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Sri Lanka: Domestic Workers

An Analysis of the Legal and
Policy Framework

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Decent Work for Domestic Workers: Report No. 1

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Sri Lanka: Domestic Workers

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Decent Work for Domestic Workers: Report No. 1

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Image courtesy The Hindu

INTRODUCTION

The past two decades have witnessed a significant increase in the worldwide demand for domestic work.¹ In a number of countries, domestic work exists as an occupation where women constitute an overwhelming majority of the workforce. According to recent global and regional estimates released by the International Labour Organization (ILO), at least 52.6 million women and men above the age of fifteen were listed as being domestic workers, with women constituting 83 percent of the total figure.² In other words, one in every thirteen women participating in the labour force will be a domestic worker.

1 in 13 women in the labour force is a domestic worker

The overwhelming percentage of women participating in the domestic work sector is also reflected in the Sri Lankan context. According to a Labour Force Survey conducted in 2007, it was recorded that there was a total of 87,400 domestic workers in the country – 60,400 of whom were female.³ More recent statistics on domestic workers are yet to be provided. These workers can be further classified according to their work arrangements, although estimates under each classification are unavailable. Domestic

workers who take up residence at their place of employment may be classified as ‘residential’ workers. These domestic workers are often described as ‘live in’ workers. Those who live separately and travel to their place of employment may be classified as ‘non-residential’ workers. These domestic workers are often described as ‘daily’ workers, although the term is misleading because non-residential workers may also be contracted on a ‘weekly’ or ‘monthly’ basis, and not only on a daily basis.

Notwithstanding these significant numbers, domestic work remains virtually an invisible form of employment in Sri Lanka. Domestic workers function in a sector that is synonymous with low wages, and one in which work is largely performed by women from historically disadvantaged communities. This context often results in domestic workers being excluded in whole or in part from the scope of labour law protection and the social security framework that applies to the country’s workforce. Furthermore, the informality associated with domestic work is compounded by the fact that employers rarely view

domestic workers as employees with rights and privileges. Instead, they are depicted as ‘aides’

being offered the ‘favour of employment’⁴ in exchange for compensation.

In this context, this study analyses the gaps between six global standards of decent work and current national policies and laws governing domestic work. The study offers a fresh perspective on the problem and aims to outline a strategy for sustainable reform in Sri Lanka.



ILO C189:

DECENT WORK FOR DOMESTIC WORKERS

The ILO has sought to promote a 'Decent Work Agenda' that extends to all wage earners. Under this mandate, the organisation recently began to develop a normative labour rights framework for domestic workers. It is a framework that aims to bring workers traditionally thought to be outside the scope of protection into the ambit of the organisation's mainstream work.⁵

In June 2011 at its International Labour Conference, the ILO adopted the Domestic Workers Convention, 2011 (C189) and its supplementing Recommendation Concerning Decent Work for Domestic Workers (R201). The central premise of the Conference was that domestic work should be treated both as 'work like any other, and as work like no other'.⁶ C189

C189 targets two points of intervention; (1) The vulnerability and dependency faced by the individual domestic worker; (2) The under-professionalisation of the domestic work sector as a whole

and R201 set out a framework of principles targeted at strengthening implementing national laws and policies to enable a Member State to deal with the negative aspects of informality associated with its domestic work sector. To date, fourteen countries including the Philippines, South Africa, Uruguay, and Mauritius have ratified C189. Sri Lanka is yet to ratify the convention.

Under C189, several key standards of decent work are guaranteed to domestic workers. These standards relate to (1) payment of wages, (2) social security, (3) maternity benefits, (4) hours of work, (5) living conditions, (6) personal security and (7) dispute resolution. Each of these issues will be dealt with in this study.

C189 targets two points of intervention: (1) The vulnerability and dependency faced by the individual domestic worker; (2) The under-professionalisation of the domestic work sector as a whole.

1

The vulnerability and dependency faced by the individual domestic worker

C189 recognises that domestic work frequently involves the blurring of lines between an individual's place of employment and her place of residence. This context places a residential domestic worker at a heightened risk of abuse and harassment by her employer. The main contributory factors to this risk include:

- The high rates of dependency on a given employer
- The degree to which the worker is isolated from her peers and other familial support systems⁷
- Discriminatory practices that make women and girls particularly vulnerable to abuse (i.e. sexual harassment and other forms of gender-based violence)

2

The under-professionalisation of the domestic work sector

Domestic Work is informal and unstructured in nature.⁸ The nature of domestic work therefore tends to obstruct the 'formation and formalisation of employment relationships' to the detriment of the domestic worker's bargaining power.⁹ The Convention identifies the resulting power imbalance between employer and employee as a significant hurdle that prevents domestic workers from being considered worthy participants in the labour market.¹⁻

Based on these two points of intervention, this study seeks to evaluate to what extent Sri Lankan labour law guarantees to domestic workers the rights and protections necessary to ensure conditions of decent work. Furthermore, the study will propose recommendations aimed at bridging the gap between international standards on decent work and existing local conditions.



DEFINING DOMESTIC WORK

A considerable proportion of domestic work is performed in private households outside the scope or application of legal and institutional frameworks.¹¹ Furthermore, domestic work often takes place in the absence of a written contract or a verbal negotiation of the terms and conditions surrounding employment. These unique features peculiar to the domestic work sector often compounds the economic vulnerability of the worker and undermines the credibility of the services that are carried out. Hence there is a need to demand specific legislative and regulatory reform outside (or which supplements) the general scope of labour law in a given country.¹² It is, therefore, crucial that careful consideration is given to the kinds of services constituting the idea of ‘domestic work’, in order to ensure that legal and policy structures protect domestic workers’ rights.

Article 1 of C189 defines the term ‘domestic

Article 1 of C189 defines the term ‘domestic work’ as ‘work performed in or for a household or households

work’ as ‘work performed in or for a household or households’.¹³ Furthermore, a domestic worker is set out to mean ‘any person engaged in domestic work within an employment relationship’.¹⁴

The Convention does not provide a definition for the term ‘household’. However, a study of various legislative instruments governing domestic work from across the globe indicates that a ‘household’ is an economic unit which corresponds to the individual employer’s private home.¹⁵

Under Sri Lankan law, a domestic worker is defined in the Domestic Servants Ordinance No.28 of 1871 as a ‘servant, hired by the month or receiving monthly wages, and shall include head and under servants, female servants, cooks, coachman, horse-keepers, and house and garden servants’.¹⁶ Largely attributed to the archaic nature of the above legislative instrument, this

definition proves to be unhelpful in (a) outlining the particular services that are currently representative of the domestic work sector, and (b) categorising the domestic worker as entitled to a rights framework guaranteed under the labour law of the country. In this regard, the Ordinance's use of the terminology 'domestic servant' to describe an individual engaging in domestic work may undermine efforts to cure decent work deficits in the domestic sector. In other words, the use of the term 'servant' as opposed to 'worker' to describe an individual working in the domestic work sector serves to undermine both the dignity and the professional credibility owed to her.

Comparatively, Cambodia's Labour Code provides a useful example of how service oriented terminology surrounding domestic work can serve to professionalise the domestic sector. Article 4 of the Code defines domestic and household workers as:

“Those workers who are employed to take care of the homeowner or of the owner's property in return for remuneration. This group includes maids, guards, chauffeurs, gardeners, and other similar occupations, as long as a 'home owner' employs them to work directly at his or her residence.”¹⁷

Therefore, in conjunction with the aims of C189, it would appear that any effort to transform the domestic work sector must first hinge on capturing the legitimacy of the domestic worker as a 'real' worker, i.e. 'acknowledging the domestic nature of the work, while reaffirming its compatibility with the employment relationship.'¹⁸

Sri Lankan jurisprudence on the contract of service is useful in terms of establishing the employment status of domestic workers. In the case of *Ceylon Mercantile Union v. Ceylon Fertilizer Corporation*,¹⁹ the Supreme Court discussed a series of English common law tests that help distinguish an employee from an independent contractor. The Court held that the following elements must be present in order to establish a contract of service:

- A payment of wages between employer and worker
- The employer exerts significant control over the worker and her tasks
- The employer has the right of selection, suspension and dismissal of the worker
- The work performed is intrinsic to the work of the employer
- Exclusivity in the relationship between worker and employer²⁰

While this list is not conclusive, a domestic worker may be able to prove a contract of service in or for a household if such common law conditions are fulfilled.

Domestic workers are typically interviewed, hired and remunerated by the homeowner. Once engaged, workers are required to spend a majority of their time in close proximity to their employer and her household. Further, the employer will often outline and supervise the performance of day-to-day tasks, demonstrating a high degree of control over the individual domestic worker and the service rendered. Therefore, it is arguable that the nature of domestic work creates a common law contractual nexus between homeowner and domestic worker, notwithstanding the lack of a formalised employment relationship between the parties.

