

Title: Invisible Children: The Rights of Domestic Child Workers in South Africa



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ABSTRACT

This research paper focuses on the violation of the rights of children aged 16–17 who are school dropouts and employed as domestic workers in South Africa. This is a violation of their rights and occurs in their employment in domestic work, which can be considered a worst form of child labour in third party households in South Africa. This type of work deprives these children of their rights to education, and family life, subjecting them, amongst others, to social isolation and long working hours. Children in these situations are not easy to identify as they are above the compulsory education age, as defined by the South African Schools Act of 1996. However, they are still considered to be children in terms of the Children's Act of 2005 as well as the Constitution (2006) which defines a child as any person below the age of 18. The Children's Act of 2005 also addresses child labour, observing it to have detrimental effects on children and their development, thus identifying all children as needing care and protection. Considering this aspect of the Children's Act of 2005, this research paper scrutinises the role and obligations of the state regarding the protection of children who perform domestic work in third party households.

Moreover, the study assesses the obligations of the South African government as a signatory of the UNs' regional and domestic norms which protect the rights of children. The role of the state as the primary custodian for the advancement and protection of the rights of children is scrutinised particularly in terms of legislation and administration of related policies in pursuance of creating and promoting a child rights-based culture in South Africa. In addition, the ILO's standards for decent employment for all and those specific to the employment of children are brought to bear in this research paper. The significant role of civil society organisations, the family, the community, and religious sector are brought to bear in terms of their assisting the state to meet its constitutional and global obligations, responsibilities, and commitments with regards to child domestic workers.

KEYWORDS

Child exploitation

Child employment

Child protection

Duty to care

Children's right

Child domestic worker



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DECLARATION

I declare that *Invisible Children: The Rights of Domestic Child Workers in South Africa* is my work, and that it has not been submitted for any degree or examination at any other university. All sources used or quoted have been duly acknowledged.

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Date

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child AID
BCEA	Basic Conditions of Employment Act
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
DSD	Department of Social Development
DOL	Department of Labour
CLPA	Child Labour Programme of Action
HRW	Human Rights Watch ^[SEP]
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO C138	International Labour Organization ^[SEP] Minimum Age Convention, 1973 (No. 138)
ILO C182	Worst Forms of Child Labour Convention, 1999 (No. 182)
ILO C189	Domestic Workers Convention, 2011 (No. 189)
IPEC	International Programme on the Elimination of Child Labour
LRA	Labour Relations Act
NPA	National Plan of Action ^[SEP]
OHSA	Occupational Health and Safety Act
SAHRC	South African Human Rights Commission
UNICEF	United Nations International Children's Emergency Fund

UNCRC United Nations Convention on the Rights of the Child

UDHR Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).



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CHAPTER ONE: BACKGROUND

1.1 Introduction

Domestic work is regarded as ‘one of the most widespread and invisible sectors for child exploitation.’¹ This suggests that exploitation of children in the labour force is ubiquitous globally across all sectors, including in the private domestic space.² Exploitative working conditions restrict or deny children their freedoms and rights to education and protection.³ The challenges of under-regulation and poor compensation characterise domestic work.⁴ Statistics South African’s Quarterly Labour Force Survey for the first quarter in 2020 reported those aged 15–34 represents 43% of 7.1 million unemployed in South Africa.⁵ With limited marketable skills and disproportionate levels of poverty, domestic work becomes the only option for youth from depressed economic backgrounds.

This research paper focuses on child domestic workers aged 16–17 in private third-party households in South Africa, with domestic work as possibly *the* worst form of child labour. Child domestic work denying children their rights, as outlined in the International Labour Organisation (ILO) 182 of 1999, is classified as the worst form of child labour, the conditions for this, as amongst others, long working hours, night work, and working with domestic equipment that can cause them harm. Child domestic work as the worst form of child labour is also regarded as a form of economic exploitation of children.⁶ Under-age child domestic

¹Save the Children Foundation ‘Child domestic workers’ (2016) available at <https://resourcecentre.savethechildren.net> (accessed on 29 October 2020).

See also ILO ‘Labour inspection in domestic work (Module 16) pdf-ILO’ (2014) available at <https://www.ilo.org> (accessed on 28 March 2020).

²Save the Children Foundation ‘Save the Children’s Foundation on Child Labour’ (2019) available at <https://resourcecentre.savethechildren.net> (accessed on 31 March 2020) (hereafter ‘Child Labour’).

³ILO ‘Child Domestic Labour’ available at [http://ILO.Org/Ipec/Areas/Child Domestic Labour/long-en-index.html](http://ILO.Org/Ipec/Areas/Child%20Domestic%20Labour/long-en-index.html) (accessed on 29 October 2020).

⁴Marais C ‘Caring and connectedness in the context of domestic worker employment in South Africa’ (2016) 26 (3) *Journal of Psychology in Africa*. 237.

See also Bonnet F, Vanek J & Chen M *Women and Men in the Informal Economy: A statistical picture* (January,2019) 1-32.

⁵Statistic South Africa *Quarterly Labour Force Survey, Quarter 1: 2020* (2020) available at www.statssa.gov.za (accessed on 26 October 2020).

⁶Van Bueren G *The International Law on the Rights of the Child* (1998) 264.

⁷UNICEF ‘Child Labour’ (2020) available at https://www.unicef.org/protection/57929_child_labour.html (accessed on 30 October 2020).

workers are deprived of their rights to education, health and dignified existence, and experience undue psychological stress.⁷

In 2015, 577 000 of 11.2 million South African children aged 7–17 was involved in child labour, including domestic employment in private third-party households.⁸ Similarly, 15–24-year-old South African youth, mentioned early in the Quarterly Survey, comprises 34.1% of the extended unemployed, nor are they in the education system. The statistics suggest that youth with limited market related skills are more likely to be absorbed in poorly paying domestic employment in comparison to those with relevant academic skills. This research paper thus explores how the rights of child domestic workers labouring under poor work conditions in private third-party households are violated. It argues that the state is failing to honour its duty to care for them as children, by not identifying and including them as in need of care or recognising them as victims of gross social and economic exploitation and crime.⁹

1.2 Problem statement

South Africa has ratified conventions that govern the protection of children's rights.¹⁰ These include the ILO's conventions relating to the abolishment of child labour. South Africa has also endorsed the African Union's (AU) norms, including the African Charter on the Rights and Welfare of the Child (ACRWC). These international and regional norms find resonance in the country's domestic jurisprudence and are relevant to the current study on the violation of the rights of child domestic workers aged 16–17 in private third-party households. Yet South Africa's embracing a rights-based constitution aims to redress apartheid's derelictions of children's rights, including education, food insecurity and health and fair employment.

