . . [r]esponses to calling cards were less than expected as very few employers have fax facilities at their homes, which necessitated knock-knocks (i.e. inspectors moving from one house to the next); [m]ost employers request . . . postponement of inspections; [m]ost of the employers did not respond to the calling cards, because the domestic worker is only working once a week for a few hours; [n]ot having an updated database for employers in the Domestic Worker Sector; [e]mployers rescheduling appointments on the last minute; [n]ot having access to the premises; [and] [l]ack of employers responding to calling cards.” *Id.* at 31–32.

¹⁴¹ *Id.* at 35; Sjöberg, *supra* note 87 at 36–37, 48; *see also* Debbie Budlender, Cmty. Agency for Social Enquiry, *Decent Work for Domestic Workers* 54–55 (2010), *available at* <http://www.case.org.za/~caseorg/images/docs/domestic%20workers.pdf>.

means for promoting compliance with labor laws.¹⁴² This was confirmed in meetings with members of SADSWAU, who reported that in their experience, the Department of Labour failed to send out inspectors when complaints are lodged. In fact, most interviewees did not know personally of any incident where an inspector had inspected a home.¹⁴³ Others were of the opinion that there was corruption in the department.¹⁴⁴

Finally, labor inspectors face a sociological obstacle. Even if they could inspect every workplace, domestic workers may be, and some have been, reluctant to expose violations “for fear of losing their jobs . . .”¹⁴⁵ This same reluctance extends to reporting violations to the Department of Labour.¹⁴⁶ The department’s procedure for an inspection brings both the employer and employee together and inspector checks averments and responses. SADSWAU informed us that domestic workers were submissive in front of their employers, but would come around to the inspectors after the meeting, stating that the employer was not telling the truth and was in fact violating labor laws.¹⁴⁷

With respect to inspections on farms, while labor inspectors have the authority, under BCEA, art. 65, to enter farms without an appointment in order to monitor and enforce compliance with employment legislation, inspectors do not automatically have the right to enter homes on farms. That is, the farm itself generally is not considered a home for purposes of legislation. In practice, however, there is an agreement between the Department of Labour, Agri South Africa (the main farmers association) and other parties that requires labor inspectors to give farmers prior notice of inspections.¹⁴⁸ Clearly this undermines their ability to identify violations.¹⁴⁹

In an interview with Nkuzi Land Development Trust, we were advised that inspectors and the Department of Labour are often bribed and are a “waste of time.” And when the union comes, the farm owner closes the water supplies in order to intimidate the workers and locks the gates.¹⁵⁰ A similar sentiment was expressed in an interview at the Johannesburg CCMA, where we were told that when the labor inspectors come to the farms, the farm owners “send the dogs

¹⁴² Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 35; Sjöberg, *supra* note 87 at 36–37, 48; *see also* Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 33 (noting that inspections are likely to promote compliance when they can be carried out, but questioning the ability to actually carry them out). That said, inspections still are important for responding to complaints of violations. Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 35.

¹⁴³ Thokosila Maisa *supra* note 108.

¹⁴⁴ Engelinah Molontoa, *supra* note 103.

¹⁴⁵ Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 37 (“The very imbalance in the power relationship between domestic workers and their employers, which places the worker at risk in the first place, may also inhibit the worker from taking action to combat such abuse.”); *see also* Sjöberg, *supra* note 87, at 35–36, 48–49 (citing author’s interview with Anthony Rudman of the Western Cape Department of Labour Inspectorate).

¹⁴⁶ Sjöberg, *supra* note 87 at 35–36, 48–49 (citing author’s interview with Anthony Rudman of the Western Cape Department of Labour Inspectorate); *see also* Budlender, *supra* note 149, at 55–56.

¹⁴⁷ Interview Eunice Dhladla, *supra* note 114.

¹⁴⁸ Human Rights Watch Report, *Ripe with Abuse* at 12 and 81.

¹⁴⁹ *Id.*

¹⁵⁰ Ntokozi Nzimandi, *supra* note 100.

out,” and the inspectors have no choice but to leave.¹⁵¹ Some interviewees commented that in their experience, when an inspector did arrive to inspect a farm, he/she does not interview the workers or the union, but only the employer.¹⁵² Similar to domestic worker “blitzes” in urban areas, there is no high profile public report that comes in the wake of a farm blitz.

4.4.2. Commission on Conciliation, Mediation and Arbitration & Labour Court

Domestic workers have two tribunals to seek redress for violations of their labor rights: the CCMA and the Labour Court. The CCMA is the largest dispute mediation forum in the world, and though limited in jurisdiction, it is often used by domestic workers.¹⁵³ The Labour Court possesses expansive jurisdiction, but is rarely used by domestic workers.

The Labour Court’s jurisdiction includes disputes arising under the Labour Relations Act and the Basic Conditions of Employment Act, including Sectoral Determination 7.¹⁵⁴ The CCMA’s jurisdiction, contrastingly, is limited to disputes arising under the Labour Relations Act and deals largely with issues of unfair treatment and unfair dismissal.¹⁵⁵ It can only hear disputes arising under Sectoral Determination 7 if it is incidental to a dispute arising under the Labour Relations Act, such as unfair dismissal.¹⁵⁶ Yet the CCMA also has a wider education mandate and utilizes radio (it has five radio slots a week dealing with the Rights of Workers) and road shows to ensure that workers are informed of their rights under the law.¹⁵⁷

As for the success of these tribunals, many domestic workers use the CCMA. From a numerical standpoint, the percentage of domestic work disputes referred to the Commission is greater than the percentage of domestic workers employed in South Africa, thus “indicat[ing] . . . a high level of awareness of employment rights amongst domestic workers”¹⁵⁸ In addition, from a

¹⁵¹ Meeting with Commissioners Mduduzi Khumalo and Shawn Christansen at CCMA Johannesburg, December 2012.

¹⁵² Ntokozi Nzimande, *supra* note 100.

¹⁵³ Meeting with Commissioners of Johannesburg CCMA *supra* note 156.

¹⁵⁴ Basic Conditions for Employment Act, *supra* note 130, at § 77 (granting jurisdiction for violations of the BCEA to the Labour Court); Labour Relations Act § 157 (S. Afr.), *available at* <https://www.labour.gov.za/legislation/acts/labour-relations/read-online/amended-labour-relations-act> (establishing jurisdiction of the Labour Court).

¹⁵⁵ Labour Relations Act, *supra* note 154, at § 115; *see also* Bamu, *supra* note 92 at 42 (stating that jurisdiction of the Commission “is limited to [Labour Relations Act] disputes, notably dismissal and unfair labour practices”); S. Afr. Labour Guide, Get the Power of the CCMA Behind You, <http://www.labourguide.co.za/ccma-information/get-the-power-of-the-ccma-behind-you-364> (last visited Oct. 27, 2012) (discussing jurisdiction of the Commission as limited to violations of the Labour Relations Act).

¹⁵⁶ Bamu, *supra* note 92 at 42.

¹⁵⁷ Interview with Commissioners of Johannesburg CCMA.

¹⁵⁸ Macun et al., An Analysis of Commission for Conciliation Mediation and Arbitration Awards 14 (2008)

(unpublished paper), *available at*

<http://dspace.cigilibrary.org/jspui/bitstream/123456789/25149/1/An%20Analysis%20of%20Commission%20for%20Conciliation%20Mediation%20and%20Arbitration%20Awards.pdf?1> (“While employers in private household (domestic workers) constitute 8.7 percent of the work force (1 087 000) workers, they constitute 12.1 percent of referrals.”). In 2011, domestic workers constituted 9% of the referrals. Commission for Conciliation, Mediation &

substantive standpoint, domestic workers were often successful.¹⁵⁹ This, according to those working in domestic worker placement agencies, has “instilled fear among[st] employers of being taken to the Commission.”¹⁶⁰

In meetings with the Johannesburg provincial branch of the CCMA in December 2012, commissioners were of the opinion that their domestic worker case load had decreased in the previous months (where they used to hear between 50 and 70 cases a week, now they only hear 20 cases a week).¹⁶¹ They observed that migrant workers, particularly Zimbabweans, were more assertive and sophisticated in using the CCMA, since many were educated professionals in Zimbabwe but were domestic workers in South Africa.¹⁶² In this scenario, where the domestic worker in question was an undocumented worker, the CCMA would award compensation for unfair dismissal, but could not award reinstatement.¹⁶³

In contrast, domestic workers rarely use the Labour Courts.¹⁶⁴ This is primarily because most disputes are resolved by the more informal CCMA.¹⁶⁵ Labour Courts, with their more formal proceedings, frequently are prohibitively expensive for domestic workers, who often lack free or low cost assistance from a union or other legal aid program.¹⁶⁶

Some have considered expanding the CCMA’s jurisdiction to include violations of Sectoral Determination 7, in an effort to parlay the CCMA’s success as a dispute mechanism to other areas affecting domestic workers.¹⁶⁷ But it is not clear if this would be successful.¹⁶⁸ Currently, 81% of the CCMA’s disputes regard unfair dismissals.¹⁶⁹ Its success may be due not only to its accessibility, but also to the fact that its disputes occur after the employment relationship has ended, when the domestic worker has nothing to lose.¹⁷⁰ During employment, however, domestic workers may be “reluctant to challenge their employers,”¹⁷¹ just as many are reluctant to report violations.¹⁷²

Arbitration, Annual Report: 2010–2011 19 (2011), *available at* <http://www.ccma.org.za/UploadedMedia/CCMA%20Annual%20Report%202010-2011.pdf>.