In the case of *Carsons Cumberbatch & Co. Ltd v. Nandasena*, it was determined that 'a common law contract of service must subsist between the employer and the workman before two persons can be regarded as employer and workman.'²¹ The decision demonstrates the weight courts attach to a fulfilment of the above common law conditions when determining the existence of an employer-employee relationship. In this context, the restrictive statutory definitions of the term 'workman' contained in Sri Lankan laws may not preclude courts from applying common law tests to establish the employment status of a domestic worker. This judicial trend creates a strong basis from which to advocate that reciprocal rights and duties be placed on homeowners and their domestic workers – notwithstanding restrictive statutory definitions that threaten to exclude domestic workers from protection under Sri Lanka's labour law.²²



LEGAL GAP ANALYSIS

This section of the study examines the deficits in the existing legislative and policy framework relating to domestic work. The section is divided into two parts. The first part sets out the rights and protections generally available to domestic workers under ratified international instruments and Sri Lankan law. The second focuses on the minimum standards of protection set out in C189 and identifies notable exclusions of domestic workers from other ratified international labour conventions and from Sri Lankan labour law.

AVAILABLE PROTECTIONS

INTERNATIONAL INSTRUMENTS

Sri Lanka is party to a number of international instruments that contain core rights obligations that are directly relevant to the domestic work sector. For example, the Universal Declaration of Human Rights (UDHR)²³ sets out minimum obligations to provide for and protect the individual's right to access (1) social security²⁴ (2) just and favourable conditions of work²⁵ (3) equal pay for equal work²⁶ and (4) the right to join trade unions for the protection of workers' interests.²⁷ The application of the UDHR in Sri Lanka is reaffirmed in the National Workers' Charter.²⁸

Moreover, given the fact that Sri Lanka's domestic work sector is disproportionately composed

Sri Lanka is party to a number of international instruments that contain core rights obligations that are directly relevant to the domestic work sector

of women, the state's ratification of the Convention on the Elimination of all Forms of Discrimination on the Elimination of all Forms of Discrimination Against Women (CEDAW) becomes relevant.²⁹ Article 11 of the Convention mandates that the State Parties 'shall take all appropriate measures to eliminate discrimination against women in the field of employment'.³⁰ A female dominated sector that fails to (a) ensure the protection and the safety of workers

in respect of their working conditions³¹ and (b) prevent discrimination against workers on the grounds of marriage or maternity (i.e. paid maternity leave and special protection during pregnancy if the worker in question is engaged in hazardous work)³² could constitute an indi-

rect form of discrimination on the grounds of sex under Article 11 of the Convention.

Sri Lanka is also party to a number of specific labour conventions that are designed to guarantee fundamental principles and rights at work. These include:

- The Freedom of Association and the Protection of the Right to Organize Convention, 1948 (No. 87)³³
- The Right to Organize and Collective Bargaining Convention, 1949 (No.98)³⁴
- The Forced Labour Convention, 1930 (No. 29)³⁵
- The Equal Remuneration Convention, 1951 (No. 100)³⁶
- The Abolition of Forced Labour Convention, 1957 (No. 105)³⁷
- The Minimum Age Convention, 1973 (No. 138)³⁸
- The Worst Forms of Child Labour Convention, 1999 (No. 182)³⁹
- The Maternity Protection Convention (Revised), 1952 (No. 103)⁴⁰
- The Minimum Wage Fixing Convention 1970 (No. 131)⁴¹

The rights and protections envisaged by these conventions are applicable to domestic workers. Hence Sri Lanka has an international obligation to give effect to these rights and protections through appropriate laws and policies. According to an ILO study on domestic workers, 'recognition and protection of these rights for domestic workers is an essential step in breaking domestic work away from the informal economy with its perpetuation of exploitation and inadequate working conditions.'⁴²

GAPS IN THE LAW

This section deals with several key rights and protections that domestic workers are entitled to under C189. Using C189 as a benchmark, the section proceeds to examine the Sri Lankan labour law to identify critical gaps. The following benchmarks are discussed:

- **Payment of wages**
- **Living conditions**
- **Social security**
- **Personal security**
- **Maternity benefits**
- **Dispute resolution**
- **Hours of work**

SRI LANKAN LABOUR LAW

The Sri Lankan labour law framework contains a number of rights and protections that are designed to guarantee employment security and prevent labour exploitation in the workplace.

- The Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended)⁴³ and the Wages Boards Ordinance No. 43 of 1941 (as amended)⁴⁴ stipulate the basic conditions of work (e.g. working time, annual leave, and wages)
- The Employees' Provident Fund Act No. 15 of 1958 (as amended), Employees' Trust Fund Act No. 46 of 1980 (as amended), and the Payment of Gratuity Act No. 12 of 1983 detail the social security schemes accessible to workers
- The Factories Ordinance No. 45 of 1942 (as amended) regulates the working environment and conditions of work in factories
- The Workmen's Compensation Ordinance No. 19 of 1934 (as amended) sets out the mechanism for compensation payable to employees (or their families in the event the employee is deceased) that suffer injuries, disablement, and death during the course of employment
- The Industrial Disputes Act No. 43 of 1950 (as amended) sets out the dispute resolution mechanism accessible to employees in the event employment has been terminated

In addition to the above, there are also special protections for women in the workplace.

- Employment of Women, Young Persons, and Children Act No. 47 of 1956 regulates night work for women and children
- Maternity Benefits Ordinance No. 32 of 1939



PAYMENT OF WAGES

Domestic work constitutes one of the lowest paid occupations in the labour market. A primary contributor to this phenomenon is the undervaluation of the services associated with domestic work. First, domestic work is treated as work that is traditionally performed by women (or other members of the household) without pay. Second, the knowledge and skills associated with domestic work are skills that are often acquired and developed within the family through experience rather than formal training. Arguably, these two factors reduce incentives for employers to remunerate domestic work in a manner equivalent to other forms of labour.

C189

Article 11 states: ‘each member shall take measures to ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex.’ Moreover, Article 12 factors in the unique relationship between employer and employee in the domestic work sector by acknowledging that in some instances ‘in-kind payments’⁴⁵ (i.e. cost of food or accommodation) could legitimately constitute a limited portion of the domestic worker’s total monthly remuneration.

Domestic work constitutes one of the lowest paid occupations in the labour market

SRI LANKAN LAW

Sri Lanka has two statutory instruments that play a dominant role in the wage fixing mechanism across the country:

- 1) The Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954
- 2) The Wages Boards Ordinance No. 27 of 1941

The Shop and Office Act mandates when and how remuneration is payable. Domestic workers, by virtue of the fact that they are not ‘em-

neration. Given the room for abuse in respect of the above, C189 sets out strict conditions under which these deductions can be lawfully made. Accordingly, (a) they must be agreed to by the worker, (b) they must be for her personal benefit, and (c) the monetary value attributed to the payments must be fair and reasonable, in order to be lawful.⁴⁶

At present, domestic workers are not entitled to receive any legal protections with respect to the payment of wages

REFORM & RECOMMENDATIONS

Excluding domestic workers from the legislative regime that guarantees fair remuneration is problematic because it equates them with unskilled workers. This classification has been strongly resisted by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) on the basis that it seeks to undervalue the complex tasks and responsibilities associated with domestic work.⁴⁹

The exclusion of domestic workers from a national wage fixing mechanism seems to be in direct contravention of Sri Lanka's international obligations, vis-à-vis the Minimum Wage Fixing Convention, 1970 (C131).⁵⁰ Article 1 of the Convention states:

“ Each Member of the International Labour Organization which ratifies this Convention undertakes to establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate [emphasis added]. ”

At least two approaches may be considered in order to bring domestic workers within the ambit of protections generally available to the workforce.

The first approach relates to an expansive interpretation of available laws. While such an approach is not possible in the case of the Shop and Office Act, the scope of the Wages Boards Ordinance may in fact be expanded through interpretation. The definition of trade in the Ordinance is set out in section 64 to mean:

- (1) Any industry, business, undertaking, occupation, profession or calling carried out, performed or exercised by an employer or a worker; and
- (2) Any branch of, or any function or process in, any trade.

ployed in or about the business of a shop or office,⁴⁷ are excluded from the protective framework of this Act. Consequently, domestic workers are also excluded from the provisions of the Act that stipulate the extent to which and for what reasons employers are permitted to make authorised salary deductions from an employee's monthly remuneration.⁴⁸

The Wages Boards Ordinance provides for the institution of a 'Wages Board' tasked with regulating fundamental working conditions (i.e. minimum wage, leave entitlements and mandatory rest periods) for a particular sector in accordance with the statutory guidelines set out in the Ordinance. Two impediments remain in terms of bringing domestic workers within the ambit of the Ordinance. First, to date, no Wages Board has been set up for the regulation of domestic work in Sri Lanka. Hence, no minimum wage has been assigned to the domestic work sector. Second, there is ambiguity with respect to the scope of the Ordinance. The preamble states that it is 'an Ordinance for the regulation of the wages and other employments of persons employed in trades' (emphasis added). It could be argued that the use of the term 'trade' implies a purely commercial undertaking and cannot apply to work performed in private households.

Therefore, at present, domestic workers are not entitled to receive any legal protections with respect to the payment of wages. Moreover, they are not entitled to a minimum wage.