A rights-based constitution is meant to extend social protection to domestic workers, including children. Child-specific legislation--including the Children's Act of 2005,¹¹ the South African Schools Act 84 of 1996,¹² and labour legislation--the Labour Relations Act (LRA) 66 of 1995¹³

⁷ Kane J Helping hands or shackled lives? Understanding child domestic labour and responses to it, (2004) ILO-Geneva: International Labour Office

⁸ Statistics South Africa 'Economic activities of young people in South Africa' (2015) 6 para 2 available at www.statssa.gov.za (accessed on 16 April 2018) (hereafter 'Economic activities').

⁹ Sloth-Nielsen J & Ackerman MA 'Survey of foreign children in care of the Western Cape Province. A Socio-Legal Study' (2016) 9 (7) *PER/PELJ* 1-27.

¹⁰ Sloth-Nielsen J & Ackerman MA (2016) *PER/PELJ* 7 1-27.

¹¹ Children's Act 38 of 2005 sec. 150.

¹² South African Schools Act 84 of 1996 sec. 31(1).

¹³ Labour Relations Act 66 of 1995 sec 10(d) (1)(2), deals with the prohibition of child employment.

and Basic Employment Conditions Act (BCEA) of 2003¹⁴ form part of the adequate safety-net for children's rights. The Constitution also safeguards children's rights, Section 28, for example, is child specific. However, the employment of children in private third-party domestic households persists, which seems to suggest that the reach of the child protective legislation and associated administrative process do not adequately protect these children. Failure on the part of the government to arrest this untenable situation of child employment in exploitative environment, militating against these children realising their rights to education, non-discrimination, right to have a voice and participate in all matters that affect their lives; deprives them of the right to life and does not promote their best interest. Moreover, should the situation not be given the urgency that it requires, there will be a proliferation of more children performing the worst forms of child labour and condemning them to precarious existence. It is in this context that this study asserts that the state is obliged as a signatory to numerous international, regional, and domestic conventions¹⁵ to prioritise the protection of the rights of children who are in these unlawful employments and undergoing the worst kind of child labour, particularly children employed in private third-party household that are the focus of this study. Below are the factors that obstructs the eradication of employment of child domestic workers in precarious conditions in the private third-party domestic space.

Impediments to eradicate child labour include such legislative partiality as:

- (i) deficiencies in administration and implementation of policy;
- (ii) gross shortages of critical personnel and budget deficits that hamper protective measures for child domestic workers; and
- (iii) inadequate monitoring of implementation outcomes, a major gap in extending social protection to child domestic workers.

In addressing the above, this paper also contributes to the literature on domestic work as the worst form of child labour. Moreover, this paper highlights the application of labour laws within the private domestic space as a site of employment.

¹⁴Basic Conditions of Employment Act of 2013 sec. 43(1) (2) and 44(2).

¹⁵Article 7 Convention C189 of 2011

1.3 Objectives

The two primary objectives of this study are:

1. To examine the duty of the state in preventing children from undergoing the worst forms of child labour in third party private households in South Africa.
2. To explore the legal and administrative deficits that enable the prevalence of the worst forms of child labour performed by 16- and 17-year-old children in private third-party households in South Africa.

1.4 Research questions

The primary research questions this thesis attempts to answer is:

- How are the rights of child domestic workers aged 16–17 in private third-party households employment in South Africa violated?
- What gaps in legislation and administration is enabling this situation?

The following sub-questions are also explored to answer the above primary question:

- What are the South African government's international and national obligations to these children, whose rights might be violated in domestic work as the worst form of child labour?
- What policy and administrative responses has the government institutionalised to curb the phenomenon of child domestic work in private third-party households as the worst form of child labour?

1.5 Methodology

This desktop study relies on primary and secondary sources. It examines international and regional instruments and domestic legal and policy frameworks informing protection of child domestic workers in South Africa. Legal judgments on harmful forms of child labour, including the domestic work sector, as well as on the protection of children's protection are also examined.

1.6 Definition and description of concepts

The following concepts and terms are defined and described in terms of their use in this study.

1.6.1 Child

Article 1 of the UN Convention on the Rights of the Child (UNCRC) refers to the “child” as a person under the age of 18.¹⁶ Article 2 of the ACRWC defines a child as a person under the age of 18 unless the age of majority is attained earlier under national legislation.¹⁷ The South African definition is aligned to these treaties to which the country is a signatory; the Constitution defines the child as any person under the age of 18,¹⁸ also applying in all domestic jurisprudence.

1.6.2 Child domestic worker

The term “child domestic worker” refers to a child performing domestic tasks in the home of a third party or employer under exploitative employment conditions.¹⁹ Child domestic workers are the most affected by employment injustices.

1.6.3 Domestic work

ILO Article 1(a) of Convention 189 of 2011 defines domestic work as work performed in or for a private household or households.²⁰

1.6.4 Domestic worker

ILO Article 1(b) of C 189 refers to a domestic worker as any person engaged in domestic work within an employment relationship.²¹ The majority of domestic workers are black women

¹⁶UN Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

¹⁷African Charter on the Welfare and Rights of the Child, (1999) arts. 1 and 2).

¹⁸Constitution of the Republic of South Africa, 1996 s 28(3).

¹⁹C189-Domestic Workers, 2011, 189-ILO.

²⁰ C189-Domestic Workers, 2011, 189-ILO.

²¹C189-Domestic Workers, 2011, 189-ILO. See also Unemployment Insurance Contributions Act No. 4 of 2002, according to the Act “[D]omestic worker” means an employee who performs domestic work in the home of his or her employer and includes (a) gardener; 15(b) person employed by a household as a driver of a motor vehicle; and (c) person who takes care of any person in that home, but does not include a farm worker’.

in South Africa with limited skills, high job insecurity and poor compensation, which increase their precarious and informal existence.²²

1.6.5 Child labour

The ILO defines child labour as any form of work that deprives children of their childhood, their potential and dignity, and that is harmful to their physical and mental development. It is work that:

- is mentally, physically, socially, or morally harmful to children; and
- Interferes with their schooling.²³

1.6.6 Worst form of child labour

Article 3 of ILO 182 of 1999²⁴ defines the worst forms of child labour as work comprising the critical aspect of force or compulsion. Forced or compulsory labour, by its very nature or circumstances in which it is carried out, is likely to harm the health, safety or morals of children, and/or deny them their well-being and opportunities for self-development.²⁵ Domestic work as a worst form of child labour is work performed by children below 18; it is work that is age-inappropriate for the child, with the potential to cause them permanent physical and mental harm.²⁶ This includes night duties, work isolating them from their peers and broader society and depriving them of family life, entailing the use of harmful domestic equipment, and denying them opportunities for education and development. For this paper, some aspects of domestic work performed by children in private third-party households are considered the worst form of child labour, depriving them rights to a dignified existence and development trajectory.