¹⁵⁹ Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 41.

¹⁶⁰ Sjöberg, *supra* note 87 at 39–40 (reporting on author’s interviews with the owner of the company Marvelous Maids and others).

¹⁶¹ Meeting with Commissioners of CCMA Johannesburg.

¹⁶² *Id.*

¹⁶³ *Id.* Although it is illegal to employ someone unlawfully in South Africa, which carries a penalty of R6000.00, this fine is rarely enforced.

¹⁶⁴ *Id.* at 43 (reporting on interview with Labour Court judge).

¹⁶⁵ *Id.* at 43, 49.

¹⁶⁶ *Id.* at 44, 49–50.

¹⁶⁷ *See id.* at 50.

¹⁶⁸ *Id.* at 50.

¹⁶⁹ Commission for Conciliation, Mediation & Arbitration,, *supra* note 158, at 18.

¹⁷⁰ Sjöberg, *supra* note 87 at 50; Social Law Project, *Enforcing the Unenforceable*, *supra* note 84 at 41–42.

¹⁷¹ Social Law Project, *Enforcing the Unenforceable*, *supra* note 87 at 41–42; Sjöberg, *supra* note 87, at 50.

¹⁷² *See* notes 145–146, *supra*, and accompanying main text.

5. HOW WOULD RATIFYING ILO CONVENTION 189 ON DOMESTIC WORK HELP?

This section examines the gaps in South Africa's system of regulation and questions what is to be gained by ratification of ILO Convention 189. The ILO, through much of its history, passed a series of sector-specific conventions that created a sort of "cafeteria system" where member states could ratify protections for their preferred sectors without improving the baseline standards of all workers.¹⁷³ This changed after the ILO pressed for ratification of its "core conventions" and passed its Declaration on Fundamental Rights at Work, and it has largely abandoned the sectoral approach.¹⁷⁴ The Domestic Workers Convention is a notable exception to this abandonment, as it focuses on a sector that has not previously received its own ILO Convention. The ILO's reason for this exception to its shift away from sectoral conventions is that domestic work is unique, and uniquely neglected.

In this section, we examine the changes South Africa would need to make in order to harmonize its law with the ILO Domestic Workers Convention, paying special attention to the ILO's Recommendation 201. This section will look at (a) wages and collective bargaining; (b) socio-economic rights and (c) institutions of law enforcement. It will argue that while South Africa largely complies with, and in many respects exceeds certain provisions of the Convention, the effect of ratification would strengthen institutions of enforcement and close the conceptual gaps in the legislative scheme, particularly so with socio-economic rights such as housing and social security.

As an initial matter, since the ILO Domestic Workers Convention makes no distinctions between domestic workers in urban areas and on farms, ratification of it could have significant effect on South Africa's current distinction between domestic workers falling under the rubric of Sectoral Determination 7 and those falling under Sectoral Determination 13. However, the Convention limits its application to full time workers, and to the extent that a domestic worker on the farm is not a full time worker, she would not benefit from ratification of the Domestic Workers Convention.

5.1. Comparing the ILO Domestic Workers Convention with South Africa

South Africa already satisfies, and even exceeds many of the ILO Domestic Workers Convention's requirements. This section lists areas where this is so.

The Convention requires that an employer pay the employee's wages at least monthly,¹⁷⁵ and Sectoral Determination 7 has an equivalent provision.¹⁷⁶ The Convention requires ensuring that

¹⁷³ Lawrence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 Vand. L. Rev. 649, 708-11 (2006).

¹⁷⁴ *Id.* at 706-11.

¹⁷⁵ Domestic Workers Convention arts. 11-12.

¹⁷⁶ Sectoral Determination 7 §§ 2, 5.

domestic workers have a minimum weekly rest period of 24 consecutive hours;¹⁷⁷ Sectoral Determination 7 has an equivalent requirement, but instead mandates a rest period of 36 consecutive hours.¹⁷⁸

The Convention requires “set[ting] a minimum age for domestic workers consistent with the provisions of the Minimum Age Convention” and also requires that work does not deprive workers under 18 of compulsory education;¹⁷⁹ Sectoral Determination 7 already sets a minimum age consistent with the convention and forbids employing children who are “under the minimum school leaving age in terms of any law” or whose education would be placed at risk from the employment.¹⁸⁰

The Convention requires taking measures to eliminate forced labour;¹⁸¹ South African law already takes these measures both in its domestic law—Determination 7¹⁸² and its constitution¹⁸³—and in its international obligations.¹⁸⁴

The Domestic Workers Convention requires establishing a minimum wage for domestic workers,¹⁸⁵ but sporadic workers are exempt from this requirement.¹⁸⁶ Sectoral Determination 7 establishes a minimum wage for all domestic workers, including sporadic ones, but they are excluded from full protection of the law.¹⁸⁷ Similarly, the Convention requires informing domestic workers of certain terms of their employment, preferably in writing.¹⁸⁸ Consequently, if the worker is a migrant worker recruited from a foreign country to work in the home country, the Convention requires that the worker receive a written contract of employment enforceable in the home country.¹⁸⁹ Sectoral Determination 7 already requires providing all workers, including migrant workers,¹⁹⁰ with a written document including the same—and even more—terms than

¹⁷⁷ Domestic Workers Convention, art. 10(2) (“Weekly rest shall be at least 24 consecutive hours.”).

¹⁷⁸ Sectoral Determination 7 § 16(1)(b) (“An employer must grant a domestic worker . . . [a] weekly rest period of at least 36 consecutive hours which, unless otherwise agreed, must include a Sunday.”).

¹⁷⁹ Domestic Workers Convention arts. 3(c), 4.

¹⁸⁰ See Sectoral Determination 7 §§ 23(1)–(2) (setting the minimum working age at 15 years old); see also Minimum Age Convention arts. 2(3)–(4), June 6, 1973, available at <http://www.unhcr.org/refworld/docid/421216a34.html> (stating that the minimum working age in sufficiently developed countries is 15 years old).

¹⁸¹ Domestic Workers Convention art. 3(b).

¹⁸² Sectoral Determination 7, § 23 (“[A]ll forced labour is prohibited.”)

¹⁸³ Constitution of South Africa art. 13 (“No one may be subjected to slavery, servitude or forced labour.”).

¹⁸⁴ Forced Labour Convention, June 28, 1930; see also Ratifications of ILO Conventions: Ratifications for South Africa, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888 (last visited Oct. 11, 2012) (detailing South Africa’s ratification of the above convention).

¹⁸⁵ Domestic Workers Convention art. 11.

¹⁸⁶ *Id.* art. 1(c) (stating that the Convention does not apply to domestic workers who “work only occasionally or sporadically and not on an operational basis”).

¹⁸⁷ Sectoral Determination 7 § 1(4) (stating that for “domestic workers who work less than 24 hours per month for an employer” “only clauses 2 and 3 setting minimum wages apply”); see also *id.* §§ 2–3 (establishing minimum wage regulations for domestic workers).

¹⁸⁸ Domestic Workers Convention art. 7.

¹⁸⁹ *Id.* art. 8.

¹⁹⁰ See *infra* notes 255–256 and accompanying main text (detailing how “Determination 7 applies equally to all domestic workers, irrespective of citizenship”).

required by the Convention.¹⁹¹ The provision does not explicitly state that the document is an enforceable contract, instead describing it as “written particulars,”¹⁹² but the ILO recognized it as a contract in its report on domestic workers.¹⁹³ Perhaps, complying with the Convention would require clarifying that these documents are enforceable contracts for migrant workers.