The definition explicitly excludes ‘any industry, business or undertaking which is carried on mainly for the purpose of giving an industrial training’ to (a) juvenile offenders, (b) orphans or (c) persons who are destitute, dumb, deaf or blind.

Arguably, ‘trade’ under the Ordinance, does not restrict itself to a purely industrial occupation. On this premise, barring domestic work from the ambit of protection purely due to the fact that it takes place within a private household is unjustified. Domestic work may fall within the ambit of terms such as ‘occupation’, which is considered part of the definition of ‘trade’. Thus it is critical that we revisit the exclusion of the domestic worker from the Wages Boards Ordinance. Such an approach would require an expansive judicial interpretation of the Ordinance. Alternatively, the minister in charge of the subject of labour could interpret the Ordinance to include domestic workers and appoint a Wages Board.

An expansive reading of the term ‘trade’ is strengthened by a comparative analysis of similar statutory instruments dealing with the term ‘trade’.

First, domestic workers are in fact recognised as ‘workmen’ capable of forming a trade union ‘that represents workmen or employers in trade disputes’ under the Trade Union Ordinance, No.14 of 1935. A Domestic Workers’ Union has already been established and is presently working towards reforming laws and policies applicable to domestic work.⁵¹ It would be counter intuitive to accept that domestic workers can be engaged in a ‘trade dispute’ without domestic work itself being classified as a ‘trade’.

Second, where the legislator intends to exclude the domestic worker from the ambit of the legislation, it often does so expressly. Examples of this practice are seen in the Employees’ Provident Fund Act, No. 15 of 1958 and the Employees’ Trust Fund Act, No. 46 of 1980. Regulations passed under these instruments expressly exclude domestic work from ‘covered employment’.⁵²

An alternative approach to the ‘interpretational approach’ involves enacting new laws or specific amendments to existing laws to explicitly

include domestic workers within their scopes. For example, a new law could be enacted to provide domestic workers with the same rights available to workers under the Shop and Office Act. Moreover, an amendment could be introduced to the definition of ‘trade’ in section 64 of the Wages Boards Ordinance to specifically include domestic workers. Such an approach would require the intervention of the legislature.

Broadening the definition of ‘trade’ in the Wages Boards Ordinance – either through expansive interpretation or a specific amendment – to include all wage earners will be a crucial starting point. On this basis, it would be possible to establish a specific Wages Board to regulate the fundamental conditions of work for domestic workers.⁵³ Specifically, in accordance with R201, the Board would have the authority to regulate the mode of payment of wages (i.e. through monthly pay slips or into a bank account in the name of the domestic worker), and limit the instances and the amount in which the salaries of the domestic workers can be lawfully deducted on the basis of an ‘in-kind payment’. These additional fetters could potentially limit the instances in which domestic workers are exposed to unequal, unfair, and abusive treatment.

It would be counter intuitive to accept that domestic workers can be engaged in a ‘trade dispute’ without domestic work being classified as a ‘trade’

Additionally, a Wages Board to regulate domestic work could aid domestic workers in their transactions within the marketplace. Their services will no longer be considered invisible chores. Instead, their contribution to households and working mothers will be recognised as intrinsically valuable – a critical step in reversing the discriminatory burden accompanying domestic work and lending much needed momentum to the decent work agenda. Moreover, the contribution of domestic workers is currently excluded from Central Bank statistics on the economy. The establishment of a Wages Board may also contribute towards changing the way the economy values the domestic work sector.

At this juncture, it must be noted that the challenges associated with this form of regulatory intervention is that a Wages Board, in order to be properly constituted, must necessarily include one member representing an employer of

domestic workers and one member representing the domestic work sector.⁵⁴ Given the poor organisational platforms that exist within the sector at present, these appointments are not likely to be easy. In this context, a move to es-

tablish a Wages Board must be accompanied by measures to engage existing domestic worker networks and employers of domestic workers, and to secure representation from both groups.



SOCIAL SECURITY

The vulnerability associated with domestic work is compounded by the fact that a domestic worker's access to social security in Sri Lanka is either absent or, at best, incomplete. Denying domestic workers social security that is generally available to rest of the workforce perpetuates the idea that domestic work is not regular 'work'.

C189

C189 states that the health and well-being of the domestic worker is crucial in curbing the inequality and marginalisation associated with the sector.

Article 14 states:

“ Each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection... including maternity benefits. ”

A domestic worker's access to social security in Sri Lanka is either absent or, at best, incomplete

SRI LANKAN LAW

The three key legislative instruments governing social security for the labour force in Sri Lanka are:

- 1) The Employees' Provident Fund No. 15 of 1958 (EPF Act)
- 2) The Employees' Trust Fund No. 46 of 1980
- 3) The Payment of Gratuity Act No. 12 of 1983

The EPF Act provides for a fund that is sustained through monthly employer and employee contributions. According to the Act, members of the fund are entitled to the sum lying in their accounts either upon retirement (i.e. 55 years of age for men and 50 years of age for women)

Both the EPF and the ETF Acts omit the domestic worker from the contemplated ambit of social protection

REFORM & RECOMMENDATIONS

The inability for a domestic worker to partake in schemes that secure their welfare interests is a discriminatory practice that must be remedied if Sri Lanka is to comply with C189. Since Sri Lanka is a member of the International Convention on Civil and Political Rights (ICCPR),⁶⁰ it also has an international obligation to 'recognise the right of everyone to social security, including social insurance.'⁶¹ Furthermore, in alignment with the ILO Convention of Social Security (Minimum Standards) Convention, 1952⁶² (No. 102)⁶³ Resources and Employment Policy⁶⁴ states:

“ Sri Lanka recognises the need to adopt a comprehensive social protection policy to all⁶⁵ ”

Given these international obligations, it is useful to examine how other countries have attempted to balance the particular needs of the domestic work sector with the importance of securing social welfare for all workers.

India proves to be an instructive example in this respect. The country proposes to recognise the 'severe exploitation'⁶⁶ faced by domestic workers in the absence of legal protection through its Domestic Workers Welfare and Security Bill (2010) tabled by the National Commission for Women.⁶⁷ The Bill ensures that national social security coverage extends to India's domestic sector. Accordingly, subject to the payment of a monthly contribution, every domestic worker registered as a beneficiary is entitled to receive payments from the 'Domestic Workers Welfare Fund' set up under the Bill.⁶⁸ The Fund is designed to function as a welfare scheme for domestic workers, 'including family welfare, family planning, education, insurance, and other welfare measures'.⁶⁹ Additionally, the Bill mandates the institution of state and district boards to monitor and assist domestic workers.⁷⁰

Another salient example of welfare schemes set up for the protection of domestic workers is the initiative taken in Brazil to combine two mechanisms to foster the entry of domestic work into the formal

or cessation of employment.⁵⁵ Similarly, the ETF Act provides for a fund based on employee and employer contributions. The fund aims to promote employee ownership, employee welfare and economic democracy through participation in financing, investment and acquisition of equity interests in enterprises.⁵⁶

Crucially, both the EPF and the ETF Acts omit the domestic worker from the contemplated ambit of social protection. The EPF Act only applies to those sectors that are classified as being 'covered employment'. Pursuant to regulations published under the Act, 'domestic service' is explicitly excluded from the list of covered employment under the fund.⁵⁷

The regulations passed under the ETF Act also state that the employers of 'employees in any domestic service in any household' will not be held liable for the non-payment of stipulated contributions under the Act.

The Payment of Gratuity Act places a liability on the employer to pay gratuity to workmen for the termination of services, provided the workman in question has worked for over a period of five years.⁵⁸ This Act also implicitly excludes the domestic worker from its ambit on the basis that it applies only where the employer employs fifteen or more workers at any given time.⁵⁹ The extreme unlikelihood of domestic workers being employed in such numbers within the same household virtually excludes them from the scheme under the Act.

economy.⁷¹ According to the ILO Report on Decent Work for Domestic Workers (2010), Brazil (1) utilised income tax deductions linked to the payment of social security benefits on behalf of the domestic worker, and (2) simplified social security payment procedures, to increase incentives for employers to contribute to a social security scheme for domestic workers.⁷²

Standards contained in C189 necessitate the repeal of the regulations under the EPF and ETF Acts that exclude domestic workers from accessing social security payments. If these regulations are repealed, domestic workers would not operate in less favourable labour conditions (compared to the general workforce) in terms of social security.

However, the above examples demonstrate how countries are beginning to recognise that the domestic work sector needs an alternative approach to social security protection. State intervention, in this context, will ultimately be more valuable during an individual's course of employment rather than at her point of retirement. If discrimination associated with exclusion from welfare is to be remedied, the specific needs of the

Standards contained in C189 necessitate the repeal of the regulations under the EPF and ETF Acts that exclude domestic workers from accessing social security payments

domestic worker and the unique nature of domestic work need to be considered more carefully. In fact, the formal structures envisaged by national social security mechanisms may further undervalue (rather than enhance) the economic status of the worker. For example, the EPF Act stipulates that the employee make a contribution of 8% of her wages.⁷³ This requirement may be too burdensome for domestic workers, particularly where wages are low or sporadic.

