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CARE WORK AND THE GLOBAL SOUTH

Shifting the Frame on the Founding Narrative of Labour Law

by Adelle Blackett

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> *"Domestic workers must lead, as they did in calling for and then vigilantly insisting on the framing of Convention No. 189 and Recommendation No. 201. Domestic workers must have the space to frame their social justice claims themselves, to work through what an emancipatory labour law looks and feels and tastes like, to them."*

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The International Labour Organisation's Convention No. 189 was decisively built around regulatory innovation that emerged primarily from the Global South. How much does this starting point shift the narrative on how we understand the founding narratives of labour law? The contention in this paper is that the emancipatory potential of focusing on care work requires researchers to build resolutely on methodological starting points that understand the global South not as a site of 'diversity', but as an epistemological starting point, as places of deep knowing and of alternative disciplinary conceptualisations that can and, increasingly, must inform regulatory developments, transnationally.

SPEAKER:

Professor Adelle Blackett, *McGill University Faculty of Law*

Adelle Blackett is the Canada Research Chair in Transnational Labour Law, Faculty of Law, McGill University. Professor Blackett is widely published in the field of transnational labour law, with a focus on decolonial approaches. Her 2019 book manuscript entitled Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labour Law (Cornell University Press) garnered the Canadian Council on International Law's (CCIL) 2020 Scholarly Book Award. She is on the roster of experts for the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) Chapter 23 (Trade and Labour) and the Canada-United States-Mexico Agreement Annex 31-B Lists of Rapid Response mechanism, and is a member of the International Labour Organization (ILO)'s Trade and Labour Advisory Committee. Professor Blackett has significant human rights and labour rights leadership experience internationally and in Canada. Internationally, this includes serving as the lead ILO expert in a treaty-making process on decent work for domestic workers and preparing a draft Haitian labour code. In Canada, she was unanimously appointed by the National Assembly of Québec to the Commission des droits de la personne et des droits de la jeunesse. She also chaired the federal Human Rights Experts Panel. She was appointed by the federal Minister of Labour to chair Canada's new Employment Equity Act Review Task Force, whose report was made public in December 2023. Professor Blackett's contributions have been recognised by the Barreau du Québec's Christine Tourigny Award of Merit and the status of Advocate Emeritus, the Queen Elizabeth II Diamond Jubilee Medal, and the Canadian Association of Black Lawyers' Pathfinder Award.

CHAIR AND MODERATOR:

Dr. Neha Wadhawan, *National Project Coordinator, International Labour Organisation New Delhi*

Neha Wadhawan has led efforts since 2018 to prevent trafficking of adolescent girls and women into forced labour, focusing on domestic work and garment supply chains in South and West Asia. Through the Work in Freedom program, funded by UKFCDO, she promotes knowledge sharing on labour rights across regions. Neha holds a PhD in international politics from Jawaharlal Nehru University (JNU), with research interests in social protection, labour rights, mobility, and gender in South Asia. She has worked with various UN agencies and the governments of India and Nepal on socio-economic development, labour migration, and women's work, and previously taught at Ambedkar University Delhi.

Introduction

Today I will be talking about research that was not undertaken yesterday. But it is also the research of a lifetime that is close to my heart as well as connected to communities close to home. While this research surrounded the work undertaken to establish the now historic International Labour Organisation's ('ILO') Convention No. 189, the Domestic Workers Convention 2011, (hereinafter referred to as 'Convention no. 189'); it has always been more than that. It has been about taking the work of social reproduction so seriously that we understand it as transformative for labour law, itself. This work affects labour law's founding narrative, and that is the theme on which I wish to speak today: emancipatory approaches to labour law.

Domestic work is work like no other, and work like any other. This was the rallying cry that surrounded how we shifted a narrative on workers and work that W.E.B. Du Bois (1899, 136) characterised in relation to people of African descent as "a despised race [in] a despised calling". And as we are increasingly learning, Dr. Ambedkar (1946), who was in correspondence with Du Bois, acknowledged the deep similarities between the Dalit caste in India, who were typically relegated to domestic work, and the position of African Americans in Ambedkar's words in his letter to Du Bois, "the study of [the latter] is not only **natural** but **necessary**".