The Convention requires ensuring domestic workers a right to collective bargaining and the freedom of association.¹⁹⁴ South Africa already ensures these through its Constitution,¹⁹⁵ international treaty obligations,¹⁹⁶ and the Labour Relations Act.¹⁹⁷ Yet, Article 2 of the Recommendation suggests that governments should go further and identify obstacles hindering domestic worker organizing and eliminate those obstacles.¹⁹⁸

The Convention requires taking measures to eliminate discrimination.¹⁹⁹ South African law already takes such measures. Sectoral Determination 7 applies equally to both sexes, with the exception of maternity leave.²⁰⁰ Outside Determination 7, other South African domestic laws explicitly prohibit discrimination in any employment practice, including of domestic workers.²⁰¹

¹⁹¹ Sectoral Determination 7 § 9.

¹⁹² *Id.*

¹⁹³ See International Labour Conference, 99th Session, 2010 *Decent Work for Domestic Workers*(2010) at 36–37, available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf [hereinafter ILO Report on Domestic Workers] (discussing this South African provision in a section titled “Contract of employment” and describing it as “ensur[ing] clarity of contractual terms”).

¹⁹⁴ Domestic Workers Convention art. 3(2)(a).

¹⁹⁵ Constitution of South Africa arts. 18, 23(2).

¹⁹⁶ International Covenant on Civil and Political Rights art. 22, Dec. 19, 1966, 999 U.N.T.S 171 (“Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”); see generally Freedom of Association and Protection of the Right to Organise Convention, June 17, 1948; Right to Organise and Collective Bargaining Convention, June 8, 1949; see also Ratifications of ILO Conventions, *supra* note 184 (detailing South Africa’s ratification of the above two conventions).

¹⁹⁷ Labour Relations Act § 4, chs. 3, 6 (S. Afr.), available at <https://www.labour.gov.za/legislation/acts/labour-relations/read-online/amended-labour-relations-act> (guaranteeing freedom of association and providing extensive regulations on collective bargaining and unions).

¹⁹⁸ Domestic Workers Recommendation, No. 201, 2011, Article 2, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REC,en,R201,/Document.

¹⁹⁹ Domestic Workers Convention, *supra* note 246, arts. 3(2)(d), 12.

²⁰⁰ See generally Sectoral Determination 7, *supra* note 244; see also *id.* §§ 1–2 (not distinguishing applicability or wage levels based on sex); *id.* § 22 (regulating maternity leave available to domestic workers).

²⁰¹ Employment Equity Act § 6 (1998) (S. Afr.), available at <https://www.labour.gov.za/downloads/legislation/acts/employment-equity/Act - Employment Equity.pdf>; see also *id.* § (1) (defining “employee” and “employment” to mean any person who: (i) “works for another . . . [and] is entitled to receive . . . remuneration” and (ii) “conduct[s] the business of the employer”); *id.* ch. 2 (“Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.”); Human Rights Watch, *Ripe with Abuse: Human Rights Conditions in South Africa’s Fruit and Wine Industries* 43 (2011), available at <http://www.hrw.org/sites/default/files/reports/safarm0811webwcover.pdf> (stating that the Act “prohibits employers and others from discriminating against employees, in either practice or policy, on a number of grounds, including

5.2. Strengthening the Institutions

The ILO Domestic Workers Convention requires that domestic workers have access to dispute resolution mechanisms.²⁰² South Africa already has such a system, comprising the CCMA and the Labour Court.²⁰³ The ILO has even hailed the Commission in particular as “innovat[ive] . . .”²⁰⁴ It further noted that “for the years 2003–05 . . . domestic workers constituted 8.7 per cent of the work force, . . . [but] accounted for 12.1 per cent of the referrals to the [Commission].”²⁰⁵ Despite the ILO’s praise, at least one group has criticized this dispute mechanism as ineffective for domestic workers, on the grounds that they are “seldom in a position to launch formal proceedings against their employers.”²⁰⁶ The ILO Recommendation mentions a series of tools that states should implement for domestic workers, such as a telephone hotline, pre-placement inspections of households, and emergency housing, but South Africa provides none of those programs.²⁰⁷

The Convention requires establishing enforcement mechanisms and penalties generally.²⁰⁸ South Africa establishes such mechanisms and penalties in the Basic Conditions for Employment Act and the Labour Relations Act.²⁰⁹ As for enforcement mechanisms in practice, the number of inspectors has been steadily rising, as have the number of inspections.²¹⁰ In 2006, there were 1,012 inspectors, with an additional 145 inspector positions waiting to be filled.²¹¹ At this time the Department of Labour called for “strengthen[ing] the implementation, enforcement and

race, gender, sex, pregnancy, marital status, and ethnic or social origin”). South Africa’s constitution also prohibits discrimination. Constitution of South Africa art. 9.

Prohibited discrimination includes discrimination against “race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.” Employment Equity Act, *supra*, § 6.

²⁰² Domestic Workers Convention arts. 16, 17(1).

²⁰³ See Labour Relations Act, *supra* note 197, ch. 7 (establishing and regulating three dispute mechanisms: the Commission for Conciliation, Mediation and Arbitration, the Labour Court, and Labour Appeal Court)

²⁰⁴ ILO Report on Domestic Workers, *supra* note 193, at 75.

²⁰⁵ *Id.*

²⁰⁶ Solidar, Domestic Workers: Decent Work for All — South Africa 13, available at http://www.solidar.org/IMG/pdf/b6_2010_sadsawuresearchpaper-decentworkforall.pdf.

²⁰⁷ Domestic Workers Recommendation, Article 21; Huysamen, *supra* note 3, at 25.

²⁰⁸ Domestic Workers Convention art. 17(2).

²⁰⁹ Basic Conditions for Employment Act ch.10, § 93; Labour Relations Act ch. 7 (establishing and regulating three dispute mechanisms: the Commission for Conciliation, Mediation and Arbitration, the Labour Court, and Labour Appeal Court); see also *id.* § 3(1) (stating that the Act applies to “all employees and employers except” unpaid volunteers for a charitable organization and a select class of employees that does not include domestic workers); Budlender, *supra* note 149, at 52 (“Contraventions of the [Basic Conditions of Employment Act] and determination can be reported to the Department but it is primarily the Labour Relations Act that provides for dispute resolution rather than the [Basic Conditions of Employment Act.]”).

²¹⁰ Solidar, *supra* note 206, at 9 (“Since 2005 the inspectorate of the Department of Labour has increased its inspections of employers of domestic workers, conducting numerous—‘blitz’ campaigns in major cities.”).

²¹¹ Dep’t of Labour, Annual Report of the Department of Labour 1 April 2005 to 31 March 2006 165 (2006), available at <https://www.labour.gov.za/downloads/documents/annual-reports/departamental-annual-reports/2006/Annual%20Report%20-%20Department%20of%20Labour%202006%20-%20Part%205.pdf>

monitoring mechanisms of our legislation.”²¹² Now the number of inspectors has increased by almost half, with the number of inspectors at 1,513 and unfilled inspector positions at 138.²¹³

In 2012, the Department of Labour inspected and audited 172,300 workplaces, specifically targeting the vulnerable sectors, and “achieved [a] 74% compliance rate within 90 days of inspections.”²¹⁴ It resolved 84% of labor-related complaints within two weeks of their official receipt, compared to the prior year’s rate of 75%.²¹⁵ Despite these improving metrics, the Department of Labour still calls for further “strengthening . . . [of] compliance monitoring and enforcement structures”²¹⁶ Several studies have detailed non-compliance rates in the domestic sector.²¹⁷ Such non-compliance includes: not paying domestic workers the minimum wage;²¹⁸ not giving domestic workers sufficient, or any, paid leave;²¹⁹ not giving domestic workers written contracts;²²⁰ and not registering domestic workers with Unemployment Insurance Fund.²²¹

The Domestic Workers Convention regulates employment agencies, establishing numerous requirements.²²² These regulations require, essentially, taking measures to “provide adequate protection for and prevent abuses of domestic workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations that specify the respective obligations of the private employment agency and the household towards the domestic worker”²²³ It also requires ensuring there are sufficient enforcement mechanisms and that agency fees

²¹² *Id.* at 1.