When evaluating avenues for reform in Sri Lanka, the proposed Indian model ought to be considered. The approach recognises that domestic workers require a dynamic form of social welfare that is distinct to the static pension scheme approach that currently exists under the EPF and ETF Acts. It is a dynamism that will provide for the establish-

ment of vocational training centres, legal aid clinics, a pension scheme and the provision of medical care to alleviate the existing vulnerabilities associated with domestic work.⁷⁴ Such dynamic social security might be guaranteed only through the enactment of a new law in Sri Lanka, similar to the Indian Domestic Workers Welfare Fund Bill.



MATERNITY BENEFITS

The domestic work sector mainly comprises women. When advancing the case for regulatory and legislative reform in line with a decent work agenda, it is crucial that domestic workers are afforded maternity benefits and protected from pregnancy related discrimination.

C189

Article 14 of the Convention clearly recognises the right of domestic workers to maternity benefits. States are obliged to consider the specific characteristics of domestic work when ensuring that domestic workers enjoy conditions that are ‘not less favourable than those applicable to workers generally’.

Article 14 of the Convention clearly recognises the right of domestic workers to maternity benefits

SRI LANKAN LAW

The Maternity Benefits Ordinance No. 32 of 1939 contains the framework for maternity protection in Sri Lanka. Under section 3, a female employee is entitled to twelve weeks of paid maternity leave upon delivery of her first child, and six weeks of paid maternity leave for any child thereafter.⁷⁵

Further, section 10A prohibits an employer from dismissing a female employee during her

maternity leave. The scope of protection also extends post-natally. For instance, the Ordinance mandates that nursing mothers receive at least two rest breaks (not less than 30 minutes) in a working day.⁷⁶

The application of the Maternity Benefits Ordinance is restricted to those workers employed in a ‘trade’. Unfortunately, the definition of ‘trade’ under the Ordinance is identical to that of the Wages Boards Ordinance. Hence, the interpretational challenge discussed in the previous section on payment of wages applies to maternity benefits as well. However, as argued previously, the term ‘trade’ does not necessarily justify the exclusion of domestic workers; the term could potentially accommodate a domestic worker on the basis that she engages in an ‘occupation’ or an ‘undertaking’.

REFORM & RECOMMENDATIONS

Sri Lanka has ratified the Maternity Protection Convention (Revised) No. 103 of 1952 (C103), which sets out the basic obligations of member states with regard to maternity protection. These obligations extend from the period of paid leave (i.e. paid maternity leave shall be at least twelve weeks) to the prohibition of pregnancy related discrimination.⁷⁷ Furthermore, the Convention specifically states that it is

applicable to ‘women employed in industrial undertakings and in non-industrial agricultural occupations, including women wage earners working at home’.⁷⁸ C103 also specifically mentions domestic workers by stating that the term ‘non-industrial undertakings’ includes ‘domestic work for wages in private households’.⁷⁹

Interestingly, C103, through Article 7, allows member states to ‘opt-out’ of applying the pre-

Reconciling local laws with international standards would require that the Maternity Benefits Ordinance be interpreted widely to include ‘all wage earners’

scribed standard of maternity protection to three categories of workers: (1) certain categories of non-industrial occupations, (2) occupations carried out in agricultural undertakings, and (3) domestic work. Sri Lanka has not made use of the above opt-out clause to date. Thus, the exclusion of domestic workers from maternity protection under Sri Lankan law (i.e. the protection available to the general workforce under

the law) contravenes Sri Lanka’s international obligations.

Therefore, reconciling local laws with international standards would require that the Maternity Benefits Ordinance be interpreted widely to include ‘all wage earners’ – giving domestic workers the right to obtain maternity protection and be free from pregnancy related discrimination.



HOURS OF WORK

A particularly concerning aspect of domestic work, especially in the case of residential workers, is the blurring of lines between rest and work.⁸⁰ As illustrated in an article published by Erna Magnus in 1934, there seemed to be customary expectation that ‘servants’ would constantly be available to their ‘masters’ to perform all required duties ‘within the reasonable limits of their physical strength and moral welfare.’⁸¹ Unfortunately, we are still to see evidence of a significant attitudinal shift even in modern times. In this context, a regulatory framework that guarantees domestic workers the right to enjoy a ‘work-life balance’ is urgently needed.

C189

Article 25(1)(c) of R201 calls for ‘the concerns and rights of domestic workers [to be] taken into account in the context of more general efforts to reconcile work and family responsibilities’. Therefore, C189 challenges what was considered customary practice within the domestic work sector by recognising that regulation of working time (and the delineation of ‘work time’ from ‘non-work time’) is integral to the protection of domestic workers – both in terms of health and ensuring the worker’s freedom of movement.⁸²

Sri Lanka currently has no applicable labour laws that regulate working time in the domestic work sector

SRI LANKAN LAW

Sri Lanka currently has no applicable labour laws that regulate working time in the domestic work sector. Due to the domestic worker’s exclusion from the Shop and Office Act⁸⁵ and the Wages Boards Ordinance,⁸⁶ there is no requirement for employers to comply with mandatory rest periods, annual

leave or maximum working times as set out under these laws.

Domestic workers are also excluded from the protective framework outlined in the Factories Ordinance No. 45 of 1942, which regulates night

To this end, Article 10 of C189 sets out a base framework for regulating work time in the domestic sector. It mandates that member states shall take steps to ensure ‘equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest, paid annual leave in accordance with national laws.’⁸³ Furthermore, it specifies that weekly rest shall be ‘at least 24 consecutive hours’.⁸⁴

REFORM & RECOMMENDATIONS

Bridging the deficit between international standards and Sri Lankan law governing domestic workers, it is crucial to keep in mind that:

“ The heterogeneity of tasks covered by domestic work and the fact that some tasks may have to be performed outside and beyond regular hours of work make regulation in this area complex. In order to limit hours of work effectively, legislative and regulatory instruments should address these complexities in a clear and comprehensive manner.⁹² ”

C189 factors these concerns into its regulatory framework under Article 10 by stating that legislative solutions to guarantee equal treatment in relation to working time for domestic workers should take into account the ‘special characteristics of domestic work’.⁹³ Therefore, in the case of residential workers, ‘rest’ and ‘regular working hours’ may have to be computed and regulated in a manner that deviates from the rigidity of the industrial workplace model.⁹⁴

In countries that have legislative instruments governing domestic work, ‘regular working hours’ are generally between eight to nine hours a day, and 44 to 45 hours a week.⁹⁵ Moreover, these instruments often have criteria to regulate and remunerate overtime.

Section 5(5) of Austria’s Federal Act Governing Domestic Help and Domestic Employees provides: ‘The [normal] working hours as provided may be exceeded in exceptional cases only’.⁹⁶ Finland,

Solutions to guarantee equal treatment in relation to working time for domestic workers should take into account the ‘special characteristics of domestic work’

work. The Ordinance stipulates that the following conditions apply to every woman or young person employed in a factory:⁸⁷

- (a) The total hours of work performed by a woman shall not exceed 48 hours in any week;⁸⁸
- (b) No woman shall be compelled to work at night against her will;⁸⁹
- (c) Every person who works at night shall be in receipt of a payment not less than one and a half times the normal payment received by her;⁹⁰ and
- (d) No woman shall be employed for more than ten days of night work, during any one-month.⁹¹

in its Employment of Household Workers Act, limits working outside regular working hours to a list of emergency-type situations.⁹⁷ The Act also stipulates that ‘on any one occasion, emergency work is allowed during a period not exceeding two weeks and for a time not exceeding twenty hours’.⁹⁸ While the above standards are likely to be enforceable for non-residential domestic workers, enforceability may be more complex in the case of residential workers. Therefore, due to the informal nature of tasks given to the residential worker, there may need

to be a re-computation of working time in the event the worker is left idle for significant portions of the day (i.e. when the employer goes to work, or the children of the employer attend school).