> ***Domestic work is work like no other, and at the same time, is work like any other. This was the rallying cry that surrounded our shift of the narrative on workers and work that W.E.B. Du Bois characterised in relation to people of African descent as "a despised race [in] a despised calling."***

I would like to take that insight even further, today because it is a fitting reminder that the Global South is as much a **conceptual framework** as it is a geographic label. It is a framework that begins to allow us to grapple with what it means to *emancipate ourselves from a vision of our legal fields* that implicitly but powerfully shapes – even contorts - how we understand our disciplines, in this case, labour law. I argue that the shifting of the frame that we need to undertake in labour law is necessary. I go further to claim that the most human of activities – that of care – helps immeasurably with that shift. Further still: that shift happens through the Global South, through racialisation and labour migration, that is, through the *South of the North*... The movement is transnational. I acknowledge that focusing on the example of domestic workers to operate this shift seems counterintuitive. These workers face historical marginalisation and workplace isolation despite their prevalence in global migration. Domestic workers fall outside of the imaginary of the paradigmatic worker that has been at the core of dominant conceptions of labour law. Yet domestic workers have been at the forefront of a **subtle** but **unmistakable** move on the part of the ILO. This has occurred in the following three ways:

1. Through a focus on an entire protective framework of rights, commensurate with the move beyond a narrow articulation of what it means to be legally in an employment relationship, moving us past informal employment frameworks.

2. Through an emphasis on domestic workers' exercise of agency – something that is often articulated but that domestic workers themselves **insisted on foregrounding** *beforehand*, throughout the standard setting process, and in the implementation of any ameliorative agenda, to ensure that reform was in fact transformative.
3. Through an insistence on the need to understand this work as **transnational** work, and through that process, to understand the transnational in its *specificity*. Of course, migrant domestic work is our most immediate conduit to understanding the transnational. But if the pandemic has taught us *anything,* it is that unless we focus on social protection – and not protectionism – and on creating the transnational conditions to raise the working conditions of the most disenfranchised, we are missing the call of the current moment.

> ***At the heart of emancipatory approaches to labour law [is] work that insists on preserving space for workers' autonomy, which can mean both acting without the state and holding states accountable for opening and protecting spaces for autonomy.***

While it is beyond the scope of this lecture to engage with the powerful scholarship, led by Professor Kotiswaran (2021), on sex workers and the politics of anti-trafficking discourse that persists in enshrining a form of sex work exceptionalism, I do want to acknowledge one of the many points of convergence in our work. This includes a shared deep distrust of 'redemptive capitalism' as well as close rootedness in how we understand exploitative labour market conditions across a spectrum of work. What I wish to underscore today is Professor Kotiswaran's acknowledgement of the need to engage in a thick and sustained way with global heterogeneity in the quest not to flatten out the world between abolitionist or neoliberal legalisation strategies, but rather to ensure a form of **regulatory sophistication** that *centres redistributive questions*.

This preoccupation has been at the heart of emancipatory approaches to labour law – work that at once insists on preserving space for workers' autonomy, which can mean both acting *without* the state, *and* holding states accountable for safeguarding space for autonomy. I suggest that this accountability for action increasingly must happen across states, through multilateral governance, transnationally.

Regulatory Innovations Central to Establishing the Domestic Workers Convention, 2011

Let me now turn to the forms of regulatory innovation that were central to the establishment of Convention No. 189 and the accompanying, non-binding, supplementary Recommendation No. 201. I will discuss three such innovations.

A. South Africa

First and foremost, is the case of South Africa, which inspired the ILO Governing Body's support for standard setting on domestic work in the first place. In March 2008, when the item first came onto the agenda as a potential topic amongst many others, it was not necessarily the most obvious choice.

Of course, the ILO had been seized of the issue of standard setting on domestic work soon after it was established in 1919. The ILO's engagement with the issue progressed from the 1936 Convention on Holidays with Pay that exempted domestic workers but saw a resolution to consider putting the protection of domestic workers on the agenda for future sessions (International Labour Office, 1936, p. 740), to a 1945 mention of domestic workers in a standard on child labour (Article 1 of the Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946), to a 1948 Resolution Concerning Holidays with Pay for Domestic Servants (International Labour Office, 1948, pp. 545-546) in which the ILC noted that it is "the duty of the ILO to extend the benefits of international protection" to domestic workers, and finally to a 1965 Resolution Concerning the Conditions of Employment of Domestic Workers (International Labour Office, 1965, pp. 693-694) that cited the "urgent need" for standards for domestic workers "compatible with the self-respect and human dignity which are essential to social justice".

