

## TRANSNATIONAL CARE WORK REGULATING TRANSNATIONAL CARE WORK

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### Summary:

Care work, described as taking care of the elderly, children and persons with disabilities as a separate category, is better placed within the broader framework of Domestic work. Domestic work is referred to by the International Labour Organisation (ILO) as the work typically done as unpaid Labour by women in the house and follows the reproductive Labour framework.

This paper argues and emphasizes the need to understand care work as a category within domestic work rather than as a distinct category, and the persons carrying on both care work and domestic work are marginalized not only because of being racial minorities, women but also migrant workers, especially in the transnational context. The focus of this paper is to integrate care work within domestic work and discuss the regulatory framework for both.

Care work, defined in terms of taking care and responsibility for the elderly, children and persons with disabilities falls within the understanding of domestic work. Care work has been defined in terms of feelings of affection and responsibility for the recipients feeling of well being<sup>1</sup>. Domestic work is generally understood to include all work done at the home which includes caring for the elderly, children and persons with disabilities. The ILO finds that there is no comprehensive definition of domestic work by various legislations across the world irrespective of whether they have separate legislations for domestic workers or not. The ILO also records that domestic work has been a major occupation for women through centuries although it has scarcely been given the status of regular paid employment<sup>2</sup>.

The use of the term care work to represent sub-categories within domestic work has consequences which need to be thought out<sup>3</sup>. Care work introduces categories such as the differences between menial and spiritual domestic work<sup>4</sup> with connotations of racial segregation of domestic work, wherein the menial jobs of cleaning, washing, cooking can be differentiated from providing care which does not involve these jobs. Mignon Duffy analyses the two theoretical frameworks towards care as the nurturance model and the reproductive Labour framework as having very different implications for understanding care. A broad

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<sup>1</sup> Cancian, Francesca M., and Stacey J. Oliner. *Caring and gender*. Thousand Oaks, CA: Pine Forge Press, 2000, referred to in Mignon Duffy (ibid)

<sup>2</sup> ILO report on Decent work for domestic workers 2009.

<sup>3</sup> Joan Williams in “*Care as work, gender as tradition*”, 76 Chi.-Kent L. Rev. 1441, categorises care work into at least 8 kinds of work: Day care, care for the sick, emotion work, social capital development, growth work, housework, yard work, and household management

<sup>4</sup> Evelyn Nakano Glenn (1992) and Dorothy Roberts (1997), Nakano Glenn, Evelyn. 1992. *From servitude to service work: Historical continuities in the racial division of paid reproductive labor*, Signs: Journal of Women in Culture and Society 18:1-43., Roberts, Dorothy. 1997. *Spiritual and menial housework*. Yale Journal of Law and Feminism 9:51-80. (referred to in Mignon Duffy (ibid)

framework which she uses to define care as nurturance would lead to the inclusion not only of teachers, doctors and nurses but a range of other educational, social and religious care givers. The inclusion of better paid, highly educated workers within the broad framework of care workers raises controversies. She argues that this lack of conceptual clarity in defining care work should not lead to reproducing Labour inequalities<sup>5</sup>.

The wide variety in the way domestic work is done is seen in the Au pair programmes also, where young girls are sent to other countries as a cultural exchange and the domestic work done is incidental. If they are to be understood as workers they probably need permits to visit and work in the destination country. The invisibility of domestic work also has meant that the extent of jobs that need to be done, the skills required and the responsibility that it entails are not explicitly set out. Given the prevalence of exploitation in these services, the lack of training to perform care jobs and their liability for negligence, it may be preferable to categorise the work that they do as employment so that a sense of seriousness is associated with care work which in turn would dispel the assumption that care work can be done by any one with no skills and training required.

Domestic work has remained an invisible form of employment, poorly regulated and subject to gross exploitation, both nationally and transnationally. Regulating and valuing domestic work challenges the existing paradigms of regulation as the activity is not carried on for profit; there is no manufacturing process and no final product. Valuing care giving also raises several issues including the categorization of work and skills, responsibilities and value in terms of remuneration for care-giving. Even though a Labour issue, it is too tied up with other concerns regarding the valuation of what is called “women’s work” in general and “care giving” as such to be treated purely as a Labour issue. The traditional idea of work, which ordinarily refers to paid employment done outside the home in fixed places for fixed number of hours, does not always suit the needs of these workers. Therefore, most countries do not extend Labour regulation to them and they are thus left out impliedly or explicitly<sup>6</sup>. It is not sufficient to just focus on minimum conditions of work and assume that it will bring about the desired results. Paid Domestic work is tied up with the under recognition of women’s work and consequently suffers from neglect and invisibility. It is important to address these concerns along with guaranteeing minimum conditions of work.