In Sri Lanka, a large part of ensuring decent working times for domestic workers is ensuring that rest periods are computed in a manner that is representative of how work takes place in the

sector. In South Africa, for example, under section 16 of Sectoral Determination 7, an employer is bound to grant the domestic worker a daily rest period of at least twelve consecutive hours between ending work and starting work the next day.⁹⁹ With the aim of capturing the informal nature of domestic work, the above instrument also provides a certain degree of flexibility for employers of residential domestic workers by mandating that the rest period 'by written agreement, be reduced to ten hours for a domestic worker (i) who lives at the workplace, and (ii) whose meal interval lasts for at least three hours'.¹⁰⁰

Under Section 24 of the Wages Boards Ordinance, a Wages Board is entitled to mandate minimum working times, leave, and overtime protection for a specific sector. Drawing from the experience of South Africa's Sectoral Determination 7, the institution of a Wages Board for Sri Lanka's domestic sector could potentially address the prevailing inequality associated with working time for residential workers. The working hours could then be defined in a manner that does not compromise the individual worker's autonomy.¹⁰¹



LIVING CONDITIONS

Domestic work is somewhat unique in the way it relocates ‘work’ from the public sphere to the private sphere. This feature often raises serious legislative and regulatory challenges surrounding the prevention of forced labour. Largely impacting residential domestic workers, the personalised service conditions of domestic work tend to afford the worker an ambiguous status. This ambiguity leads to the construction of ‘a special type of worker who is neither a member of the family, nor an employee in the public sphere enjoying the full advantages of socialised work’.¹⁰²

Domestic workers are often forced to live in inadequate living conditions or to work in unsafe environments.¹⁰³ Since the sector is placed outside the scope of labour law protection, there are no laws that mandate employers of domestic workers to provide them with private accommodation. In this context, some workers have little choice but to live and sleep in the public areas of the home.¹⁰⁴

Additionally, failing to regulate the domestic worker’s living conditions also exposes her to health and safety threats during the course of her employment e.g. handling dangerous equipment, food deprivation, and restricted communication.¹⁰⁵

C189

Recognising that there is an urgent need to regulate the ‘residential standards’ of domestic work, C189 outlines an employer’s obligations when employing residential domestic workers. These aspects include the nature of accommodation, the quantity and quality of food, and the worker’s privacy.¹⁰⁶

To this end, Article 6 of the Convention man-

Domestic workers are often forced to live in inadequate living conditions or to work in unsafe environments

SRI LANKAN LAW

There are currently no labour laws that govern the living conditions of domestic workers in Sri Lanka. The lack of protection also extends to working conditions, which, in the case of residential workers, overlaps with living conditions.

Certain portions of the Sri Lankan workforce are entitled to protection. For instance, the Factories Ordinance¹⁰⁷ regulates working conditions

dates: 'Each Member shall take measures to ensure that domestic workers enjoy...decent working conditions and, if they reside in the household, decent living conditions that respect their privacy'.

There are currently no labour laws that govern the living conditions of domestic workers in Sri Lanka

REFORM & RECOMMENDATIONS

Article 27 of the Sri Lankan Constitution (under the Directive Principles of State Policy), obliges the State to ensure:

“ The realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities¹¹⁰ ”

According to the Supreme Court in *Bulankulama v. Minister of Industrial Development*,¹¹¹ Directive Principles of State Policy are accompanied by an obligation on the State to ensure the progressive realisation of the relevant right. If the same principle is extended to residential domestic workers, the State has a positive obligation to impose minimum standards on employers. These standards should aim to ensure that residential domestic workers are not deprived of an 'adequate standard of living...adequate food, clothing and housing' while residing in the employers' household,¹¹² R201 in fact defines 'minimum' conditions to mean:

- 1) A separate, adequately ventilated room with a lock
- 2) Access to suitable sanitary facilities
- 3) Meals of good quality and sufficient quantity, taking into account religious and cultural requirements (to the extent that is reasonable)¹¹³

of factory workers. While domestic workers are obviously not factory workers, no equivalent protection framework has been made available to the domestic work sector. For example, domestic workers would be entitled to the circulation of fresh air, to adequate ventilation and suitable lighting if the same principles found in the Factories Ordinance were extended to domestic work through an equivalent law.¹⁰⁸

Domestic workers are also excluded from the compensation mechanism set out under the Workmen's Compensation Ordinance No. 19 of 1934 for injuries sustained during the course of employment. The Ordinance only applies to a 'body of persons whether corporate or unincorporated'.¹⁰⁹ The reference to a 'body of persons' implies that the Ordinance was intended to apply to businesses and other commercial undertakings rather than an individual employer of domestic workers. Hence domestic workers are not entitled to any statutory protections relating to injuries and losses suffered as a result of poor living and working conditions.

A guiding example in this respect is the Domestic Workers Act in the Philippines,¹¹⁴ where it is mandated that employers of domestic workers shall provide for the 'basic necessities of the worker to include at least three adequate meals a day and humane sleeping arrangements'.¹¹⁵ Furthermore, the Act provides for the guarantee of the domestic workers' privacy by ensuring that this right extends to all forms of communication and personal effects.¹¹⁶ Meanwhile, in Bolivia, Article 21 of the Household Worker's Act 2003 obligates the employer to '...provide those workers living in the household in which they perform services with adequate hygienic accommodation; access to a toilet and shower for personal hygiene'.¹¹⁷

It is clear that, in the absence of a specific legislative enactment, domestic workers in Sri Lanka are not guaranteed minimum standards with respect to living conditions. A new law that guarantees such standards ought to include a mechanism for registering all residential do-

mestic workers. Such a registration mechanism is required if minimum standards are to be monitored and enforced. A similar model is envisaged in India's draft Domestic Workers Welfare and Security Bill of 2010.¹¹⁸ Chapter III of the proposed bill mandates that every employer of domestic workers register with the District Board within one month of commencing to employ a domestic worker.¹¹⁹ Drawing

from India's experience, Sri Lanka's registration mechanism could attach certain terms and conditions on employers with regard to the working (and living) conditions of domestic workers. The monitoring mechanism – either a new body under the law or an existing body such as the Labour Commissioner – could monitor compliance, impose penalties for non-compliance and prescribe compensatory damages for injuries sustained at work.



PERSONAL SECURITY

Domestic workers are particularly vulnerable to security risks when compared to other groups of service workers. As noted by the ILO, 'domestic workers, whether working in their home countries or abroad, are vulnerable to many forms of abuse, harassment and violence, in part because of the intimacy and isolation of the workplace'.¹²⁰

Kristi Graunke argues that the patterns of abuse and mistreatment in domestic violence cases are remarkably similar to the nature of violence experienced by domestic workers.¹²¹ First, the household employer frequently exploits the dependency that grows between the domestic worker and the employer.¹²² Second, employers often use the domestic worker's sense of isolation as a mechanism to exert power and control.¹²³ Third, both instances involve a high degree of physical proximity between the victim and the abuser.¹²⁴ Given these similarities, adequate protections against abuse, harassment and violence should be made available to domestic workers.

C189

In curtailing abuse frequently associated with the domestic work sector, Article 5 of C189 mandates: 'Each member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence'.

Employers often use the domestic worker's sense of isolation as a mechanism to exert power and control

SRI LANKAN LAW

Under Sri Lankan law, abuse, harassment and other forms of sexual abuse perpetrated against the domestic worker are punishable under the country's Penal Code No. 2 of 1883 (as amended). For instance, Section 345 prohibits sexual harassment perpetrated by words or physical force. Section

363, Section 364 and Section 365B deal with rape and other forms of grave sexual abuse. Furthermore, Section 342 covers general assault and battery, which is not covered by the sections on sexual offences.

Criminal proceedings under the Penal Code are not 'victim centric' and do not always provide the victim with relief. Such relief is often made available through quasi-criminal proceedings. The quasi-criminal nature of domestic violence has already been recognised to an extent in Sri Lanka under the Prevention of Domestic Violence Act No. 34 of 2005. Despite being similarly placed, domestic workers are not afforded such protections.

REFORM & RECOMMENDATIONS

Existing criminal laws may not adequately address abusive practices that domestic workers are potentially exposed to. In this context, a new law designed to protect domestic workers from abusive practices that may not amount a criminal offence needs to be enacted. The type of relief offered under such a new law ought to be carefully considered. For instance, the type of relief available to victims under the Prevention of Domestic Violence Act, i.e. a protection order restraining the perpetrator from accessing the victim for a period not exceeding twelve months, may not be applicable to the domestic work context. Alternatively, compensation may be a more appropriate form of relief for a domestic worker—who would be unwilling to continue employment after making a complaint against her employer.

According to the ILO, protecting domestic workers from abuse, harassment and violence

A new law designed to protect domestic workers from 'quasi-criminal' offences, needs to be enacted

requires definitional clarity on what constitutes abuse, harassment and violence. Hence legislative reform should be preceded by a thorough analysis of the unique vulnerabilities associated with domestic work (i.e. isolation, lack of support, lack of awareness of rights, and gender discrimination).¹²⁵ The Employment of Foreign Manpower (Work Passes) Regulation in Singapore, offers such definitional clarity by outlining the instances that amount to 'ill-treatment' in the domestic work context.¹²⁶ For example, sexual abuse, criminal intimidation, hazardous neglect, and threats on the welfare of the domestic worker are punishable offences under the Act. Additionally, employers found guilty of abuse, exploitation, ill treatment or other criminal offences against domestic workers are barred from employing further domestic workers.¹²⁷ This model may be useful to consider when designing a similar law in Sri Lanka.



DISPUTE RESOLUTION

Guaranteeing decent work for domestic workers ultimately depends on the effectiveness of enforcement mechanisms. In this context, an effective dispute resolution mechanism needs to be in place and should be accessible to domestic workers. A weak or inaccessible dispute resolution mechanism will only diminish the consequences faced by employers for non-compliance with decent work standards.