²¹³ Dep’t of Labour, Annual Report 2012, *supra* note 135, at 202.

²¹⁴ *Id.* at 16, 40.

²¹⁵ *Id.* at 16.

²¹⁶ *Id.* at 21 (listing compliance monitoring and enforcement as the sixth of seven challenges facing the Department of Labour).

²¹⁷ See, e.g., Budlender, *supra* note 149 (reviewing Sectoral Determination 7 compliance literature and conducting focus groups on the issue). From its literature review and focus group studies, the report concluded: [M]any workers do not even enjoy the basic low level of protection that is, in theory, provided by these laws as enforcement is difficult in a situation where most workers are the only such employee in a workplace, their workplace is a private home, and the relationship between worker and employer is very unbalanced in terms of power. The situation of workers is further weakened by the fact that trade union membership and coverage is minimal.

Id. at 5.

²¹⁸ *Id.* at 13–16.

²¹⁹ In 2004, four-fifths of domestic workers were denied paid leave. *Id.* at 12, 15.

²²⁰ In 2004, over two-thirds of domestic workers lacked the legally required written contracts. *Id.* at 12, 15.

²²¹ *Id.* at 20; Solidar, *supra* note 206, at 8. The Unemployment Insurance Contribution Act applies to all employees, including domestic workers, who work at least 24 hours per week. Unemployment Insurance Contributions Act § 4 (2002) (S. Afr.), available at <https://www.labour.gov.za/legislation/acts/unemployment-insurance-fund/unemployment-insurance-contributions-act> (listing three exceptions to the Act’s scope that are generally not applicable to domestic workers). It requires employers to register these employees and contribute to the Unemployment Insurance Fund. *Id.* at §§ 5, 10.

²²² Domestic Workers Convention, *supra* note 246, art. 15.

²²³ *Id.*

are not deducted from a worker's remuneration. It also must "consider" concluding international agreements to prevent abuses of migrant laborers.²²⁴

Sectoral Determination 7 states that an employment agency qualifies as an employer when it pays the worker, and, if it is an employer, it and the homeowner are jointly and severally liable for violations of the BCEA.²²⁵ While the idea of joint and several liability of agencies and employers is not mentioned in the Convention, South Africa's law touches upon an innovative legal tool for domestic workers. Most notably, employment agencies are jointly and severally liable with their clients for violations of the following provisions: every provision in Determination 7,²²⁶ "acts of unfair discrimination" committed by the agency per the client's instructions,²²⁷ every provision in the Basic Conditions of Employment Act, "a collective agreement concluded in a bargaining council that regulates terms and conditions of employment[, . . . a binding arbitration award that regulates terms and conditions of employment[, and] a determination made in terms of the Wage Act."²²⁸

Though liability does not extend to other areas, such as the Labour Relations Act's provisions against unfair labour practices,²²⁹ South Africa likely still complies with the Domestic Workers Convention. The Convention does not require that an employment agency comply with all legal requirements applicable to the employer herself. Rather, it requires only "adequate protection."²³⁰ Arguably, holding the employment agency liable for violations of the six areas listed above is adequate. Further, it clearly delineates which parties are responsible for which violation: Both the agency and the household employer are liable for the above six areas, and just the employer is liable for all other breached obligations.

As for the two other noted requirements of the Domestic Workers Convention—enforcement mechanisms and no deducting employment agency fees from an employee's wages—South Africa already complies with these provisions. Employment agencies' current obligations under South African law occur as part of broader legislative schemes with already existing enforcement mechanisms.²³¹ And regarding fees, the employer cannot deduct employment agency fees from a worker's wages because Determination 7 does not permit it.²³²

²²⁴ *Id.* art. 15(b), (d)–(e).

²²⁵ Sectoral Determination 7 Domestic Workers § 29.

²²⁶ Sectoral Determination 7, *supra* note 244, § 29(2).

²²⁷ Employment Equity Act § 57(2); *see also* BPS Van Eck, *Temporary Employment Services (Labour Brokers) in South Africa and Namibia*, 13 PER/PELJ 107, 110 (2010), available at <http://www.saflii.org/za/journals/PER/2010/12.pdf> (arguing that this liability covers only the hiring process, not later acts during employment).

²²⁸ Labour Relations Act, *supra* note 197, § 198(4).

²²⁹ Van Eck, *supra* note 227, at 109; *see* Labour Relations Act, *supra* note 197, § 198(4).

²³⁰ Convention art. 15; *supra* note 223 and accompanying main text.

²³¹ *See* Basic Conditions for Employment Act, *supra* note 236, ch. 10; Labour Relations Act, *supra* note 197, ch. 7.

²³² Sectoral Determination 7, *supra* note 244, § 8 (not listing employment agency fees as a permissible deduction).

5.3. Filling the Socio-economic gaps: Housing and Social Security

The Convention requires taking measures to ensure that domestic workers possess social security protections, including maternity that are on par with those offered to other workers.²³³ South Africa already offers some social security protections to domestic workers, but not always on the same terms as other workers. For example, such social security protections include: unemployment insurance,²³⁴ skills development programs,²³⁵ maternity leave,²³⁶ child support, care dependency, foster children support, disability support, old age, support for war veterans, assisted living support, and support for distressed persons.²³⁷ Yet, the unemployment insurance fund would also cover a domestic worker during pregnancy, and to the extent that she makes use of it, her unemployment benefits are diminished.

In two areas, South Africa explicitly excludes domestic workers from social security protections. The first is pensions and provident funds. Some other sectors of employment have a pension or provident fund.²³⁸ Domestic workers do not currently have one, but they are scheduled to have one by March 2013, as the Department of Treasury has both budgeted for and is working with the Department of Labour in establishing a “social security fund [that] includes domestic workers and farm workers.”²³⁹

²³³ Domestic Workers Convention, *supra* note 246, § 14(1).

²³⁴ See Unemployment Insurance Act §§ (1), (3) (2001) (S. Afr.), *available at* <https://www.labour.gov.za/legislation/acts/unemployment-insurance-fund/amendments/amended-unemployment-insurance-act> (stating that the Act generally applies to all employees who work at least 24 hours a month for an employer).

²³⁵ See Skills Development Act § 9(1) (1998) (S. Afr.), *available at* <https://www.labour.gov.za/legislation/acts/unemployment-insurance-fund/acts-and-amendments/> (“The Minister may, in the prescribed manner, establish a sector education and training authority with a constitution for any national economic sector.”); List of SETAs and SIC Codes 10, *available at* http://www.serviceseta.org.za/Downloads/PublicDocuments/List_of_SETA_s_and_SIC_Codes.pdf (placing “domestic services” in “SETA 23”). In fact, domestic workers were recently beneficiaries of a “massive [government] training project entitled the Workers Skills Development Project[,] . . . aim[ing] to train 27,000 domestic workers throughout the country over three years.” See ILO Report on Domestic Workers, *supra* note 193, at 56.

²³⁶ Compare Sectoral Determination 7 § 22 with Basic Conditions for Employment Act §§ 25–26 (S. Afr.), *available at* <https://www.labour.gov.za/legislation/acts/basic-conditions-of-employment/read-online/amended-basic-conditions-of-employment-act>.

²³⁷ Social Assistance Act §§ 5–13 (2004) (S. Afr.), *available at* <http://www.info.gov.za/view/DownloadFileAction?id=67950>.

²³⁸ See, e.g., *Government Gazette* 23983, GN 1331, Oct. 25, 2002, §§ 24–28 (S. Afr.), *available at* <https://www.labour.gov.za/downloads/legislation/sectoral-determinations/basic-conditions-of-employment/Sectoral%20Determination%206%20-%20Private%20Security%20-%20Amendment%20-%202002.pdf> (regulating the provident fund for Sectoral Determination 6, the private security sector).

²³⁹ Dep’t of Labour, Annual Report of the Department of Labour: 1 April 2011 – 31 March 2012 61 (2012), *available at* <https://www.labour.gov.za/downloads/documents/annual-reports/departamental-annual-reports/2012/pfma2012.pdf> [hereinafter Dep’t of Labour, Annual Report 2012]; see also Times Live, Budget Speech 2012, <http://www.timeslive.co.za/local/2012/02/22/budget-speech-2012> (“The labour department will establish provident funds for domestic and farm workers by March next year, according to budget documents tabled by Finance Minister Pravin Gordhan . . .”) (last visited October 10, 2012).