²²Campbell I & Price R 'Precarious work and precarious workers: Towards an improved conceptualisation' (2016) (3) 27 *The Economic and Labour Relations Review* 314 available at <https://doi.org/10.1177/1035304616652074> (accessed on 30 October 2020).

²³ILO International Program for the Elimination of Child labour 'What is child labour?' available at www.ilo.org/ipecc/eng (accessed on 30 October 2019).

²⁴ILO C182-Worst Forms of Child Labour, 1999 (No. 182).

²⁵ILO C182 art. 3(d), 1999 (No. 182).

²⁶Gamlin J, Camacho AZ & Ong M et al 'Is Domestic work the worst form of child labour? The findings of a six-country study of the psychosocial effects of child domestic work' (2013) 255 available at <http://dx.doi.org/10.1080/14733285.2013.829660> (accessed on 30 October 2020).

1.6.7 Hazardous work

ILO Recommendation 190 refers to hazardous work as work that exposes children to sexualised activities, and psychological and physical exploitation; for example, night work, use of potentially harmful tools of the trade for a child below 18, work exposing children to toxins, alcohol, drugs, underwater conditions, long hours without breaks and to unsafe heights, and jobs with high rates of injuries.

1.6.8 Employee

Sections 1 of BCEA and 213 of LRA define an employee as “any person, excluding an independent contractor, who works for another person, or for the State, and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of the employer.”²⁷ According to the LRA’s definition, children aged 16–17 are considered workers. This paper adopts the BCEA definition, viewing child domestic workers as employed in the domestic sector under the span and control of their employers in private third-party households which qualifies referring to them as employees.

1.6.9 Private third-party domestic household

A household that is not the child’s family of birth and employs him/her as a domestic worker in exchange for some form of remuneration.

1.7 Literature review

The literature review presented here examines selected international treaties and interrogates their efficacy in eliminating and curbing child exploitation in domestic employment in private third-party households.²⁸ The South African government has ratified the UNCRC, which outlines the role of the state in protecting child-specific rights, including those pertaining to child workers. Basu opines the various child protection conventions and articles to be ‘a set of minimal rules and conditions for labour which all countries are expected to satisfy’.²⁹ These minimum standards guide member states regarding child labour protection where national

²⁷Basic Condition of Employment Amended Act 20 of 2013; see also LRA Act 66 of 1995.

²⁸Basu K ‘Child Labor: Cause, Consequence, and Cure’ (1999) *XXXVII Journal of Economic Literature*. 1091 (hereafter ‘Child Labor’).

²⁹Basu K ‘Child Labor’ (1999) 1091.

norms are non-existent. Moreover, the standards are referenced in advancing and protecting children's rights in states that have not yet ratified the conventions.

Dejure equality cannot be achieved in the absence of interrogation of the impact of laws, policies, and implementation of administrative process. To the extent attention to these in this paper will show the degree of commitment by member states to the UNCRC, either protecting or betraying child domestic workers in the process.³⁰ Failure has dire consequences for these children employed in private third party households--abuse and poor treatment by employers, deprivation of sleep, lack of privacy, inadequate and poor enforcement of labour protection, and discrimination.³¹ Basu argues that the international standards 'are important even if they are weak, and for that reason may actually be more influential than they at first appear'.³² Basu counters possible challenges regarding enforceability of international norms by highlighting that as norms they 'can, in fact, exert a strong influence on policy by shaping and establishing reference points for international debate and action'.³³ Indeed, the international norms provide the basic floor to member states for fair and humane employment practices at the workplace.

du Toit commends the Decent Work Agenda of ILO C189 as having 'transformed the development of an appropriate regulatory framework for this sector from an aspiration to a practical task'.³⁴ Convention C189 of 2011 accords domestic workers rights that includes a decent wage and voice as well as outline the duties and responsibilities of the state parties in this regard.³⁵ As domestic work is performed under isolation and mobilisation is severely constrained, convention C189 becomes a tool to mobilise, to forge alliances and embed domestic workers issues in local struggles thus influencing national issues.³⁶ In addition, state parties who are signatories to this convention are required to domesticate the articles of the

³⁰Smith A 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal*: 609.

³⁰Hall BJ, Garabiles MR & Latkin CA 'Work-life, relationship, and policy determinants of health and well-being among Filipino Domestic Workers in China: A qualitative study' (2019) 19 ((229) *MBC Public Health* 1-14 See also Jackson KC & Phillips E 'She Was a Member of the Family, Domestic Labor, and Employer Perceptions; (2017) 45(3/4) *Women's Studies Quarterly* 160-173.

³¹Mahmudal Haque MD 'Reviewing Child Labour and its Worst Forms: Contemporary theoretical and Policy agenda (2021) 6 (4) *Journal of Modern Slavery* 32-51.

³²Basu K 'Child Labor: Cause, Consequence, and Cure' (1999) 37 (3)1083-1119. See also Ramesh A 'UN Convention on the Rights of the Child: Inherent weaknesses' (2001) 36 (22) *Economic and Political Weekly* 1948.

³³Basu K 'Child Labor' (1999) 1099.

³⁴du Toit D & Huysamen E 'Implementing domestic workers' labour rights in a framework of transformative constitutionalism' (2013) *Exploited, Undervalued and Essential: Domestic Workers and the Realisation of their rights* 2.

³⁵ Article 3.1 of C189 of 2011

³⁶ Cherubin D Geymonat G & Marchetti S 'Global rights and local struggles: The case of the ILO N189 on domestic workers' (2018) 11 (3) Special Issue on: Ten years of PACO .

convention into national policies in addition to reporting on these. Thus, this international convention is identified as enabling practical accomplishment or steps towards this. Boris and Fischer, similarly, posit the enabling value of ILO C189 in terms of its giving voice to domestic workers in the US, and subsequent internationalisation of struggles for social justice, previously denied them.³⁷ The National Domestic Workers in India have used the UNCRC and ILO C189 principles as tools for enabling child domestic workers' agency by transforming their lives in terms of identifying aspects of work that is harmful to them.³⁸

However, it should be noted that ideological contestation also prevails regarding the child domestic work as the worst form of child labour. Some socio-cultural theorists suggest perspectives and cultural belief systems in particular economic contexts as influencing the extent of children's participation in diverse forms of work, especially domestic work.³⁹ In addition, Mahmud Hanque opines that globally COVID 19 has enabled the spread of worst forms of child labour dealing a blow to the achievement of targets for eradicating the worst forms of child labour. Moreover, the worst forms of child labour have increased and normalised in numerous contexts and communities.⁴⁰ During COVID 19 women and children were locked down 24hrs with their abuses and the pressure on women's shelters was increased during this time with limited resources to cope with the demand for the services.⁴¹ In addition, COVID 19 has increased the precarity of vulnerable groups in numerous ways that included increases in job losses and in cases of live-in domestic workers it entailed the loss of shelter.⁴² The socio-cultural theorists view child domestic work as a kind of rite of passage for children or apprenticeship towards adulthood.⁴³ Thus domestic apprenticeship of children is viewed as preparing them for adult responsibilities, for example.⁴⁴ Consequently, for girl-children, this

³⁷Boris E & Fish J 'Slaves No More': Making Global Labor Standards for Domestic Workers' (2014) 40 (2) *Feminist Studies* 411-43, 487-89.