C189

Article 17(1) of C189 mandates: 'each member shall establish effective and accessible complaint mechanisms as a means of ensuring compliance with national laws'.¹²⁸ Moreover, Article 17(2) of the Convention sets out an additional obligation to 'develop and implement measures for labour inspection and enforcement with regard to the special characteristics of domestic work'.¹²⁹ Hence the Convention contemplates the inspection of households notwithstanding their 'private' nature.¹³⁰

A weak or inaccessible dispute resolution mechanism will only diminish consequences faced by employers for non-compliance with decent work standards

SRI LANKAN LAW

Section 31B of the Industrial Disputes Act No. 43 of 1950 (as amended) gives a workman or a trade union on behalf of a workman the right to apply to the labour tribunal for relief or redress in respect of specific grievances.¹³¹ The termination of an employee's service by her employer is one such grievance.¹³² Under the said Act a 'workman' is described as:

“ Any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or

Section 31B of the Industrial Disputes Act No. 43 of 1950 (as amended) gives a workman or a trade union on behalf of a workman the right to apply to the labour tribunal for relief or redress in respect of specific grievances

REFORM & RECOMMENDATIONS

Any reform related to an effective dispute resolution mechanism for domestic workers only complements the guarantees of decent work standards already provided under the law. Hence dispute resolution can only be contemplated when decent work standards such as minimum wages, social security, maternity benefits, minimum rest, appropriate living conditions and personal security are already provided for under the law.

Moreover, once standards have been set, enforcement will need to factor in the low education levels of domestic workers that may result in (a) a lack of knowledge about applicable laws and (b) an inability to engage with complex complain procedures.¹³⁹

(1) A lack of knowledge about applicable laws

One strategy to deal with the lack of knowledge and awareness about applicable laws is to introduce a regulatory framework through which all domestic workers are registered. In such a context, a regulatory body dedicated to domestic workers could issue to all registered domestic workers an easy to comprehend manual that sets out (a) the fundamental conditions underlying her employment relationship (e.g.

or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated.¹³³ ¶

Given the fact that this definition includes individuals working ‘in any capacity’ whether the contract is ‘implied or expressed’,¹³⁴ a domestic worker is entitled to make a claim under the Industrial Disputes Act. In fact, ‘domestic servants’ are specifically cited in Section 33(3) of the Act.

In the case of *Wijedeera v. Babyhamy*,¹³⁵ a ‘domestic servant’ applied to the Labour Tribunal for relief with regard to the termination of her services (without pay). The court held:

It will neither be just nor equitable to preclude the tribunal from awarding proved arrears of wages where an employee comes to the Tribunal crying for relief and redress.¹³⁶

This case clearly confirms the ability of a domestic worker to sue her employer for wrongful termination. To date, there have been only a handful of reported judgments that concern domestic workers who have sought the intervention of the labour tribunal to advance their rights.¹³⁷ These judgments deal exclusively with termination of service under Section 31B of the Industrial Disputes Act.¹³⁸ However, a larger volume of unreported cases before the labour tribunal could in fact exist.

Sri Lanka’s labour law appears to partially comply with Article 17(1) of C189. The jurisdiction of the tribunal with respect to domestic workers is, however, limited to Section 31B(1) of the Industrial Disputes Act. Hence domestic workers are only entitled to make a complaint regarding the termination of services and the ‘conditions of labour’, which thus far have not been properly defined in the context of domestic work. In effect, domestic workers are only entitled to back-wages under the Act. Even where reinstatement is the appropriate remedy, Section 33(3) of the Act requires that the Labour Tribunal stipulate the payment of compensation as an alternative to reinstatement where the workman concerned is employed in the capacity of a ‘domestic servant’.

In the absence of any provision for labour inspection in the domestic work sector, Sri Lanka’s labour law currently fails to comply with Article 17(2) of C189.

minimum wage, holidays, rest etc.) and (b) the complaint mechanism available in the event these conditions are breached. Where the domestic worker concerned is unable to read, the contents of the manual could be read out and explained to her by an officer of the regulatory body. The manual could be further supplemented by training programmes and seminars on domestic worker rights.

Additionally, drawing on the experience of South Africa, all employers of domestic workers should be required to keep a copy of the standard manual in a place where the domestic worker has access to it.¹⁴⁰

(2) Overcoming complex complaint procedures

Given the unique features of the domestic work sector (i.e. low levels of education, significant disenfranchisement, and high levels of employer dependency), successful enforcement of decent work standards will depend on the availability of non-confrontational avenues of enforcement. In this context, a labour tribunal or court is likely to be a domestic worker's last resort.

The crucial point of intervention, therefore, is the potential for a new regulatory body or an existing authority such as the Labour Commissioner to play a more robust role in the protection of domestic worker rights. Some avenues for reform are set out in the following:

An effective dispute resolution mechanism for domestic workers only complements the guarantees of decent work standards already provided under the law

- 1) A complaints hotline should be set up to receive (and investigate) complaints from domestic workers.¹⁴¹ This would ensure that workers have access to justice in a relatively non-confrontational manner, through the involvement of an empowered third party. A regulatory body may also be useful to facilitate alternative employment for a domestic worker who is being subjected to abuse or harassment by her current employer.
- 2) Officers of a regulatory body should be authorised to conduct on-site investigations in order to assess the suitability of working conditions and the payment of remuneration. In South Africa, for example, labour inspectors have the right to enter private homes following an authorisation by a labour court.¹⁴² According to the ILO, in January 2011 labour inspectors visited over 200 households in the Western Cape Province and administered a questionnaire to assess working conditions and social security of residential domestic workers.¹⁴³
- 3) A regulatory body should offer conciliation and mediation services to domestic workers and their employers. Such services may provide the space needed to settle disputes between the domestic worker and employer in a manner that does not irreversibly damage the employment relationship.



CONCLUSION

This study examines the concept of ‘decent work’ within the legal and policy framework of Sri Lanka’s domestic work sector. The study uses ILO C189 as a frame of reference for appropriate standards and best practices and concludes that a number of prevailing laws and practices are inconsistent with the convention.

The current exclusion of domestic workers from the framework of protection contributes to: (1) high levels of vulnerability associated with domestic work, and (2) devaluation of the economic benefit of the services performed by domestic workers.

In this respect, the study identifies three approaches to legal reform:

- (1) Expansive interpretation of existing laws**
- (2) Amendment of existing laws to reflect international standards**
- (3) Introduction of new laws based on international standards**

EXPANSIVE INTERPRETATION

Domestic workers are prevented from accessing protection with respect to certain fundamental conditions of work (e.g. minimum wage, living conditions, rest, and annual leave) due to a conceptual hurdle. This hurdle essentially relates to the definitional limitation of the term ‘trade’ and

the fact that domestic work is seldom characterised as a trade. However, a worker that performs services in a private household is not statutorily barred from interacting within the labour marketplace. Hence it is possible to conceive of domestic work as a ‘trade’ for the purpose of statutory interpretation that includes non-industrial occupations. Such an expansive interpretation already applies to the Trade Union Ordinance and Industrial Disputes Act, both of which extend to domestic workers. Hence a similar expansive interpretation enables the inclusion of domestic workers as a protected class of employees under the Wages Boards Ordinance and the Maternity Benefits Ordinance.

This strategy will ensure that Sri Lanka’s legal and policy framework complies with the following minimum standards contained in ILO C189:

- a) Guarantee of a minimum wage
- b) Regulation of ‘in-kind’ payments
- c) Ensuring domestic workers enjoy conditions that are not less favourable than those applicable to workers generally with respect to maternity

AMENDING EXISTING LAWS

Sri Lanka is currently party to the ILO conventions that govern minimum wage and maternity protection for workers. The conventions in their current form are applicable to all wage earn-

ers regardless of whether they are engaged in the formal or informal sector. Compliance with these international conventions requires that existing laws be amended to include domestic workers within their scope. Certain laws such as the Wages Board Ordinance and Maternity Benefits Ordinance contain ambiguity over their respective definitional scopes. These laws could be amended to clearly include domestic workers within their ambits.

Meanwhile, regulations under the EPF Act and the ETF Act should be amended to include domestic workers within their ambit. Such inclusion may not necessarily guarantee social security to domestic workers. However, it will, at least, remove an unnecessary barrier that prevents employers of domestic workers from contributing towards the social security of long-term employees.

The amendments described above would result in compliance with the following standards contained in ILO C189:

- a) Guarantee of a minimum wage
- b) Ensuring domestic workers enjoy conditions
- c) that are not less favourable than those applicable to workers generally with respect to social security, and maternity

INTRODUCING NEW LAWS

Given the unique nature of domestic work, integrating domestic workers into the existing labour protection framework will not always ensure compliance with international standards. Therefore, new laws need to be introduced to address specific gaps in the legal and policy framework. This study proposes three specific interventions in this regard:

a) A dynamic social security mechanism

A dynamic social security payment scheme designed to address ongoing vulnerabilities of domestic work (as opposed to a scheme that offers only a safety net accessible upon retirement) should be introduced. This scheme may be modelled on the Indian Domestic Workers Welfare and Security Bill of 2010.

b) A registration mechanism

A registration mechanism for employers should be introduced to ensure that employing households maintain minimum standards with respect to living conditions, hours of work and rest for residential workers. The mechanism should also provide for labour inspection. Introducing such a mechanism necessarily involves drafting new legislation – perhaps modelled on the Indian Domestic Workers Welfare and Security Bill, which provides for a registration system.

c) A new law on personal security

A new law that protects domestic workers from abusive practices within the home that do not amount to criminal offences should be enacted. The law should include a complaints mechanism to ensure that a worker's personal security is safeguarded during the course of employment.