The second area is South Africa's workers' compensation law. It provides workers' compensation benefits to many workers for on-the-job accidents resulting in disablement or death,²⁴⁰ but it excludes domestic workers from these benefits.²⁴¹ Ratifying the Domestic Workers Convention would require extending these workers' compensation benefits to domestic workers.

Perhaps most importantly, South African law does not provide any specifications regarding the provision of accommodations like housing, as required by the Convention.²⁴² While Sectoral Determination 7 provides the requirements under which an employer can deduct up to 10% of the worker's wages,²⁴³ and which stipulates that the accommodation be: (i) "weatherproof and generally kept in good condition; (ii) ha[ve] at least one window and door, which can be locked; [and] (iii) ha[ve] a toilet and bath or shower, if the domestic worker does not have access to any other bathroom."²⁴⁴ However, in terms of Sectoral Determinations 7 and 13, these minimum conditions apply only to employer-provided accommodation that the employee pays for through explicit deductions from her wages.²⁴⁵ Thus, when an employer provides deduction-free accommodation, these living condition stipulations do not apply. Ratifying the Convention may require provisions making Determination 7's minimum living conditions applicable to all employer-provided accommodation.

The Convention also requires taking measures to ensure "decent living conditions" for live-in domestic workers "that respect [the worker's] privacy."²⁴⁶ Further provisions of the Convention require that domestic workers be able to choose whether to live in the household.²⁴⁷ Consequently ratifying the Convention may require South Africa to enact further measures guaranteeing the domestic workers choice to live in or out the household, as well as her privacy.

The Domestic Workers Convention 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

²⁴⁰ Compensation for Occupational Injuries and Diseases Act § 22 (S. Afr.), *available at* <http://www.info.gov.za/view/DownloadFileAction?id=71058>; *see also id.* § 1(xviii).

²⁴¹ *Id.* § 1(xviii)(d)(v) (stating that an "employee" does not include "a domestic employee employed as such in a private household"); Giampaolo Garzarelli et al., *Workers' Compensation in the Republic of South Africa* 4 (2008), *available at* http://us-cdn.creamermedia.co.za/assets/articles/attachments/17662_compensationreport.pdf (stating that the Act "excludes domestic, independent and self-employed workers from compensation").

²⁴² Domestic Workers Convention, Article 9; Huysamen, *supra* note 3, at 13-14.

²⁴³ Sectoral Determination 7 Domestic Workers § 8(b); *see also* Sectoral Determination 13 Farm Workers § 8(3).

²⁴⁴ *Government Gazette* 23732, GN 1068, Aug. 15, 2002, §§ 8(b) (S. Afr.). [hereinafter Sectoral Determination 7].

²⁴⁵ *Id.* § 8(b) (stating that the employer may make a "deduction of not more than 10% of the [employee's] wage for a room or other accommodation supplied to the domestic worker by the employer if the accommodation [meets the minimum living conditions]") (emphasis added). The ILO report on domestic workers is written in a manner that hides the conditional nature of the minimum living conditions. *See ILO Report on Domestic Workers, supra* note 193, at 45-46. (stating that "Sectoral Determination 7 provides that no more than 10 per cent of the wages may be deducted for a room or other accommodation, which must [meet the minimum living conditions]").

²⁴⁶ Domestic Workers Convention art. 6., June 16, 2011.

²⁴⁷ *Id.* art. 9.

household”²⁴⁸ South African law lacks this explicit guarantee,²⁴⁹ and ratifying the Convention may require adding such a provision.

For live-in domestic workers, the Domestic Workers Convention requires taking measures to ensure that these workers are not required to stay in the accommodation during rest periods and leave.²⁵⁰ The most likely reason for this requirement was the ILO’s concern that “domestic workers, especially live-in workers, are often subject to working time arrangements that can be a threat to their well-being.”²⁵¹ This is because, for live-in workers, “there is a definite grey area between work and home.”²⁵² Thus, by giving employees the right to leave the workplace when they are on rest or leave, it ensures their time-off will actually be time-off.

Sectoral Determination 7 does not explicitly delineate a right of the domestic worker to leave the employer-provided accommodation.²⁵³ In that regard, adding such a provision would further cement a legitimate right to rest periods and leave, enabling domestic workers to do whatever or go wherever they want while not working.

The Domestic Workers Convention requires that the above provisions on employment agencies also apply to migrant workers.²⁵⁴ South African law already accomplishes this, as Determination 7 applies equally to all domestic workers, irrespective of citizenship.²⁵⁵ In addition, one Labour Court decision even recognized that non-citizens illegally working in South Africa also have a right to fair labour practices and are fully protected by the Labour Rights Act and the Basic Conditions of Employment Act.²⁵⁶ However the Convention also requires member states to require that migrant domestic workers receive their contract and the details of their job offer before entering the country; South Africa has no such law in place.²⁵⁷

²⁴⁸ Domestic Worker Convention art. 9(a).

²⁴⁹ See generally Sectoral Determination 7, *supra* note 244.

²⁵⁰ Domestic Workers Convention art. 9.

²⁵¹ ILO Report on Domestic Workers, *supra* note 245, at 48.

²⁵² *Id.* at 46.

²⁵³ Budlender, *supra* note 149, at 49 (“Neither the [Basic Conditions for Employment Act] nor [D]etermination [7] explicitly say what workers can and cannot do outside their working hours.”); see generally Sectoral Determination 7, *supra* note 244.

²⁵⁴ Domestic Workers Convention, *supra* note 246, art. 15.

²⁵⁵ Human Rights Watch, *Ripe with Abuse*, *supra* note 201, at 19–20, 20 n.71 (noting a South African Department of Labor document that reported the Minister of Labour as saying, “South African labour legislation—including the recently launched Sectoral Determination for the Agricultural Sector—applies to all people working in South Africa, irrespective of whether they are South African nationals or not); see generally Sectoral Determination 7, *supra* note 244, § 31 (defining “domestic worker” without regard to citizenship or migrant status).

²⁵⁶ *Discovery Health Ltd. v. Comm’n for Conciliation, Mediation and Arbitration*, (2008) 29 I.L.J. 1480, ¶¶ 20–54 (Labour Ct.) (S. Afr.), available at <http://www.saflii.org/za/cases/ZALC/2008/24.pdf> at (concluding that a contract for employment was not invalid due to the employee lacking a work permit and that even if it was invalid, the worker is still an “employee” under the Labour Relations Act).

²⁵⁷ Domestic Workers Convention, Article 8; Huysamen, *supra* note 3, at 12–13; see also Domestic Workers Convention, Article 7 (listing the terms and conditions that must appear on a domestic worker’s contract).

In sum, the differences between the Domestic Workers Convention and current South African law are few, and they are largely centered on the socio-economic dimension to domestic work. Ratifying the Convention will compel few new laws, which leads to the question: If everything is so good in law, then why is it so bad in fact?

6. FOREGROUNDING SOCIO-ECONOMIC RIGHTS

Whilst the approach of the Domestic Workers Convention highlights the particularity and unique position of domestic workers, a socio-economic rights approach argues that all human beings need certain minimum socio-economic conditions fulfilled in order to actualize their human dignity. According to this approach, the circumstances of domestic workers are not in fact unique, but reflect the plight of the poor, and government has the chief obligation to respect, protect and fulfill their rights, including their socio-economic rights. This section examines the socio-economic rights approach and its “tools” in the form of a discourse of positive rights, minimum core and progressive realization of rights. It considers the extent to which the Domestic Workers Convention incorporates socio-economic rights within its provisions, and will interrogate what can be achieved by foregrounding a socio-economic rights approach to domestic worker rights.

6.1. The ICESCR Approach to Socio-economic Rights

An ICESCR approach comes from the perspective of poverty alleviation and speaks the language of basic needs. It conceptualizes socio-economic rights as inter-related and includes diverse rights such as the right to work;²⁵⁸ to an adequate standard of living, including food, clothing, and housing;²⁵⁹ the right to social security; to decent health;²⁶⁰ to education²⁶¹ and the right to participate in cultural life²⁶² within its ambit. While the core concern, as expressed by the ICESCR Committee with respect to the right to work, is securing “choice” of work, the ICESCR excepts the informal economy from this aim, as the informal economy is less about choice and more about lack of choice and need. It is this conception that informs our approach to domestic work.

While the traditional rights civil-political are considered to require “negative” conduct on the part of the government in the sense that government must not violate such rights, socio-economic rights are said to require positive action, and consequently to have difficult budgetary and separation of power implications. However, the distinction between “positive” and “negative” action is being increasingly resisted, on the premise that negative rights have a positive

²⁵⁸ International Covenant on Economic, Social and Cultural Rights, Article 6.