Regulating a largely unregulated sector like domestic work will have benefits beyond the obvious ones, like better pay, hours of work, social security and improved health of workers. The impact will be wider with in terms of ensuring equality, non discrimination, gender justice and poverty alleviation. The difference in nomenclature must not affect the rights that are enjoyed by persons carrying on this work. They must benefit from the protection afforded to the work by regulation.

#### ILO Convention on decent work for domestic workers:<sup>7</sup>

The international consensus that is being sought for regulating domestic work is an attempt to bring dignity and equitable benefits to persons who carry out domestic work. After considerable debate within the International Labour Organisation (ILO) on the nomenclature

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<sup>5</sup> Mignon Duffy, *Reproducing Labor Inequalities: Challenges for Feminists Conceptualizing Care at the Intersections of Gender, Race, and Class*, *Gender and Society*, Vol. 19, No. 1 (Feb., 2005), pp. 66-82

<sup>6</sup> Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 *Iowa L. Rev.* 1835.

<sup>7</sup> ILO report on Decent Work for Domestic Workers, 2009

to be used, the ILO has preferred to retain the phrase domestic work thus retaining the reproductive Labour paradigm as well as its relationship to work done at home rather than in a public sphere. Thus the term domestic work does not relate to maintenance or cleaning or any of the other wide variety of work that falls within domestic work if it is done in a public sphere. The distinction between work done domestically which falls within the understanding of care and work that is paid Labour done in the public sphere is important to maintain. The need to focus on urgent drafting of a charter of rights for domestic workers is in terms of domestic work resembling forced Labour.

In its draft report the ILO refers to the ECHR's decision in *Siliadin v. France* wherein the European Convention for the protection of Human Rights and Fundamental Freedoms was invoked to ensure that the state afforded domestic workers with practical and effective protection.

#### Relevance of other international instruments:

International instruments have a key role to play in drawing up a framework for regulation of conditions of work for Domestic Workers. Given that these workers are at an intersection of several marginalizing factors i.e. invisibility, gender, migration, it is important to integrate within a framework for domestic workers the advantages of some of the earlier understandings of issues regarding their marginalization. The international conventions of the ILO regarding fundamental rights and principles at work, the CEDAW convention and the Migrant workers convention are a few examples of international consensus and understanding of issues relevant to domestic workers.

The convention on Freedom of Association forms a core convention of the ILO and is generally considered as a fundamental human right. The convention has significance for domestic workers given the low levels of organizing for domestic workers. It is also significant to observe that even though it is difficult to organise domestic workers, given that they do not work together or in a public space but alone and behind doors, the results of unionizing are similar to the results for any other organised work<sup>8</sup>.

The regulation for domestic workers including migrant women<sup>9</sup> can use provisions of the Convention on the Elimination of discrimination against Women (CEDAW). One of the important aspects of domestic work regulation is the regulation of placement agencies. The definition of discrimination under CEDAW is wide enough to include all forms of discrimination which have the effect of impairing the enjoyment of rights by women. The obligation to guarantee this by the State imposes a liability to ensure that placement agencies operate in a manner that facilitates the enjoyment of all rights by women. The CEDAW further imposes a responsibility to ensure that the rights of women are not violated by the actions of private individuals. These are important aspects to be taken into consideration for regulating domestic work.

The migrant workers convention also has important benefits for women and domestic workers. A large number of domestic workers migrate to other countries in the course of their employment. In the absence of legislations to protect their rights they have a vulnerable legal

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<sup>8</sup>Gordon Cleveland, Morley Gunderson, and Douglas Hyatt, *Union Effects in Low-Wage Services: Evidence from Canadian Childcare*, 56 Ind. & Lab. Rel. Rev. 295

<sup>9</sup>Jennifer S. Hainsfurther A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers, 24 Am. U. Int'l L. Rev. 843

status to claim their basic rights. They are involved in jobs which are considered dirty, dangerous and demeaning by local workers. The convention on migrant workers<sup>10</sup> confers a legal status irrespective of nationality and citizenship and imposes an obligation on states to ensure that basic human right violations are addressed.