The foregoing analysis reveals the complex nature of the gaps between international standards on domestic workers and the current legal and policy framework in Sri Lanka. A generic model of reform (i.e. introducing a new law) may not be necessary to guarantee compliance with certain standards. Rather, an expansive interpretation of existing law, or the revision of its scope suffices in many cases. This option is important to consider, as introducing new laws can be time consuming, and may be met with greater legislative reluctance. Therefore, lobbying policymakers to interpret existing laws broadly to include domestic workers may be a feasible 'first resort'. Where such interpretation is difficult, lobbying legislators to amend existing labour laws to include domestic workers within their scope may be prudent. Despite the availability of such an incremental approach, this study also reveals that certain international standards unique to domestic work cannot be guaranteed without fresh legislation. Hence the incremental approach may be inadequate for certain minimum standards such as those relating to living conditions, social security and personal security. In these circumstances, a new law dealing with certain aspects of domestic work ought to be enacted.

Having carefully assessed the gaps between international standards and existing law, this study proposes three unique approaches to reform (i.e. expansive interpretation, amending existing laws, and introducing new laws). A combination of these approaches, we believe, could narrow and eventually eliminate the gaps, and ultimately ensure decent work for domestic workers in Sri Lanka.

END NOTES

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- ³ Sri Lankan Labour Force Surveys from 2002 up to 2012 second quarter, provides statistics for 'Private households with employed persons' based on the 'International Standard Industrial Classification of All Economic Activities', See Luebker, Malte, and Martin Oelz. *Domestic workers across the world global and regional statistics and the extent of legal protection* (2013).
- ⁴ Tomei, *op. cit.*, p. 186.
- ⁵ International Labour Organisation, 'Toolkit For Mainstreaming Employment And Decent Work' (2006)
- ⁶ Antoinette Fauve-Chamoux, *Domestic Service And The Formation Of European Identity: Understanding The Globalization Of Domestic Work, 16th-21st Centuries*, 252 (2005).
- ⁷ Preamble to C189: 'Considering that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights.'
- ⁸ International Labour Organisation, *Extending The Scope Of Application Of Labour Laws To The Informal Economy: Digest Of Comments Of The ILO's Supervisory Bodies Related To The Informal Economy*, p. 68- 69 (2010).
- ⁹ International Labour Organisation, *op. cit.*, p.2.
- ¹⁰ R201, Clause 2.
- ¹¹ International Labour Organisation, *op. cit.*, p.2.
- ¹² Preamble to C189: 'Recognizing the special conditions under which domestic work is carried out that make it desirable to supplement the general standards with standards specific to domestic worker so as to enable them to enjoy their rights fully'
- ¹³ Article 1(a).
- ¹⁴ Article 1(b).
- ¹⁵ International Labour Organisation, *op. cit.*, p.2.
- ¹⁶ Section 24, Domestic Servants Ordinance No. 28 of 1871.
- ¹⁷ Labour Law of 13 March 1997.
- ¹⁸ Tomei, *op. cit.*, p. 187.
- ¹⁹ (1985) 1 Sri L.R. 401.
- ²⁰ *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance* (1968) 2 QB 497; *Short v J. & W. Henderson Ltd* (1946) 174 LT 417.
- ²¹ *Carsons Cumberbatch & Co. Ltd v Nandasena (President Labour Tribunal) and 2 Others* (1973) NLR 73.
- ²² Also see *Fernando v. Andrew's Travel Service* (2002) Sri L.R. 287.
- ²³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 14 November 2014].
- ²⁴ Article 22 UDHR.
- ²⁵ Article 23(1) UDHR.
- ²⁶ Article 23(2) UDHR.

END NOTES

²⁷ Article 23(4) UDHR.

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<http://www.refworld.org/docid/3ae6b3970.html> [accessed 14 November 2014], Ratified on 5 October 1981.

³⁰ Article 11(1) CEDAW.

³¹ Article 11(1)(f) CEDAW.

³² Article 11(2) CEDAW.

³³ Ratified on 15 September 1995.

³⁴ Ratified on 13 December 1972.

³⁵ Ratified on 5 April 1950.

³⁶ Ratified on 1 April 1993.

³⁷ Ratified on 7 Jan 2003.

³⁸ Ratified on 11 Feb 2000.

³⁹ Ratified on 1 March 2001.

⁴⁰ Ratified on 1 April 1993.

⁴¹ Ratified on 5 April 1954.

⁴² ILO, *Effective Protection for Domestic Workers*, at 5.

⁴³ Applicable to employees working on shop and office premises (e.g. hotel, bank etc.).

⁴⁴ Applicable to employees working in identified "trades" under the ordinance (e.g. janitorial services).

⁴⁵ According to section 14 of R201, 'when a provision is made for payment in kind of a limited proportion of remuneration, members should consider calculating the monetary value of payments in kind by reference to objective criteria such as market value, cost price or prices fixed by public authorities...'

⁴⁶ Article 12(2) of C189.

⁴⁷ Under Section 68 of the Shop and Office Act, an 'office' is defined as 'any establishment maintained for the purpose of the transaction of the business of any bank, broker, insurance company, shipping company, joint stock or other company, estate agent, advertising agent, commission agent or forwarding or indenting agent, or for the purposes of the practice of the profession of any accountant' and a 'shop' is defined as being 'any premises in which any retail or wholesale business is carried on, and includes a residential hotel and any place where the business of the sale of articles of food or drink or the business of a barber or hairdresser or any other prescribed trade or business is carried on'.

⁴⁸ Section 19(a) and 19(b) of the Shop and Office Act.

⁴⁹ International Labour Organisation, *Decent Work for Domestic Workers, Report IV(1)*, International Labour Conference, 99th Session (2010), at

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf, at para.23, 139.

⁵⁰ Ratified on 17 March 1975.

⁵¹ See Yasmin Gunaratnam, 'Plight of Sri Lanka's 'ghost' workers raises spectre of inequality and abuse', *The Guardian*, available at:

<http://www.theguardian.com/global-development/2013/nov/08/sri-lanka-domestic-workers-human-rights>, [accessed 14 November 2014].

END NOTES

⁵² By virtue of *Gazette Extraordinary* No. 171/2, 14th December 1981 passed under Section 16(2) of the Employees' Trust Fund Act, 'domestic service in any household' was explicitly excluded from attracting social security payment obligations under the Act.

⁵³ Such protections under the Wages Boards Ordinance include conditions with respect to the payment of wages (Section 2), statutory leave (Section 3), overtime (Section 22(1)), hours of work and weekly holidays (Section 24), and annual leave (Section 25).

⁵⁴ Section 9(1) of the Wages Boards Ordinance mandates that: 'Every Wages Board shall consist of the Commissioner and of members representing employers in the trade for which the Board is established, and members representing workers engaged in such trade, and of nominated members'.

⁵⁵ Section 23(1) Employees' Provident Fund No. 15 of 1958.

⁵⁶ Section 7(a) and 7(b) Employees' Trust Fund No. 46 of 1980.

⁵⁷ *Gazette* No. 14,936 of 11 December 1970, Order under Section 10(3) of the Act (Order No. 13) section 38: 'Employment in the service of any undertaking not being an undertaking carried on by a person as an undertaking in which only members of his family are employed, in which less than five persons are employed in any covered employment other than any employment...(c) in domestic service.'

⁵⁸ Section 5 Payment of Gratuity Act No. 12 of 1983.

⁵⁹ *Ibid.*

⁶⁰ Ratified 23 March, 1976.

⁶¹ Article 9(1) of the ICCPR.

⁶² *Ibid.* at s 357.

⁶³ Ratified on 27 April, 1955.

⁶⁴ Secretariat for Senior Ministers, 'National Human Resources and Employment Policy for Sri Lanka', June 2011, at available:

http://www.nhrep.gov.lk/images/pdf/nhrep_final.pdf [accessed 16 November 2014].

⁶⁵ Convention No. 102 was adopted at the International Labour conference of the ILO on 28 June 1952 and sets a framework of common important basic social security principles on which any social security system should be based to encourage the widest development of social security schemes. Convention No. 102 is the flagship of the eight up-to-date social security Conventions. It is the only international Convention, which defines the nine classical branches of social security and sets minimum standards for each. These are: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.

⁶⁶ Domestic Workers Welfare and Security Act, 2010, at available:

http://ncw.nic.in/PDFFiles/domestic_worker_welfare_and_social_security_act_2010.pdf [accessed on 16 November 2014].

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at 19(a).

⁶⁹ *Ibid.* at 19(2)(ii)

⁷⁰ 99th Session, International Labour Conference Geneva, 'Decent Work for Domestic Workers, Report IV(1)', available at:

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf [accessed 16 November 2014].

⁷¹ International Labour Organisation, *op. cit.*, p.80; Domestic Work Act (No 5.859), dated 11 December 1972, as amended by Act No. 11.324, dated 19 July 2006. Decree No. 6.481, dated 12 June 2008

⁷² 99th Session, International Labour Conference Geneva, *op. cit.*

END NOTES

⁷³ Section 15, Employees' Provident Fund No. 15 of 1958.