> ***"This method has meant that a domestic worker terminated from her job in the morning, can show up in the afternoon requesting support and, in a few weeks, find herself sitting across a table from her former employer, telling her story in her own words, in her own language, and eventually receiving a settlement – some money, some semblance of justice, and possibly, the ability to look her employer straight in the eyes…"***

But it was the South African Minister of Labour, telling the Governing Body that his mother, like the mothers of so many post-apartheid leaders, had been a domestic worker under apartheid, that domestic workers had been central to the liberation movement, and that on the eve of the end of apartheid the South Africa had managed through constitutional and legislative change to make significant strides to begin transform the relationship from one that epitomised apartheid to one in which domestic workers had rights and dignity at work… As the Law and Practice report (International Labour Office, 2010) chronicled, those changes included not only deeming domestic workers as employees but also establishing basic conditions of employment including addressing hours of work and a range of living conditions, while ultimately framing minimum wage protections.

These reforms also included a creative and accessible approach to dispute resolution through the Commission for Conciliation, Mediation and Arbitration. This method has meant that a domestic worker terminated from her job in the morning, can show up in the afternoon requesting support and, in a few weeks, find herself sitting across the table from her former employer, telling her story in her own words, in her own language, and eventually receiving a settlement – some money, some semblance of justice, and possibly,

the ability to look her employer straight in the eyes. I observed some of those mediations. And although I was not present when the South African minister spoke to the International Labour Conference's ('ILC') constituency, I understood the power of change of which he spoke. And I did get a call very soon after, when, to the surprise of many, regulating domestic work eventually became the choice for standard setting what is more, a binding convention alongside a recommendation. South Africa's role throughout the two years of deliberations of the ILC was pivotal, repeatedly informing the delegates that this transition, redressing the asymmetrical law of the household workplace in favour of decent work for domestic workers was indeed possible...

We'll come back to the South African example, and what shifting the frame actually starts to feel like in a society that has changed so much, but where too many born free who still overwhelmingly rely on low paid domestic work and still live the spatial differentiation across the economic divide. How much can the frame be shifted through labour law?

B. Uruguay

I turn to a second pivotal example that emerged from the experience in Uruguay, which had tackled the challenge of how to address the pernicious issue of labour inspection in households. In other words, what does it mean to state that the household is a workplace and how does that force us to engage with the state? Labour inspection has tended to be a primary casualty of the prevailing resistance to see the household as somebody's workplace. Even though the ILO's Labour Inspection Convention, 1947 (No. 81) and the Protocol of 1995 to the Labour Inspection Convention should cover domestic workers, privacy and the inviolability of the home were repeatedly raised as barriers during the ILC deliberations.

The Law and Practice Report (International Labour Office, 2010, p. 73) squarely addressed this question, highlighting that – "Respect for privacy, though important, need not result in an absolute bar on inspection visits. As observed by the [ILO's Committee of Experts], the consent of the employer or occupant of a household, or prior authorisation by a judicial authority, ensure respect for the principle of privacy, while balancing this with workplace rights". But it was Uruguay's prominent role at the time as permitting labour inspections where there is a presumed violation of labour and social security laws, and because it had formed a specialised section in charge of monitoring provisions for domestic work, that became central. Uruguay's laws included strict limits on nighttime inspections and required judicial authorisation for daytime inspections. In other words, Uruguay worked to strike a balance, a balance that is largely reflected in the text of Convention No. 189.

C. India

A third example is India. Let me preface this by stating that a ton of legislative and policy reform from India has been pivotal in thinking through in particular the move from the informal economy to formalisation of domestic workers' rights through comprehensive, creative approaches to social welfare protection. Many in the audience would be better placed to inform me about those examples than I would be to speak about them. So instead, I want to focus on an historical example that may too readily be overlooked, or may

be thought of as far from how we conceptualise social regulation that is typically centred in work on law reform and legal change. I want to reference the impact of broad forms of resistance, and through it, the affirmation of domestic workers' agency.

A big part of the surprise about having domestic work as a subject of international labour regulation is the perception – sometimes but not always put into words – that they were not really workers, not really the paradigmatic worker, but rather, like one of the family. I've spent a fair bit of time explaining that once you need the modifier, you have basically confirmed that what you are talking about is an older form, the household economy where domestic servants were very much central but not as a family-member, but as slaves or servants. We have retained the vestiges of these older relationships, just as we have largely retained the vestiges of the law of Master and Servant.

> ***...a broader, more capacious way to think about what it means for workers to organise, exercise agency, and defend their collective rights. It broadens our frame in a manner that keeps our focus on the agency of domestic workers themselves.***

So the example I want to highlight from India is when the members of the New Delhi-based All India Domestic Workers Union, which began mobilising in 1953, held a 26-day hunger strike to seek legislative reform. In the process, the union sponsored draft legislation to improve the rights of domestic workers as early as 1959 (Rajya Sabha, 1959). I emphasise the hunger strikes because they offer a broad, capacious way to think about what it means for workers to organise, exercise agency, and seek to defend their collective rights. It broadens our frame in a manner that keeps our focus on the agency of domestic workers themselves.