³⁸National Domestic Workers Trust. *Unheard, Unseen Unreached (II) Stories of Women and Child Domestic Workers who break the barriers of slavery and became the catalyst for change. (2016) Geneva: International Labour Office. available at www.ndwm.org Accessed on 8 November 2020.*

³⁹Save the Children Foundation "Report on Child Domestic Workers." (2016)

⁴⁰Mahmudal Haque MD 'Contemporary theoretical and Policy agenda (2021) 6 (4) *Journal of Modern Slavery* 32-51.

⁴¹Netshitangani T 'COVID-19 Lockdown: A Fertile Ground for Gender-Based Violence in South Africa.' (2021). *9(1) Journal of Intellectual Disability - Diagnosis and Treatment* 120-127. <https://doi.org/10.6000/2292-2598.2021.09.01.15> Accessed on 28 October 2023

⁴² Human Rights Watch (2020) July Submission to the UN special rapporteur on violence against women, its causes and consequences regarding COVID-19 and the increase of domestic violence against women. Accessed on 30 October 2023

⁴³UNICEF. 'Child Protection Child Labour' (2016) available at https://www.unicef.org/protection/57929_child_labour.html (accessed on 29 October 2020).

⁴⁴Cooke FL & Brown R 'The Regulation of Non-Standard Forms of Employment in China, Japan and the Republic of Korea' (2015) *International Labour Office, Inclusive Labour Markets, Labour Relations And Working*

‘rite of passage’ prepares and conditions them for feminised roles in domestic work and marriage.⁴⁵ Furthermore, domestic work is perceived as positive in so far as creating an avenue for women to enter the labour market.⁴⁶ Women tend to be the majority of domestic workers globally and in South Africa.⁴⁷ In 2021, women were reported to make up most of the domestic workers within that sector in the United States.⁴⁸

Heady associates children’s early entry into the labour market, including via domestic labour, with the poor academic performance that manifests as poor grades and repetition of school stages.⁴⁹ In a study in Ghana, researchers linked a perceived drop in literacy levels with the number of hours a child spends labouring.⁵⁰ In a similar study in Brazil, researchers found poor completion of academic studies amongst children to be the result of their engagement in domestic labour.⁵¹ Such circumstances and contexts in which many children live appear to be in counter distinction to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which importantly highlights the value of education as both an equaliser and liberator of the mind, specifically for children’s development.⁵² Moreover, Mahmudul Haque suggest that due consideration has to be given to relevant societal cultural norms when strategies are developed for the eradication of worst forms of child labour. The best interests of the child are realisable when the voice of the child and the community initiatives are embedded in all efforts aimed at eradicating the worst forms of child labour.⁵³ During the COVID19 lockdown the civil society has played a significant role in documenting, reporting

Conditions available at https://www.ilo.org/wcmsp5/groups/public/---ed.../wcms_414584.pdf (accessed on 30 October 2020). See also Klocker N ‘Negotiating change: Working with children and their employers to transform child domestic work in Iringa, Tanzania’ (2011) 9(2) *Children’s Geographies* 205-220.

⁴⁵Save the Children Foundation *Report on Child Domestic Workers* (2016).

⁴⁶D’Souza A Moving towards decent work for domestic workers: An overview of the ILO’s work (2010) *ILO Working Papers* 994305583402676, alleges domestic work provides employment opportunities for impoverished rural women with limited access to education mostly from marginalized ethnic groups, or those with otherwise truncated employability.

⁴⁷ Hobden C & Bonnet F Making decent work a reality for domestic workers:

Progress and prospects ten years after the adoption of the Domestic Workers Convention, 2011 (No. 189) (2021) Geneva: International Labour Office.

⁴⁸ U.N . Human Rights Committee In response to the Second and Third Periodic Report of the United States’ Domestic Workers’ Rights in the United States: available at https://law.inc.edu/wpcontent/uploads/2019/10/domestic_workersreport.pdf (accessed on 29 October 2020).

⁴⁹Heady C ‘What is the Effect of Child Labour on Learning Achievements? Evidence from Ghana’ (2000) *Innocenti* (Working Paper 79) Florence: UNICEF Innocenti Research Centre.

⁵⁰Heady C ‘What is the Effect of Child Labour on Learning Achievements? Evidence from Ghana’ (2000) *Innocenti* (Working Paper 79) Florence: UNICEF Innocenti Research Centre (2000)

⁵¹ Guedes VM ‘Child Labor in Brazil and Uruguay’. (2018). Oxford Encyclopedia of Latin American History 1-23

⁵² International Covenant on Economic, Social and Cultural Rights, art.13.1

⁵³ Mahmudul Haque MD ‘Contemporary theoretical and Policy agenda (2021) 6 (4) ‘*Journal of Modern Slavery*’ 32-51.

and litigating on behalf of vulnerable women and children ensuring that the state honoured its duty to care.⁵⁴

1.8 Conclusion and outline of chapters

The employment of children in domestic work, and in private homes is a disturbing global phenomenon. Particularly, it occurs despite knowledge of regional and international legal instruments, such as those established by ILO, and of the detrimental effects of child labour on the psycho-social development of children.⁵⁵ Insights gained from the literature are valuable for pinpointing the South African government's failures in its commitment to children's rights.

This paper explores the government's failure to protect child domestic workers, with child domestic work as a worst form of child labour. Chapter Two assesses the extent to which the government has been able to fulfil its international and constitutional responsibilities towards child domestic workers aged 16–17 and employed in private third-party households. The chapter discusses the international norms and domestic legislation and administrative mechanisms for the protection of these children's rights, including labour rights and particular deficits in terms implementation and monitoring via state officials in various state institutions. Chapter three focuses on redress and recommendations for these.