⁷⁴ Domestic Workers Welfare and Security Act, *op. cit.*, at section 5.

⁷⁵ Section 3(1) Maternity Benefits Ordinance No. 32 of 1939.

⁷⁶ *Ibid.* Section 12B.

⁷⁷ Article 3, Article 6, Article 10 Maternity Protection Convention (Revised), 1952 (No. 103).

⁷⁸ Maternity Protection Convention (Revised), 1952 (No. 103).

⁷⁹ *Ibid.*

⁸⁰ Adele Blackett, "The Decent Work for Domestic Workers Convention and Recommendation", 106 *Am. J. Int'l L.* 778 [2012].

⁸¹ Erna Magnus, "The Social Economic, and Legal Conditions of Domestic Servants", 30 *Int'l Law. Rev.* 190,206 [1934].

⁸² International Labour Organisation, *op. cit.*, p.49.

⁸³ Article 10(1) C189.

⁸⁴ Article 10(2) C189.

⁸⁵ Article 3 of The Shop and Office Act states that persons falling under the purview of the act shall not work (a) on any one day for more than 48 hours and (b) in any one week not less than 45 hours. Furthermore, in addition to statutorily mandated national holidays (Section 7A) such employees are also entitled to 14 days (Section 6(ii)) of annual leave and 7 days (Section 6 (iii)) of casual leave under the Act.

⁸⁶ Under Section 4(1)(a) of the Wages Boards Ordinance, 'any Wages Board may, in respect of the trade for which it is established...fix the number of hours constituting a normal working day or a normal working week, inclusive, in the case of a normal working day of the interval or intervals for meal or rest'. Additionally, in accordance with (1) Section 4(2), 'the number of working hours constituting a normal working day fixed by a Wages Board in respect of the trade for which it has been established shall not...be more than nine' and (2) Section 4(3) 'the number of working hours constituting a normal working week shall not exceed forty eight'. Furthermore, Section 25(1)(a) of the Wages Board also states that for those employees for whom Wages Boards have been set up, the Holidays Act (i.e. the act setting out statutory national holidays) shall be applicable.

⁸⁷ Section 67 Factories Ordinance No. 45 of 1942.

⁸⁸ *Ibid.* Section 67(a).

⁸⁹ *Ibid.* Section 67A(a)

⁹⁰ *Ibid.* Section 67A(d).

⁹¹ *Ibid.* Section 67A(g).

⁹² International Labour Organisation, *op. cit.*, p.49.

⁹³ Article 10(1), C189.

⁹⁴ Colleen Sheppard, *Inclusive Equality*, 103 [2010].

⁹⁵ Section 10 Sectoral Determination 7: Domestic Work Sector, binding as of 1 September 2002 (South Africa); Section 19(1) Employment and Labour Relations Act (Tanzania); Article 2 Act No. 18.065 of 15 November 2006 (Uruguay).

⁹⁶ Federal Act Governing Domestic Help and Domestic Employees, Act No. 60, dated 23 July 1962, as amended.

⁹⁷ Act on the Employment of Household Workers, Act No. 951 of 1977 (as amended up to Act No. 73 of 2001).

⁹⁸ *Ibid.* Section 8.

END NOTES

⁹⁹ Section 16 Sectoral Determination 7: Domestic Work Sector, binding as of 1 September 2002.

¹⁰⁰ *Ibid.*

¹⁰¹ Article 9 of C189 states: 'Each member shall take measures to ensure that domestic workers...who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave'.

¹⁰² Arat Kroc, Sedef, 'In the Privacy of Our Own Home: Foreign Domestic Workers as Solution to the Crisis in the Domestic Sphere in Canada', *Studies in Political Economy* 28, 33-59 (1989).

¹⁰³ International Labour Organisation, *op. cit.*, p.45.

¹⁰⁴ *Ibid.* at p.46.

¹⁰⁵ Katherine Scully, 'Blocking Exit, Stopping Voice: How Exclusion From Labour Law Protection Puts Domestic Workers at Risk in Saudi Arabia and Around the Works' 41 *Columbia Human Rights Law Review* 842 – 843 [2010].

¹⁰⁶ International Labour Organisation, *op. cit.*, p.45.

¹⁰⁷ Factories Ordinance No. 45 of 1942.

¹⁰⁸ Section 12(1), Section 13(1) Factories Ordinance No. 45 of 1942.

¹⁰⁹ Section 2(1) Workman's Compensation Ordinance No. 19 of 1934.

¹¹⁰ Article 27(c) Sri Lankan Constitution.

¹¹¹ S.C. Application No. 884/99 (FR).

¹¹² *Ibid.*

¹¹³ R 201, Paragraph 17.

¹¹⁴ An Act Instituting Policies for the Protection and Welfare of Domestic Workers (Republic Act 10361) 2013.

¹¹⁵ *Ibid.* Section 6.

¹¹⁶ *Ibid.* Section 7.

¹¹⁷ Domestic Workers Act, dated 3 April 2003.

¹¹⁸ Domestic Workers Welfare and Security Act, *op. cit.*

¹¹⁹ *Ibid.* at section 15.

¹¹⁰ International Labour Organisation, *op. cit.*, p.45.

¹¹¹ Kristi L. Graunke, 'Just Like One of the Family: Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States' 9 *Mich. J. Gender & L.* 131, 165 (2002).

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ International Labour Organisation, *op. cit.*, p.42.

¹¹⁶ Section 10(a) – (d) Employment of Foreign Manpower (Work Passes) Regulations 2012, at <http://www.mom.gov.sg/Documents/services-forms/passes/WPSPassConditions.pdf> [accessed on 16 November 2014].

¹¹⁷ International Labour Organisation, *op. cit.*, p.42.

¹¹⁸ Article 17(1) C189.

¹¹⁹ Article 17(2) C189.

END NOTES

¹²⁰ International Labour Organisation, *op. cit.*, p.45.

¹²¹ Kristi L. Graunke, 'Just Like One of the Family: Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States' 9 *Mich. J. Gender & L.* 131, 165 (2002).

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ International Labour Organisation, *op. cit.*, p.42.

¹²⁶ Section 10(a) – (d) Employment of Foreign Manpower (Work Passes) Regulations 2012, at <http://www.mom.gov.sg/Documents/services-forms/passes/WSPPassConditions.pdf> [accessed on 16 November 2014].

¹²⁷ International Labour Organisation, *op. cit.*, p.42.

¹²⁸ Article 17(1) C189.

¹²⁹ Article 17(2) C189.

¹³⁰ Johnson, Michael P., and Kathleen J. Ferraro, 'Research on domestic violence in the 1990s: Making Distinctions' *Journal of Marriage and Family* 62.4 948-963 (2000); one notable example in which the veil of 'privacy in homes' has been pierced by the state is with respect to domestic violence. The rationale is that the harm committed by intimate partner violence outweighs the individual's right to privacy and therefore necessarily creates an obligation on the state to investigate and respond to the said violence. Similarly, in the case of an abusive employer of domestic workers, it can be argued that a breach of fundamental conditions of work triggers an obligation on the state to investigate the extent of the breach.

¹³¹ Section 31B(1)(a), Section 31B(1)(b), Section 31B(1)(c), Section 31B(1)(d) Industrial Disputes Act No. 43 of 1950.

¹³² Section 31B(1)(a) Industrial Disputes Act No. 43 of 1950.

¹³³ Section 48 Industrial Disputes Act No. 43 of 1950.

¹³⁴ *Ibid.*

¹³⁵ *Wijedeera v Babyhamy* S.C. 234/70-L.T. 204/Matara [1973].

¹³⁶ *Ibid.*

¹³⁷ *Wijedeera v Babyhamy* S.C. 234/70-L.T. 204/Matara [1973]; *Sirisena v Silva* S.C. 62/68-L.T. G/263587 [1972]; *Karunaratne v Jackolis Appuhamy* S.C. 69/69-L.T. 7/36402 [1970].

¹³⁸ *Ibid.*

¹³⁹ James Lin, "A Greedy Institution: Domestic Workers and Legacy of Legislative Exclusion" 36 *Fordham Int'l L.J.* 706 [2013].

¹⁴⁰ Section 30 of South Africa's Sectoral Determination 7: Domestic Work Sector [2002] sets out that 'every employer on whom this sectoral determination is binding must keep a copy of the sectoral determination or an official summary available in the workplace in a place to which the domestic worker has access'.

¹⁴¹ At present the Department of Labour has a Women's and Children's Affairs Division. One of its objectives is listed as being to 'Inquire into complaints received with regard to violation of legal provisions pertaining to employment of women, young persons and children'. The proposed hotline could be an extension of the services provided by this particular Division. More information on the Women's and Children's Affairs Division available at:

http://www.labourdept.gov.lk/index.php?option=com_content&view=article&id=57&Itemid=80&lang=en [accessed on 17 November 2014].

¹⁴² Section 65(2) South Africa's Sectoral Determination 7: Domestic Work Sector [2002].

¹⁴³ International Labour Organisation, *op. cit.*, p 109.



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