> ***In a neoliberal economic order, the ability to unsettle historical forms of subordination has transnationally been a rare and sparkling counterexample to the cemented vision of social change.***

What we saw through the advocacy and negotiations of Convention No. 189 is that domestic workers themselves claimed the frontlines. They shaped the narrative around standard setting and successfully lobbied the ILO to adopt new international labour standards, which they immediately drew upon to seek further constitutional and labour law reform, all geared towards unsettling societal practices of inequality that directly affected them. They have also been at the forefront of litigation – reaching some of the highest courts across world regions. There are many more examples of how decent work for domestic workers has essentially become a counterhegemonic transnational legal order. Certainly, Convention No. 189 has been ratified by 38 states worldwide, across world regions, including countries with high internal and historical domestic worker populations, countries

that send domestic workers abroad, and countries with significant migrant domestic worker populations. But there is more. In a neoliberal economic order, the ability to unsettle historical forms of subordination has been a rare and at times sparkling counterexample to a cemented vision of social change transnationally.

Labour Law from the Margins

It would be perilous to end the story here, of course. And the palpable, painful backlash – For example, the constitutional and legislative change in Brazil that combined social welfare provision of *bolsa familia* with domestic workers' rights, was reported to have a significant impact on presidential elections. -. Backlash should be no surprise when a subordinating legal order is disrupted. A key observation that holds and that was central to the work of establishing Convention No. 189 is that regulatory innovation came *in large measure* from the **Global South**.

> ***Building an international convention based from a vision of what matters in labour law that emerges from the Global South was, and remains, a significant shift from the assumption that our labour law frameworks are necessarily of and from the Global North.***

Truly, this should not even have to be said. But building an international convention from a vision of what matters in labour law that emerges from the global South *was*, and remains, a significant shift from a vision that assumed that our labour law frameworks were necessarily of and from the global North, of and from a narrative of the global North that situated the trajectory of the field as commencing with industrialisation, focusing on an archetype of "industrial man" that shaped how we came to understand labour regulation, and literally leaving *any question* of how the wealth that financed the Industrial Revolution and the accumulation of wealth *behind*. Let's call it for shorthand a form of modernisation theory for law, or labour law. Its power was that this did not have to be named.

Focusing on standard setting for domestic workers then, meant shifting a frame to engage with the persistence of a form of work, in the care economy, that was supposed to be a relic of a forgotten past, that was supposed – with a particular form of industrial modernisation, to have disappeared. Close attention to the care economy – and to labour market stratification – allows us to distinguish between strategies that *invisibilise* the very forms of labour that sustain us, while also relegating that work to those whose subordination far from questioned, is naturalised. Standard setting on decent work for domestic workers goes some way toward unsettling that starting point.

How does that happen? Briefly, the subject of labour law itself had to be rethought. In my book (Blackett, 2019), I chronicled how the realisation slowly but surely started to sink in, so much so that, by the second year of discussions in Geneva, in June 2011, it was the employers' group representative making the case for why a historically marginalised group performing such work had to have a minimum wage at least commensurate with the general

minimum wage, as a basic human right. Labour law, in other words, was being regenerated from its margins.

> ***Close attention to the care economy – and to labour market stratification – allows us to distinguish between strategies that invisibilise the very forms of labour that sustain us while relegating that work to those whose subordination is little questioned and naturalised.***

It is important to consider what we mean by its margins if we are to take a starting point from the global South – and the South of the North – seriously, and I will do this here all too briefly because what needs to be done is to think about labour law in its relationship to colonialism, and in particular settler colonialism - how the dispossession necessary to secure land and resources also entailed *extracting* colonised people from their land and their traditional ways of being on that land, and replacing them with the **migrant** – rural to urban, or across partitioned states – but dispossessed, a 'stranger in his/her own **home**'. Labour law in the colonies gave the **migrant** – recharacterised as modern industrial man, but **often a domestic servant** – only limited features of so-called 'industrial citizenship' – which for domestic workers, was sometimes just a bed in or near someone else's home.

Although there has been some scholarly engagement with the fraught project of building a limited native labour code, which the ILO embarked upon soon after it was established in 1919, we have not *quite* revisited the extent to which the narratives have become controlling. This is true even as we increasingly recognise and engage with the history of colonialism, and slavery, as intertwined **global** histories. Moreover, we have not quite engaged with how, as First Nations (Dene) scholar Glen Coulthard (2014) recognises in the work of Franz Fanon, **misrecognition** will remain **subordinating** in the broadest sense, if it does not entail engaging with the subjectivities of the historically dispossessed.