### The need for regulation: A case study from India:

Domestic workers have remained a largely neglected section of the workforce in India. In spite of their growing numbers they are still unable to secure minimum protections from the law and the sector remains largely unregulated and undervalued. Existing legislations are unsuitable and specifically exclude<sup>11</sup> domestic workers considering the nature of the work and the persons who carry on this work. Since Independence there have been several attempts at introducing legislation for domestic workers particularly in 1959, through 1972, 1977, 1989 and 1990<sup>12</sup>. Domestic work is seen as an unskilled job that women learn without much effort and reinforces the sexual division of Labour<sup>13</sup>. This neglect by regulation has meant that domestic workers have no protection and entitlements. They are excluded by definition or interpretation by legislation<sup>14</sup>.

The informalising and undervaluation of women's work finds its expression in the manner of treatment of Domestic work<sup>15</sup>. It has remained invisible even within the Unorganised sector. The new legislations on the Unorganised sector do not explicitly mention domestic workers as workers in the unorganized sector. Women and children make up for more than 90% of domestic workers in India and worldwide<sup>16</sup>. Since the sector has received such low attention and domestic work is not being seen as work per se, it has also seen the engagement of children in this work with impunity. The severe injuries sustained by children, the violence that they face which has resulted in death in several cases makes it a hazardous occupation for children. However, the child Labour legislation in India did not recognise domestic work as hazardous for children until very recently<sup>17</sup>. One of the major hurdles faced in the recognition of domestic work as hazardous for children was the fact that no legislation recognizes domestic work as work and domestic workers as part of the Labour force. The exclusion of domestic workers from even social security legislation denies workers compensation in case of workplace accidents. The other aspect to domestic work is regarding the trafficking of girls in the name of and for domestic work.<sup>18</sup> There is no attempt being made by the state to integrate all these issues and regulate domestic work.

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<sup>10</sup> International Convention on the Protection of the Rights of all Migrant Workers and member of their families, 1990

<sup>11</sup> Industrial Disputes Act, 1947, a major Labour legislation applying to all workers by an expansive definition of industry nevertheless excludes domestic workers from the definition of worker and the work is excluded from the definition of industry. Since the definitions given by this Act are followed in several other legislations domestic workers fall out of their purview.

<sup>12</sup> WIEGO, Background note on domestic workers, [http://www.wiego.org/informal\\_economy\\_law/india/index.html](http://www.wiego.org/informal_economy_law/india/index.html)

<sup>13</sup> Sujata Gothoskar, New initiatives in organizing strategy in the informal economy -- Case study of domestic workers' organizing-- *Executive summary* (available at [www.wiego.org/publications/Gothoskar%20%20New%20initiatives%20in%20organizing%20strategy%20in%20the%20inf](http://www.wiego.org/publications/Gothoskar%20%20New%20initiatives%20in%20organizing%20strategy%20in%20the%20inf))

<sup>14</sup> WIEGO, Background note on domestic workers, [http://www.wiego.org/informal\\_economy\\_law/india/index.html](http://www.wiego.org/informal_economy_law/india/index.html)

<sup>15</sup> Areeba Hamid, *Domestic workers: Harsh everyday realities*, Economic and Political Weekly, Vol 41 NO 17, April 1 2006, p 1235.

<sup>16</sup> ILO report on Decent Work for Domestic Workers, 2009

<sup>17</sup> Notification banning children below 14 from working in residences and hospitality sectors was issued in 2006 under the Child Labour prohibition and regulation act, 1986

<sup>18</sup> Neetha N, *Regulating domestic work* Economic and Political Weekly, Vol 43 No37, Sep 13 2008, p26

## Conclusion:

Working conditions of domestic workers in several countries resembles new forms of servitude and slavery. There is an urgent need for the issue to be addressed at an international platform to help deal with the trafficking of people between countries, exploitation by lowering wages and withholding of travel documents and working conditions resembling forced Labour. Simultaneously there is a pressing need to recognise domestic work as work to ensure that there is no undervaluation and invisibility of work done at home whether paid or unpaid.

A framework dealing with domestic work must define the term in a way to include all forms of domestic work including care duties. Given that it is predominantly a occupation that is largely carried on by women the appropriate framework must take into account provisions in conventions such as the CEDAW, the Migrant workers convention and the respective ILO conventions not only on minimum rights at work but also conventions such as the convention on Contingent Labour and triangular relationships. The ILO Convention on Decent work for Domestic Workers that has been proposed in the first step in this direction.

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