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⁵⁴ Human Rights Watch (2020) July Submission to the UN special rapporteur on violence against women, its causes and consequences regarding COVID-19 and the increase of domestic violence against women. (Accessed on 30 October 2020)

⁵⁵ ILO News 'Child Labour and Forced Labour in domestic work: Taking forward Alliance 8.7 in Sub-Saharan Africa' (2017) available at <https://www.ilo.org/africa/mediacentre/pr/WCMS559788/lang-en/index.htm#:~:text=Among%20the%20substantive%20targets%20set.child%20labour%2C%20including%20recruitment%20and> (accessed on 21 November 2020)

CHAPTER TWO: OBLIGATIONS OF THE STATE FOR CHILD PROTECTION IN SOUTH AFRICA

2.1 Introduction

This chapter assesses the extent to which the South African government has fulfilled its international and constitutional responsibilities regarding the protection of children in domestic work, specifically, those aged 16–17 employed in third-party private households. The chapter thus explores how existing domestic legislation and policies are implemented to protect and promote the rights of these children. The discussion first focuses on international and regional norms for the protection of the human rights of children. The United Nations Children’s Rights four cardinal principles, namely, article 3, requires that the best interest of the child be of paramount importance when the child is affected. Moreover, the voice of the child (art12) is rooted in the best interest doctrine. Furthermore, section 7 of the Children’s Act 38 of 2005 stipulates that the child’s age, level of maturity, gender and educational level be taken into consideration when enforcing the child’s participation rights. Likewise, article 2 propagates the fair and just treatment of all children irrespective of their station in life suggesting that differential treatment of children should be sanctioned by the state.

Similarly, article 4, requires state parties to provide an environment where the socio-economic rights of the child can be realised. To this end, recommendation R201 of 2011 article 2 and 5 (1) enjoins the state parties to take extra steps to protect children against any form of discrimination on the basis that include age, gender, language, religion and economic status. The right to participate, and right to life, survival, and development (-Art.6,) are incorporated into various sections of the South African Constitution, in particular, Sections 28, 23 and 227 dealing with children. None of the UNCRC’s four cardinal principles find an expression in the private third-party domestic household where the 16–17-year-old child domestic workers are employed. The best interest of the child principle has been domesticated into the South African Children’s Act 38 Of 2005.

Section 10 of the Children's Act states that:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration”.

However, children who are 16 and 17 years old, in the domestic sector and of sufficient maturity have no voice due to unequal power relations in the household that they are employed. This seems to suggest that the voice (article 3) of the child is muffled, as children in the domestic employment work under isolated conditions with no power to negotiate better and decent working conditions in the private third-party households.

Thus, the third-party private household provides no space for the voice and the best interest of the child to be realised. Employment of children in third party private domestic households exposes them to directly and indirectly discrimination which is condemned by article 2 of the UNCR. Section 5(1) and (2) of Recommendation R201 of 2011 on domestic workers enjoins state parties to take extra steps to protect children who are in domestic employment. A State's failure to fulfil its obligation as per its endorsement of the conventions increase the vulnerability of the domestic workers as they are left with no protection against workplace abuse.

Similarly, Article 6 of the UNCR is instructive to governments to ensure that all children including those labouring in domestic employment in third-party private households enjoy their rights to development and survival without any harm to both their mental and physical well-being.

The discussion goes on to focus on the challenge of partial implementation of the national commitments as regards children's rights, including their labour rights. This paper argues that currently it is not the national legislation per se that is wanting but enforcement partiality. It examines particularly the challenges relating to capacity and skills of those working in child protective services which are inadequately funded. This deficit in turn results in inadequate identification and monitoring of child domestic workers in third party private households. Poor employment conditions, if left unchecked, deny these children their rights, and perpetuate their

exploitation in the terms described by the UNCRC and child-specific ILO conventions of child domestic employment being the worst form of child labour, as noted in Chapter One of this paper.

2.2 The state's responsibilities in terms of international law

The states' responsibilities towards children are enshrined in various UN and AU treaties and ILO protocols to which South Africa is a signatory. These treaties are aimed at guiding and protecting children's human rights at global and national levels and merit closer attention in terms of the South African context.

2.2.1 The UN Convention on the Rights of the Child (UNCRC)

The UNCRC, to which South Africa became a signatory in 1995, sets international norms on civil, political, economic, social, health and culture for the child.⁵⁶ These promote the creation of an environment within national borders that enables children's access to their human rights within diverse spaces, including family, school, and other public fora. Socio-economic rights for children include that of basic education, which is pivotal to their attainment of better life opportunities.

State parties to these treaties should work towards abolishing child labour; this is referenced in Articles 28 and 29 of the UNCRC that guarantee the child's right to education, while article 31(1) stipulates that the socio-cultural and recreational activities provided them are age-appropriate.⁵⁷ Nevertheless, as the current study argues, these critical rights cannot be realised if children are bonded in isolated and exploitative domestic work in private-third-party households.⁵⁸

The South African Schools Act of 1996 reflects the government's commitment to realisation of children's right to education, as envisaged in Chapter 2 of the Constitution. The right to education, including free compulsory primary education, aligns with, amongst others, article 28 of the UNCRC (1990, 2010) and Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1979). The purpose of education is to equip the child

⁵⁶Queenesterd A, Robinson C & I'Anson J 'The UNCRC: The Voice of Global Consensus on Children's Rights?' (2018) 36 (1) *Nordic Journal of Human Rights* 38-54.

⁵⁷UNCRC, 1989.

⁵⁸ILO 'Accelerating action against child labour' *Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. (2010) ILO: Geneva

for a life lived responsibly in a free society. Education is also promoted as central to global peace, tolerance, gender equality and friendship among all peoples, as per Articles 29 of the UNCRC, 26(2) of the Universal Declaration of Human Rights (UDHR) and Comment 13 of the ICESCR.⁵⁹

Article 19 of the UNCRC compels member states to take:

*'all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.*⁶⁰

Thus, unjust employment practices in domestic employment violate the guarantees for children detailed in the UNCRC as abuse, maltreatment, sexual exploitation tend to be occupational hazards endured by children in private third-party domestic employment.

The UNCRC opens the national space for partnerships between civil society,⁶¹ families and the government to protect children against worst forms of child labour, including domestic work. It enables working children's agency, critical in transforming their lives.⁶² The majority of child domestic workers are not aware of the protection accorded them by the UNCRC, and are blatantly denied their socio-economic rights, including access to health care, education and decent housing; their domestic employment in private third party household stems first from poor implementation, by the state to the UNCRC.⁶³ Gains made through legislation committed to the UNCRC pale, as noted, for example, in recent case law of gross violations of children's dignity and body integrity, including in employment as domestic workers in private third party households.⁶⁴

The UNCRC clearly articulates the state's obligations for establishing both the policy and administrative environment, that enables social compact towards the realisation of children's

⁵⁹Nthonto M 'Children as stakeholders in education: Does their voice matter?' (2017) 7(I) *South African Journal of Childhood Education* 434.