Transnational Regulation of Domestic Work

This is a long way of affirming that it is by *focusing on the margins* of a labour law steeped in, rather than untouched by, a colonial frame, that the tendency to **misframe** labour concerns as *naturally*, necessarily domestic governance matters becomes particularly palpable. In other words, legacies of slavery and colonialism, so deeply imprinted on the way that domestic work is regulated, should help us call into question the insistence on understanding labour governance as a purely domestic matter. This becomes all the more unavoidable when we consider the sheer scale of the phenomenon of contemporary migrant domestic workers, who undertake the perilous navigation across global borders, only to wind up in households that are deemed private and beyond the reach of any state. This issue invariably calls for a focus on the failure to address labour through transnational governance.

> ***Legacies of slavery and colonialism, so deeply imprinted on the way domestic work is regulated, should help us call into question the insistence on understanding labour governance as a purely domestic matter.***

Like labour, migration – or the movement of persons, often to work - is primarily misframed as a domestic governance matter. And Convention No. 189, although it has the distinct advantage of applying to all domestic workers, whether they are migrant or not, and applies special protections – especially on recruitment agencies – for migrant domestic workers, in no way calls into question the national paradigm, or for that matter the reliance on temporary migration programs to redress care deficits. Care work extraction, in Rhaçel Parreñas' terms, predominates. Care, rather than being reincorporated in the framing of what we all do as humans, has become *externalised*, while the racialised patterns of who does the work remains historically laden. Those patterns, far from humanising the relationships of work, serve to normalise structural inequality.

Did the standard setting to regulate decent work for domestic workers offer the space to engage with border crossing? Here I move deliberately to the specific – that is, Paragraph 26 of the non-binding but supplementary Recommendation No. 201, which encourages states to "take appropriate steps to assist one another in giving effect to the provisions of the Convention through enhanced international cooperation or assistance or both, including support for social and economic development" alongside poverty eradication programmes and universal education. Does this provision help take us in the direction of thinking transnationally, of embracing forms of international solidarity, of labour law as development? If ever there was room, there is simply no more space to be romantic about care and about paid domestic workers in this pernicious world moment when, in Judith Butler's (2016) terms, **hate has been emancipated**. It is hard even to have this conversation much less believe in it as a possibility. *Law reform is fraught*. All I can muster is that it is perhaps precisely in this world moment, where it is crucial to harness the capacity to think and act *differently* – rather than cower, to arm ourselves with the institutional courage to reimagine our paradigms. This includes doing the hard work of **building international – or transnational – social policy into the multilateral legal architecture** – that is, identifying the spaces for redistribution, transnationally. What happened, for all of the talk of the need to build social protection floors that include domestic workers, of the attention including in the Sustainable Development Goals to financing that through multilateral mechanisms?

None of this is really a new project, anymore, and it is an increasingly necessary one that both depends upon and is part of how we build international solidarity. *Reclaiming* regulatory capacity in the various spaces where economic governance operates to craft social justice alternatives is as much an act of legal imagination as it is a tremendous policy coherence challenge, in which the ability to act as a counter-hegemonic whole will be larger than any individual part. To get there will require us to be deliberate in acknowledging the weight of history on relationships with the Global South and the South of the North, and to make it a priority to do the work of *decolonising* labour law, collectively and transnationally.

Future Directions: Emancipatory Self-Recognition

So what does this have to do, in concrete terms, with those domestic workers who, almost 14 years after Convention No. 189 was jubilantly adopted, are **still** overwhelmingly historically marginalised workers – where the 19th century words, despised race in despised work - still applies to the persisting and particularly abject marginalisation, where domestic workers still risk their lives when they cross borders, still struggle to make a bed their home in someone else's household? Is focusing on domestic workers as the pathway to build a **renewed labour law** perilously utopian work? Should our shift instead be toward that of the abolitionist – thinking *beyond* labour law?

You know this: abstraction holds inherent perils. So I must instead conclude by returning to where we began, which is in the messy, rooted vision of labour law that can sustain emancipatory aims only if we take seriously the significance of cultivating redistributive goals through forms of **emancipatory self-recognition** through representation. Put simply, domestic workers must lead, as they did in calling for and then vigilantly insisting on the framing of Convention No. 189 and Recommendation No. 201. Domestic workers must have the space to frame their social justice claims themselves, to work through what an emancipatory labour law **looks and feels and tastes like, *to them***.

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