²⁵⁹ *Id.* at 11.

²⁶⁰ *Id.* at 12.

²⁶¹ *Id.* at 13–14.

²⁶² *Id.* at 15.

dimension (the right to vote requires ballot boxes), and similarly positive rights, such as the right to housing, can be “negatively” infringed (for example through wrongful evictions).

International institutions and domestic courts both have long-established habits of interpreting different types of rights as mutually reinforcing, despite conceptual distinctions between the different types of rights. This is especially true of the relationship between ESC rights and civil and political rights.²⁶³ For example, courts have pointed to the right to life in order to justify a right to access to health care.²⁶⁴ Labor rights have also received protection from civil and political rights, such as freedom from slavery and freedom of assembly and association.²⁶⁵ While the ILO has a specific focus on labor rights, such rights are ESC rights like others articulated in the ICESCR. Therefore, linking labor rights with other ESC rights follows naturally from already established conceptual relationships.

In place of the positive rights-negative rights dichotomy is the “respect, protect and fulfill” framework. Under this framework, governments have different tiers of obligation with respect to rights: (1) States must respect rights by refraining from interfering, either directly or indirectly with the enjoyment of these rights; (2) States must protect bearers of rights, which includes the state duty to regulate private conduct, and inspect and monitor compliance, and (3) States must fulfill rights, where the state must either provide the right directly or facilitate the provision by helping individuals make their own provision.²⁶⁶ This third tier of state obligation is expressed as the duty “to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of rights recognized in the present convention by all appropriate means.” This mandate is often considered to be a long term, programmatic or aspirational goal, meaning that states’ obligations should be interpreted flexibly.²⁶⁷

Yet, the obligation to “fulfill” is neither wholly flexible nor wholly postponed, since the ICESCR Committee has pointed out that some duties have immediate effect, and are justiciable.²⁶⁸ These duties with immediate effect include (a) the duty to take steps or adopt measures toward the full realization of rights contained in ICESCR (this includes, but is not limited to legislative measures and may include financial, educational and social measures) and (b) the duty to prohibit discrimination. The latter category entails extending existing provisions to excluded

²⁶³ See generally *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, International Commission of Jurists, 65–72 (overviewing how courts have applied civil or political rights to secure ESC rights).

²⁶⁴ *Id.* 65–66.

²⁶⁵ *Id.* at 69–70.

²⁶⁶ SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED, POSITIVE RIGHTS AND POSITIVE DUTIES* (2008) at 70.

²⁶⁷ International Covenant on Economic, Social and Cultural Rights, *supra* note 13 at art. 2(1); Comm. on Econ., Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations ¶ 9 (1990), available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/94bdbaf59b43a424c12563ed0052b664?Opendocument>; Int’l Comm. of Jurists, *supra* note 1 at 25–26.

²⁶⁸ Int’l Comm. of Jurists, *supra* note 1.

groups.²⁶⁹ Sandra Fredman has observed that equality can turn negative duties into positive duties, since while the State need not provide social benefits, if it does, it must do so without discrimination.²⁷⁰

The ICESCR Committee has also sought to articulate a minimum core obligation with respect to each of the socio-economic rights. Fredman observes that the minimum core refers to the duty to do everything possible to optimize the basic right of survival of the most destitute and disadvantaged in a society, because there is very little that can take priority over the basic right of survival.²⁷¹ In terms of the minimum core obligation, each state party must “demonstrate that every effort has been made to use all resources at its disposition in an effort to satisfy as a matter of priority, those minimum obligations.”²⁷² Consequently, a state party in which any significant number of individuals is deprived of the minimum core is *prima facie* failing to perform its obligations under the covenant.²⁷³

South Africa has been a forerunner in the constitutionalization of socio-economic rights and has developed a novel approach to their adjudication. The question of whether to interpret socio-economic rights as having a minimum core which is enforceable has been a controversial and much debated one there. In the leading case of *Government of the Republic of South Africa v Grootboom*, which dealt with the constitutional right to access to adequate housing, the South African Constitutional Court declined the ICESCR’s “minimum core” analysis. In that case the local municipality had evicted a group of squatters who had moved onto private land that had been earmarked for low-cost housing. Ultimately, the eviction was carried out one day early and the squatter’s homes and possessions were destroyed by bulldozers.

The South African Constitutional Court rejected the minimum core approach of the ICESCR on the grounds that it did not have enough information about the diversity of conditions to decide upon a single floor of rights.²⁷⁴ Instead, it adopted a reasonableness standard.²⁷⁵ While the Constitutional Court determined that the forcible removal of squatters the particular context of *Grootboom*, was unreasonable, the standard of “reasonableness has been criticized by proponents of a minimum core approach, as highly deferential to the legislature/executive.

Yet, it is important to note that in *Grootboom*, the court observed that the right of access to adequate housing “also suggests that it is not only the state who is responsible for the provision of houses but other agents within our society, including individuals themselves, who must be

²⁶⁹ FREDMAN, *supra* note 271 at 81.

²⁷⁰ FREDMAN, *supra* note 271 at 68.

²⁷¹ *Id.* at 86.

²⁷² Comm. on Econ., Social and Cultural Rights, *supra* note 272, at ¶¶ 9–10 (1990).

²⁷³ Int’l Comm. of Jurists, *supra* note 1.

²⁷⁴ *Id.* at 32.

²⁷⁵ *Id.* at 33.

enabled by legislative and other measures to provide housing.”²⁷⁶ It considered that a housing policy that does not take into account emergency situations, or have the ability to take into account the situation of the most needy, would not fulfill the “reasonableness” requirement.

The Constitutional Court has consistently declined minimum core analysis in its subsequent socio-economic rights cases. In *Mazibuko* the Supreme Court of Appeal allowed a minimum core for water rights, arguing that the diversity of needs that prevent the minimum core in housing rights do not hinder a minimum core in the more consistent need for water.²⁷⁷ However, the Constitutional Court maintained its reasonableness analysis on the grounds that doing so better promotes progressive realization of the right, as the framers of the constitution realized that the right to basic necessities of life could not be immediately satisfied.²⁷⁸ Further, defining a minimum core would be inappropriate for a judiciary, as that would be to implement policy. Instead, the reasonableness test allows the court to ensure that the government policies are in line with constitutional obligations. *Mazibuko* summarises the courts approach to socio-economic rights in the following manner:

Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realized.²⁷⁹

In *Mazibuko*, the Court ultimately held that the water policy was reasonable because it covered eighty percent of households in Johannesburg, and because it was not discriminatory.

However, despite the critique of a “reasonableness” approach to socio-economic rights, the Court has emphasized that legislation or executive action would not be considered reasonable if it does not take into account, most vulnerable citizens. This suggests that the plight of domestic workers would need to be taken into account for any legislative or executive endeavor to pass constitutional muster.

²⁷⁶ *Grootboom* para. 35.

²⁷⁷ Mariette Brennan, *To Adjudicate and Enforce Socio-economic Rights: South Africa Proves That Domestic Courts Are a Viable Option*, 9 *LAW AND JUSTICE JOURNAL*, No. 1, 64, 69 (2009) at 82 (citing *Mazibuko and Others v. City of Johannesburg* [2008] 06/13865 (Unreported, Tsoka J, 30 April 2008)).

²⁷⁸ *Mazibuko and Others v. City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para. 58.

²⁷⁹ *Id.* at para. 67.

6.2. Domestic Work: A Convergence of Labor and Socio-economic Rights

While the ILO Domestic Workers Convention includes not only the labor rights of domestic workers, but also some social and economic rights, we would argue that these rights are conceptualized as “background” to traditional labor rights and represents a “negative” conception of socio-economic rights. For example, Article 5 of the Domestic Workers Convention requires members to prevent abuse, harassment, and violence against domestic workers, whilst Article 14 requires members to ensure that domestic workers are equal to other workers “in respect of social security protection, including with respect to maternity.” Article 16 provides that member states’ courts and dispute resolution mechanisms should be as accessible to domestic workers as they are to all workers, while Article 17 requires members to “establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers.”

Significantly, the Convention’s Article 9, which gives domestic workers the freedom to choose whether to live outside the house where they work, addresses the profound problems domestic workers face when being required to live in their employers’ homes.²⁸⁰ However, like Sectoral Determination 7, which articulates the standards that accommodations must meet for employers to deduct domestic workers’ wages, the Convention does not lay out any requirements the employer must always meet when providing accommodation to the domestic worker.