⁶⁰UNCRC, 1989.

⁶¹UNCRC, 1989.

⁶²International Domestic Workers Federation 'Tackling child domestic labour in domestic work A Handbook for action domestic workers and their organization. (2017) 1-136. ILO Jakarta

⁶³Mandlante S Assessing the Implementation of the Convention on the Rights of the Child in Lusophone Africa (Angola and Mozambique) (unpublished LLDoctoral thesis, University of the Western Cape, 2012). 89

⁶⁴*Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019) [1].

rights.⁶⁵ Children's socio-economic needs straddle various state departments, thus the UNCRC requires 'visible cross-sectoral coordination to recognise children's rights'.⁶⁶ This suggests government departments must collaborate jointly to provide a comprehensive package of services to children to mitigate any socio-economic factors that push them into domestic employment in third party private households. Government-civil society partnerships should also include children and youth themselves to promote realisation of children's participative rights, as per UNCRC Article 12.

State parties must also report progress made regarding children's rights' implementation, as per UNCRC Article 43, to the UNCRC's Committee of Experts on the Rights of the Child. The Committee found in South Africa's first report (in 2013) on the status of its children's disproportionate levels of poverty, violence, social and economic disparities as well as skills deficit among people working with children. The Committee has urged the government to address these as matters of urgency.

2.2.2 The African Charter on the Rights and Welfare of the Child (ACRWC)

At the regional level, the ACRWC reflects the continent's response to the need for protection and advancement of children's rights. South Africa ratified the ACRWC in 2000. Article 1 instructs member states to uphold and recognise minors' rights and freedoms, as well as the ACRWC's enshrined duties.⁶⁷ Article 15 requires state parties to prohibit economic exploitation of children, including via employment conditions posing any sort of harm to their development and growth.⁶⁸ States are thus compelled to act against violations of children's employment-related rights.

ACRWC and ILO conventions on the protection and advancement of workers' rights complement the UNCRC's guidelines. Similarly, the child's rights are balanced with the child's responsibility towards his/her parents and community.⁶⁹ The complementary role of family and community is made evident in this obligation of the child towards his/her community, also expressed in the ACRWC. Thus, traditional practices contradicting the spirit

⁶⁵UNCRC art. 19.

⁶⁶UNCRC Committee on the Rights of the Child, GC No. 5 on the General Measures of Implementation on the Rights of the Child UN Doc. CRC/GC2003/05

⁶⁷African Charter on the Rights and Welfare of the Child, Adopted 1 July 1990.

⁶⁸ACRWC, 1990.

⁶⁹See ACRWC art. 131.

and values of the ACRWC must be discouraged by state parties.⁷⁰ Child “fostering” by relatives who turn them into unpaid or poorly paid domestic employees is one such example. It must also be noted here that referencing child domestic workers as part of the family diminishes the employer-employee relationship and their associated rights in the private third-party domestic setting.⁷¹ Feelings of guilt, for example, might overwhelm the child domestic worker’s need to negotiate better economic benefits for their labour in such an environment. Such filial relationships camouflage their exploitation as children and workers, denying them their employment-related rights.⁷²

The ACRWC, as mentioned, specifically Article 15, explicitly requires the state to prohibit economic exploitation of children and employment conditions that pose harm to their development and growth.⁷³ Similarly, ILO C138, considered the foundational standard for the eradication of child labour,⁷⁴ requires states to prescribe diverse age categories for children’s entry into employment per industry and employment sector, thus addressing the need for their engagement in age-appropriate work only.⁷⁵ ILO C182, with accompanying Recommendation No. 190, instructs and compels states to act to eliminate the worst forms of child labour.⁷⁶ This includes work that compromises children’s health, safety and morals.⁷⁷ It particularly prescribes priority be given to the rescue of girl children who are subjected to hidden forms of work that is likely to compromise their wellbeing, security and morals.⁷⁸

ILO’s C189 Article 4 compels states to align their national minimum age for entry into domestic work with Minimum Age Convention 138 of 1973 and the Worst Forms of Child Labour in C182. Both conventions emphasise the protection of domestic workers below the

⁷⁰See ACRWC, 1990 part 1 Rights and Duties.

⁷¹Munubi H. ‘Assessment of the causes and effects of domestic child labor and its impacts on society: A case study of Dar Es Salaam –Tanzania (2013) 1 *Journal of Global Gender Studies* 1-23 available at www.jghcs.info [ISSN 2162-691x (online)] (accessed on 30 October 2020).

⁷²ILO (Jakarta) *Tackling child labour in domestic work: A handbook for action for domestic workers and their organisations* (2017) 1-144.

⁷³ACRWC, 1990.

⁷⁴ILO-C138.

⁷⁵ILO-C138 art. 2.

⁷⁶ILO-C 138 art. 2.

⁷⁷Gamlin J, Camcho Z, Ong M & Hesketh T l. ‘Is domestic work a *worst form* of child labour? The findings of a six-country study of the psychosocial effects of child domestic work (2013) 13 (2) *Children’s Geographies* 212-235 available at <https://doi.org/10.1080/14733285.2013.829660> (accessed on 29 October 2020).

See also Bourdillon M. ‘Child Domestic Workers in Zimbabwe’ (2007) 17-34. African Books Collective. Project MUSE. Accessed at 3 December 2010 at muse.jhu.edu/book/16810.

⁷⁸Blagbrough J ‘Child Domestic Labour: Work like any other, work like no other’ (2018) in Bunting A & Quirk J (eds) *Contemporary Slavery: The Rhetoric of Global Human Rights Campaigns* 301-328.

age of 18, especially their right to compulsory education or opportunities for advancing their education.⁷⁹

2.3 Protection of children in South Africa: The constitution, legislation, state institutions and policy

The South African state has, since the country's transition to democracy in 1994, domesticated its international and regional obligations to the protection of its children via the Constitution. Children's rights are protected in Section 28 and is cited as the Bill of Rights for children in Chapter 2. The state has also promulgated pertinent legislation, circulated policies for enactment and established state institutions for attainment of children's rights. Section 28 of the Constitution guarantees 16- and 17-year-old child domestic workers employed in third party private domestic household special protection against labour exploitation, with the Bill of Rights augmenting their protection via their rights; these protective measures in the Constitution pertain to child domestic workers:

- (a) to be protected from maltreatment, neglect, abuse or degradation;
- (b) to be protected from exploitative labour practices;
- (c) not to be required or permitted to perform work or provide services that:
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral, or social development.⁸⁰

The state is also obligated to activate appropriate child protective instruments to investigate and remove children from exploitative environments;⁸¹ The Children's Act of 2005 aligning with Constitution, Section 28; in such interventions, the state must also prioritise the best interests of the child. Thus, the court ruled in the landmark *S v M* case in 2007, that the 'constitutional provision that in all matters concerning children, the child's interest shall be

⁷⁹See ILO-C189 art. 4 Convention on the Rights of Domestic Worker compels the government to protect the rights of child domestic workers, including observance of minimum age for entry into domestic work and protection of the right to education.