If we were to foreground the socio-economic dimension of domestic work and articulate the challenges of the domestic worker regime in South Africa using the language and conceptual apparatus of socio-economic rights, we might argue that the state has positive obligations to not only respect and protect, but also to fulfill domestic worker rights. Of vital significance here, are those aspects of the “fulfill” mandate that are immediately enforceable, including the non-discrimination provisions.

6.2.1. Housing

If we were to take the right to housing as an example, we could argue that the state has to respect the right to housing of domestic workers by not itself violating these right; it also has to protect the right to housing by ensuring that private actors (employers, in this case) do not violate this right, and that there are adequate enforcement mechanisms in place to secure the right. Under its duty to fulfill mandate, the government would be obliged to demonstrate that it has a program in place and has taken steps or adopted measures to ensure the full realization of this right for domestic workers, since they are a vulnerable class. Those aspect of the right which are of immediate effect, are the duty to prohibit discrimination, as well as the “minimum core” obligation of the right to housing.

²⁸⁰ Domestic Workers Convention, Article 9.

Indeed, some South African municipal governments have already acknowledged that domestic workers have unique challenges with regard to their housing needs.²⁸¹ A report by the Provincial Government of the Western Cape, when considering plans for sustainable housing, states:

The needs of special interest groups must receive particular attention and must be taken into account in endeavors to create sustainable human settlements. One such group whose needs are seldom met in the planning of human settlements, are domestic workers. Access to affordable, well-located housing and secure tenure, possibly in the form of social housing, will reduce the vulnerability and marginalization of the (mostly) women who play a critical and valuable role in our society. . . .

A vulnerable and important group encountering severe housing problems is domestic workers. It is imperative that the housing plan for the Western Cape includes a strategy for the provision of housing and security of tenure for domestic workers.²⁸²

Yet, there are three significant gaps in Sectoral Determination 7, which would not be remedied by ratification of the Domestic Workers Convention. First, there is no minimum standard regulating the “minimums” of employer-provided housing to ensure that it is “adequate” in the circumstance where there are no deductions from the domestic worker. Second, when a domestic worker is given four weeks’ notice of termination of employment, that notice also serves as her de facto notice to vacate the premises. Her position can be contrasted with the of farm worker/domestic worker on the farm. In order to formally evict a farm worker, the farm owner has to obtain a court order and show that that worker has alternative accommodation in terms of ESTA. Using the ICESCR, it could be argued that the distinction between the protections given to farm workers/domestic workers on farms, and those given to domestic workers in urban areas, amounts to discrimination. Third, related dimension is that of privacy, family and cultural life. While ESTA protects the right to family of workers on farms, Sectoral Determination 7 is silent on this issue. However, using the ICESCR’s protection of the right to family, it could be argued that in the situation where workplace and residence are the same, rights to family come into play. Yet, the right to family life, which would include the right to have close family members visit, is absent from both the Domestic Worker Convention and Sectoral Determination 7.

²⁸¹ Anzabeth Tonkin, *The Plight of Domestic Workers: The Elusiveness of Access to Adequate Housing*, 14 Law, Democracy & Development 354, 363 (2010), available at <http://www.ajol.info/index.php/ldd/article/viewFile/68292/56374> (discussing efforts by nonprofits to provide housing for low wage workers, emphasizing domestic workers, and to engage municipal governments in considering their needs) (citing Draft Discussion Document, Department of Local Government and Housing of the Provincial Government of the Western Cape (2005), available at http://www.westerncape.gov.za/Text/2005/10/discussion_document_20051018.pdf).

²⁸² Draft Discussion Document, *supra* note 150, at 15, 18.

6.2.2. Work

Similarly, the ICESCR has extensive, detailed provisions protecting the right to work, including the right to decent work conditions;²⁸³ rights like freedom of association, collective bargaining, and the right to strike.²⁸⁴ But it also imposes obligations on member states with respect to creating jobs. Consequently, under the ICESCR, states parties must take measures to provide the right work when persons “are unable, for reasons beyond their control, to realize that right themselves”²⁸⁵ States parties “must have specialized services to assist and support persons in . . . finding available employment.”²⁸⁶ They must also take measures to “enable and assist individuals to enjoy the right to work and to implement technical and vocational education plans to facilitate access to employment.”²⁸⁷ Finally, states parties should adopt a national strategy aiming to ensure full employment for all and reduce unemployment and underemployment.²⁸⁸

With the right to work, states parties’ minimum core obligations include the prohibition of discrimination, the prohibition of forced labor, the right to fair remuneration, and the right to enjoy conditions of work compatible with human dignity. According to General Comment 3, the right to fair wages and equal remuneration for work of equal value and the right to form and join trade unions do not require extensive resources and are capable of immediate implementation.

A positive obligation to not only protect and respect, but also to fulfill the right of domestic workers to freedom of association and to form trade union, might require that government do more to actively and positively bolster the SADSAWU. It is also arguable that the right to collective bargaining may be infringed by the Sectoral Determination, since by setting minimum wages and conditions of employment, the state effectively limits the bargaining rights of parties.²⁸⁹ It could also be argued that the system of Sectoral Determinations and minimum wage, do not adequately capture the right to “fair remuneration,” and similarly that the distinctions between the minimum wage in the Sectoral Determinations discriminates unjustifiably against domestic farm workers, who earn less. Also, the ICESCR approach would leave little room to exclude sporadic workers from the protection of legislation.

6.2.3. Social Security

Analogously, a state providing the minimum core right to social security must “ensure access to a . . . scheme that provides a minimum essential level of benefits . . . to acquire at least essential

²⁸³ *Id.* at 7.

²⁸⁴ *Id.* at 8.

²⁸⁵ Comm. on Econ., Social and Cultural Rights, *supra* note 272 ¶ 26.

²⁸⁶ *Id.* at ¶¶ 12(a), 26.

²⁸⁷ *Id.* at ¶ 27; *see also id.* at ¶ 14 (emphasizing the need to take these measures for young persons in particular); Socio-Economic Covenant, *supra* note 272 at 6(2).

²⁸⁸ *Id.* at ¶¶ 27, 41; *see also* Socio-Economic Covenant, *supra* note 13 at 6(2).

²⁸⁹ BILL OF RIGHTS HANDBOOK, *supra* note 9 at 400.

health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education,” and must mitigate barriers to such access, like discrimination.²⁹⁰

These social security rights are particularly relevant with respect to domestic workers protections under Sectoral Determination 7. It goes without saying that selecting a vulnerable group of workers like domestic workers, for exclusion from the protections of occupational safety, including a failure to provide protective clothing, would violate the “protect” and “fulfill” tier of the right to social security. The fact that domestic workers are singled out as not eligible for workers compensation, would violate the right to non-discrimination, which is immediately enforceable. Similar argument can be made about the fact that domestic workers are compelled to use their UIF benefits for pregnancy, as well as the absence of pension or provident fund for domestic workers.

6.2.4. Inspection

Finally, with respect to enforcement, the dearth of labor inspectors and the length and difficulty of accessing the labor court might lead to the conclusion that although the institutional apparatus for enforcement of rights exists, the government is still not fulfilling its mandate to protect domestic workers socio-economic rights.

6.3. ICESCR: A New Approach to Interpretation

South African domestic workers, like all South African citizens, already possess extensive socio-economic rights.²⁹¹ Yet implementation of the ICESCR may expand the construction of these rights and create a new vocabulary for conceptualizing and engaging with issues of socio-economic need. A significant benefit of conceptualizing domestic worker rights as socio-economic rights is that it side-steps the problems associated with an organizational rights approach—namely that it is questionable whether collective bargaining gives domestic workers bargaining power, since nearly all are isolated from each other.²⁹² Perhaps, a “rights” approach

²⁹⁰ U.N. Off. of the High Comm'r for Hum. Rts. [UNHCHR], Comm. on Econ., Soc., and Cultural Rights [CESR], General Comment 19: The Right to Social Security, § 5, U.N. Doc. E/1991/23 (Feb. 4, 2009) (internal footnote, connecting mention of health care to specific comment regarding health care, removed).