⁸⁰Constitution of the Republic of South Africa Act 108 of 1996. S28 (1)(f), protection of children as regards certain types of domestic work.

⁸¹Children's Act of 2005 s150 relates to the issuing of a court order for the removal of a child found under ss150 and 151 to be in need of care and protection.

prominent'.⁸² Thus, the law too must strive to create the conditions for children's rights to be protected to safeguard them from abuse, as in the case mentioned, being subjected to long, unregulated working hours.

As seen already, children's rights find operational expression in the Children's Act of 2005, which provides norms for the care and protection of children within the South African justice system. The Act underscores children's socio-economic rights, including to education, health care and protection.⁸³ Provision of free and compulsory basic education is key to the eradication of hunger and poverty regarding children, the latter which are prominent factors that propel children into domestic employment in private households.⁸⁴

The value of education as an equaliser is considered by the International Covenant on Economic, Social and Cultural Rights (ICESCR) as follows:

*'Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.'*⁸⁵

Considering South Africa's great socio-economic inequalities, a court judgment, guided by the Constitution, tested commitment to the ICESCR's above argument of the crucial role of education for child protection in the country. Brought by civil society against the government,

⁸²*S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12BCLR 1312 (CC) (26 September 2007).

⁸³See Constitution Act 108 of 1996 s28(c) and Children's Act 38 of 2005.

⁸⁴ CLPA cabinet report covering the period 2008/2009- 2012-2013 adopted by cabinet on February 4, 2009, indicated the child support grant will be extended up until the age of 18 years in order to support children to stay at school, especially in areas that are hot spots for child labour, including the worst forms of child labour. See also *Equal Education and Another v Minister of Basic Education and Others* (276/2016) [2018] ZAECBHC 6

⁸⁵ICESCR GC13.

Equal Education and Another v Minister of Basic Education and Others,⁸⁶ the court ruled in favour of the child's right to dignity associated with education, with Paragraph 166 stating:

*'The rights entrenched in the Bill of Rights include equality, dignity, and various other human rights and freedoms, one of which is that everyone has the right to a basic education....Section 28(3) stipulates: "A child's best interests are of paramount importance in every matter concerning the child.'*⁸⁷

The court makes clear the rights in Section 28 form the cornerstone for protection and service provision to children, including those trapped in situations that rob them of their basic human right to education.

As indicated, the Constitution's Section 28(1) further grants children the right to basic nutrition, shelter, basic health care services and social services.⁸⁸ These rights, mentioned earlier, are codified in the Children's Act 38 of 2005, with the state playing a custodial role in ensuring they are realised, within its available resources; provision of these refers to the state's duty to care.⁸⁹ The limitations to the state's duty to care is contained in Article 36(1) (a)–(e) of the Constitution, which are required to be informed by the law of general application and doctrine of reasonableness advancing the country's democratic agenda. Education is the only right that has no internal limitations; this requires the state to ensure that every child enjoys the right to basic education without hindrance. This was further elucidated in the landmark *Grootboom* case, with the decision by the Constitutional Court reinforcing the reasonable accommodation and best interest doctrine of the child.⁹⁰ The court also pointed out that the state must guarantee children a safe, protective, and nurturing environment.⁹¹

⁸⁶*Equal Education and Another v Minister of Basic Education and Others* (276/2016) [2018] ZAECBHC 6; [2018] 3 All SA 705 (ECB); 2018 (9) BCLR 1130 (ECB); 2019 (1) SA 421 (ECB) 19 July 2018.

⁸⁷*Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); see par 78 regarding the Best interest of the child being prioritised by the parents and the state.

⁸⁸ Constitution, 1996 s 28(1)(a)-(f).

⁸⁹*Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), see paras par 78 and 94 on by the parents and the state prioritising the best interests of the child.

⁹⁰*Government of the Republic of South Africa and Others v Grootboom and Others* [2000]

⁹¹See Constitution, 1996 s 28(1) regarding the state's duty to care for children and advance their socio-economic rights.

The above, also emphasised in the UNCRC, places a huge premium on the protection of children's rights because of their vulnerability as members of society.⁹² Article 5 of the UNCRC also recognises the fundamental role of the family as the primary socialisation agent in the child's life, including relating to their protection. Article 4 of the ACRWC affirms the same. Similarly, the South African Children's Act, Article 2 has the objectives of promoting family preservation and strengthening families:

‘(a) to give effect to the following constitutional rights of children, namely—

- (i) family care or parental care or appropriate alternative care when removed from the family environment
- (ii) protection from maltreatment, neglect, abuse or degradation...’⁹³

The family and domestic spheres are specifically identified as spaces where the rights of the child must be advanced and protected; in this regard, their performance of harmful and exploitative domestic labour in private third-party households contradicts both the international and domestic legislation.⁹⁴

The type of employment for the child and level of development of a country influence the scope of application of the ILO's C138 in a country.⁹⁵ It stipulates:

‘[C]hildren's work needs to be understood in the light of different material and cultural conditions and seen as varying according to a range of individual factors, and that the concept of child rights and childhood is not universal in practice but is greatly influenced by the cultural and societal norms in specific communities.’⁹⁶

⁹²UNCRC, 1989 preamble

⁹³ Children's Act of 2005 s 2.

⁹⁴ILO-C189.

⁹⁵Gamlin J Camacho AZ & Ong M ‘Is Domestic work the worst form of child labour? The findings of a six-country study of the psychosocial effects of child domestic work (2013) 13 (2) Children's Geographies 212-225.

⁹⁶See Ramanan N, Derluyn I & De Haene L ‘Parent-child relationship in the context of child domestic work in India’ (2017) [(01-10-2013-30-09-2017)

The different realities of children internationally, which in different strata within a state even differ, based on socio-economic opportunities, or disparities and inequalities, necessitates cognisance of this fact, but even so the international instruments, and in the case of South Africa, the national child protection machinery still oblige legal and policy mechanisms so that no child may fall through the gaps whatever their different family, community, work and social contexts might be.