²⁹¹ See, e.g., Shereen Pandit, Legal Protections for Domestic Workers: Could We Learn from South Africa? 4–10, available at http://www.dwrp.org.za/images/stories/DWRP_Research/shereen_pandit_icdd_paper_final_version_11-01-20.pdf (recognizing South African laws protecting domestic workers as “‘setting the standard, ”); see also Social Law Project, Domestic Workers: Decent Work for All 14 (2010), http://www.dwrp.org.za/images/stories/DWRP_Research/lrs_paper.pdf (“South African legislation already incorporates many of the rights and objectives which are envisaged in the campaign for an ILO Convention on domestic work.”)

²⁹² See Margaret Visser, *Sweeping Changes? Organising and Bargaining for the Realisation of Domestic Workers* 16–17, available at http://www.dwrp.org.za/images/stories/DWRP_Research/visser.pdf. “If collective bargaining is feasible at all, it needs to take place at another level than the workplace.” *Id.* at 17. In other countries, domestic workers have formed successful unions. *Id.* at 18. However, these countries tend to be more developed, “where domestic workers have somewhat more structural power given their shrinking labour forces.” *Id.*

might help change the social dynamics of domestic workers, their employers, and society, fostering both appreciation of and respect for domestic workers' rights.

Implementing the ICESCR would provide some meaningful rights to South African domestic workers. It would require that the government provide all workers with technological and vocational guidance,²⁹³ as well as employment services.²⁹⁴ It would also require that the government take measures to raise public awareness of workers' rights.²⁹⁵ Another gain from ratification would not necessarily add more rights, but instead change how South Africa interprets rights. Currently, the Constitutional Court has rejected the Convention's minimum core rights framework for at least some socio-economic rights enshrined in the constitution, instead applying what amounts a reasonableness standard.²⁹⁶ This may change with implementation.

Finally, even though ratifying the ICESCR need not require many new laws, it may induce greater compliance with existing laws. Currently, many employers "have difficulty conceiving . . . their home as a workplace" and their employees as possessing labor rights because they have an intimate relationship not common to other employers and employees outside the domestic sector.²⁹⁷ Some have argued that increasing compliance requires changing this mindset to one that recognizes and respects domestic workers' labor rights.²⁹⁸

Ratifying the Domestic Workers Convention and framing these issues as a matter of personal rights may do just this. A rights-based approach enables and empowers persons to claim their rights.²⁹⁹ But it does more than that.³⁰⁰ "It also helps define the right and raises awareness that

²⁹³ See Comm. on Econ., Social and Cultural Rights, General Comment No 18; ARTICLE 6 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 2 (2006); see also Social Law Project, *supra* note 84, at 15 (arguing that South Africa should empower domestic workers by improving re-establishing skills development programs).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ Lisa Forman, *What Future for the Minimum Core: Contextualising the Implications of South Africa Socioeconomic Rights Jurisprudence for the International Human Right to Health* 73 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758848; Aarthi Belani, The South African Constitutional Court's Decision in *Tac*: A "Reasonable" Choice? 23–24, available at <http://www.chrgj.org/publications/docs/wp/Belani%20The%20South%20African%20Constitutional%20Court%27s%20Decisions%20in%20TAC.pdf>; see also Minister of Health v. Treatment Action Campaign, ¶¶ 26–39 (2002) (S. Afr. Const. Ct.), available at <http://www.saflii.org/za/cases/ZACC/2002/15.pdf>; Eric C. Christiansen, Essay, Exporting South Africa's Social Rights Jurisprudence, *Loyola Univ. Chi. Int'l L. Rev.* 29, 36 (2007), available at <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1116&context=pubs>.

²⁹⁷ Margaret Visser, *Sweeping Changes?: Organising and Bargaining for the Realisation of the Rights of Domestic Workers* 16–17, available at http://www.dwrp.org.za/images/stories/DWRP_Research/visser.pdf.

²⁹⁸ Social Law Project, *Enforcing the Unenforceable? From Enforcement to Compliance* 22–34 (2009), available at http://www.dwrp.org.za/images/stories/DWRP_Research/chapter_2.pdf.

²⁹⁹ Univ. of Minn. Hum. Rights Res. Ctr., *Developing a Rights-Based Perspective*, Circle of Rights: Economic, Social & Cultural Rights Activism, <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module1.htm> (last visited Nov. 14, 2012) (stating that "rights-based approach involves not charity or simple economic development, but a process of enabling and empowering those not enjoying their ESC rights to claim their rights").

³⁰⁰ See *id.* ("The process of staking a claim not only asserts an individual's ownership of his or her entitlement.").

what has been claimed is not a privilege or an aspiration, but a right.”³⁰¹ This could answer some of the critics who argue that focusing on the “needs” and vulnerabilities of domestic workers, to the exclusion of their agency, might prove counter-productive. It also captures the recent move of the ILO to a fundamental rights approach to worker rights.

Framing domestic work within the right to work may catalyze employers’ realization that domestic work is not an intimate relationship immune from law, that they are employers, with duties, and domestic workers are their employees, with rights. Increasing the likelihood of this realization’s occurrence is the Domestic Workers Convention’s requirement that the government undertake, essentially, a public relations campaign promoting awareness of and respect for the right to work.³⁰² To some extent, similar realizations have occurred through the Constitutional Court’s adjudication of socio-economic rights enshrined in the constitution.³⁰³ Ratifying the ICESR will increase domestic worker’s substantive rights. But, perhaps more importantly, it may also increase compliance with those rights.

7. CONCLUSION: TWO FRAMEWORKS FOR UNDERSTANDING DOMESTIC WORK

South Africa has recently ratified the International Convention on Economic, Social and Cultural Rights and stands poised to ratify the ILO Convention on Domestic Work. It is these two universes of law that frame the reality of informal work in the 21st century: to look at domestic work solely through the lens of “labor” is to miss something essential—that it is also inextricably linked to indecent work and poverty, and hence a conception of basic needs and social citizenship are essential. This idea is often expressed through the attribution to domestic work as “exceptional,” i.e. different to ordinary work (in ILO-historical discourse; factory work), because there is no collective dimension to domestic work. But it is precisely in the ways that it is “exceptional” to the discourse of labor that it is “unexceptional” when viewed in context of human rights discourse.

On the other hand, an approach which focuses solely on the vulnerabilities of domestic workers, to the exclusion of their agency, might prove counter-productive. South African academic, Shireen Ally, attributes the demise of domestic workers’ labor power to the state’s constructing domestic workers as “vulnerable” and subsuming many of the union’s functions.³⁰⁴ For example,

³⁰¹ See *id.*

³⁰² See *supra* note 299.

³⁰³ See Eric C. Christiansen, Essay, South Africa’s Use of Constitutional Rights Adjudication to Remedy Persistent Economic Inequality 8 (2008) (“[T]he Court’s jurisprudence has been clearly successful on a symbolic level. By hearing claims and evaluating government actions against constitutional social welfare protections, the Court reminds South Africans of the vision of substantive equality contained in their Constitution.”).

³⁰⁴ See generally Shireen Ally, *FROM SERVANTS TO WORKERS: SOUTH AFRICAN DOMESTIC WORKERS AND THE DEMOCRATIC STATE* (2009) 85-93.

instead of promoting collective bargaining agreements for domestic workers through a bargaining council, the state sets minimum wage through the Employment Conditions Commission (ECC).³⁰⁵ The ECC solicits comments from workers and employers, but neither has the ability to negotiate for the final outcome.³⁰⁶ This, she argues, essentially relegates the union to the role of state adjunct.³⁰⁷

This difficulty highlights the tensions between “needs” and “agency” in the two international approaches – that of the ILO and of the ICESCR. Notwithstanding this tension, it would be a mistake to view these approaches as oppositional, since they are complimentary and increasingly converging. While the ILO, with its well-honed emphasis on collective bargaining and freedom of association, provides the tools for domestic workers to construct new ways of attaining collective agency and democratic voice; the ICESCR approach allows domestic workers to articulate a wider conception of socio-economic need and corresponding government obligation. Both are necessary prerequisites for the exercise of a meaningful conception of citizenship - one which enables all people to participate equally in shaping their own political, economic and social lives, as well as that of the populace.³⁰⁸

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-economic Rights*, 21 S.Afr. J. on Hum. Rts. 1 2005 at 2, arguing that “socio-economic rights are not valued as commodities, but because of what they enable human beings to do and to be. If basic subsistence needs are not met, humans face severe threats to life and health. But, in addition, such deprivation impedes the development of a whole range of human capabilities, including the ability to fulfill life plans and participate effectively in political, economic and social life.”



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