Thus, it must be recognised that the employment of child domestic workers in South Africa aged 16–17 in third party private domestic households deprives them of the parental care, comfort and support of their homes emphasised by these instruments and legislations. As, this practice violates Section 28(f) (i) and (ii) of the Constitution, which prohibits certain types of child labour. Similarly, the right to parental care, which is fundamental to the child's healthy development, is missing in the lives of child domestic workers employed in third party private domestic households. As previously mentioned, poverty is one of the main factors contributing to child domestic employment; it manifests in various forms including child-headed households where children have to head their families, due to various factors beyond the child's control, including in South Africa, by being orphaned via COVID 19, the HIV and AIDS pandemic.⁹⁷ In such instances, the state has a duty to support children in strengthening the family environment through various administrative interventions, this to aid the realisation of their rights as children.⁹⁸

These interventions include providing them funds in the form of child support grants for children in poor families; exemption from paying school fees, and free access to basic health care though the quality in certain areas is wanting. These are some of the many instruments that the state utilises to strengthen families and family life in South Africa.⁹⁹ Such interventions are enshrined in Section 217(1) of the Constitution, which guarantees all citizens access to social security. The guiding UNCRC principles previously stated include ensuring children's right to survival, development, protection, and participation. Child domestic workers employed in private third-party households are denied the enjoyment of these four cardinal UNCRC principles; in essence, it is their childhood they are denied;¹⁰⁰ hence the explicit

⁹⁷ILO-IPEC Child labour and domestic work.

⁹⁸See Children's Act of 2005 s 2(a) that compels the states to advance preservation and strengthening of families; s 2(d) requires the state to 'make provision for the structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children'

⁹⁹South African Social Security Act No. 9 of 2004.

¹⁰⁰*S v M* 2007 par 7CCT53/06 ZACC/18;2008 (3) (CC).

requirement for the state's intervention to ensure children's diverse needs are met in diverse contexts.

South Africa's report on the status of children to the UNCRC Committee of Experts in 2016¹⁰¹ again raised major concerns from the committee about child poverty; inequality; social grants of insufficient value; meagre budget allocations for education and health care; increasing levels of domestic and school-based violence; need for establishment of an independent child rights oversight structure, and high rates of nutritional deficiency and HIV/AIDS among children.¹⁰² The government's failure to adequately address these socio-economic issues was identified by the Committee as tantamount to the state abdicating its responsibilities for children's protection of children via delivery of their basic human rights.

It should be noted that children continue to suffer, exposed to various atrocities stemming from inadequate governance, including endemic corruption, gender-based violence, gang violence and being victims of these circumstances, suggesting a lack of political will to prioritise the pressing issue of the state's obligations towards its citizens, including children. The state's ongoing laxity in enforcing its obligations, as stated by the UNCRC and the Children's Act merits its sanctioning as a member state at the international level.¹⁰³ It is a shortcoming of the international child protection instrument that the South African government is not held accountable for its dereliction.¹⁰⁴

2.4 The South African Human Rights Commission (SAHRC)

The SAHRC is one of six Chapter 9 institutions established to anchor the country's democratic project post-apartheid. It promotes, protects, and monitors without fear, favour, or prejudice attainment of the human rights of all those living within the country's borders since its establishment in 1996.¹⁰⁵ Children's rights within the SAHRC mandate, is prioritised through a dedicated children's portfolio, which is advanced through education, protection via oversight and promotion.

¹⁰¹ UNCRC *Concluding observations on the second periodic report of South Africa* (2016) CRC/C/ZAF/CO/2 available at <https://www.refworld.org/docid/587ce86b4.html> (accessed on 29 October 2020).

¹⁰² UNCRC *Concluding observations on the second periodic report of South Africa* (2016) CRC/C/ZAF/CO/2 available at <https://www.refworld.org/docid/587ce86b4.html> (accessed on 29 October 2020).

¹⁰³ UNCRC art. 32

¹⁰⁴ ILO News *Child Labour and Forced Labour in domestic work: Taking Forward Alliance 8.7 in Sub-Saharan Africa* [Online] available at <http://www.i.o.org/addisababa/media-centre/pr/WCM559788/lang-en/index.htm> (accessed on 29 October 2020).

¹⁰⁵ South African Human Rights Commission. The mandate of the SAHRC is available at [www.sahrc.org.za > index.php](http://www.sahrc.org.za/index.php) (accessed on 29 October 2020).

The UNCRC Committee in response to South Africa's 2016 Report to it, mentioned previously, recommended the SAHRC commissioner holding the portfolio for children be adequately resourced and administratively empowered to conduct their work.¹⁰⁶ Such advocacy and awareness-raising about children's rights could also enable child domestic workers to participate from an informed basis towards transforming their social relations in their employment in a private third-party household. The SAHRC is noted as one of the institutional mechanisms legislated to protect children's and youth's rights, *including* those in employment, in domestic work in third party private households too. The SAHRC is recognisably an important instrument in ensuring that the state honours its domestic and international obligations to children, in particular, those from underclass stratum of society.

The SAHRC thus often acts as an *amicus curia* in court matters relating to upholding children's socio-economic rights; for example, in the *Centre for Child Law and Others v the Minister of Basic Education and Others* case.¹⁰⁷ With the SAHRC's input, the court upheld the right to nutrition as well as the right to education for all children including for undocumented children. Thus, the SAHRC should be seen as critical regarding the protection of child domestic workers' rights in third party private households.

2.4.1 General protection of workers' rights

Child domestic workers are entitled to labour rights that include fair treatment, a safe workplace, freedom of association and from exploitation, and rest time.¹⁰⁸ The South African government honours the Decent Work Agenda Principles of ILO C189¹⁰⁹ through enactment of rights-based legislation, detailed below.

2.4.2 Employment-related legislation

Numerous employment-related provisions aimed at advancing the Decent Work Agenda principles and employment laws and practices are evident in the South African Constitution. Legislation specifically includes the Labour Relations Act (LRA),¹¹⁰ the Basic Conditions of

¹⁰⁶ UNCRC GC No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence 6 December 2016 CRC/CG/20 available at <https://www.refworld.org/docid/589DAD3D4.HTML> (accessed on 10 October 2020).

¹⁰⁷ *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019) [1]

¹⁰⁸ ILO-C189 art. 4

¹⁰⁹ ILO-C189 art. 4

¹¹⁰ Labour Relations Act 66 of 2015 regulates employment relations at the workplace and creates platforms for dispute resolution which are also accessible to domestic workers.

Employment Act (BCEA),¹¹¹ and the Occupational Health and Safety Act (OHSA).¹¹² The LRA regulates the employer-employee relationship and promotes social justice and labour peace in the workplace.¹¹³ Additionally, it prohibits unfair dismissal and other labour practices.¹¹⁴

The Occupational Health and Safety Act (OHSA) is another legal instrument that can be utilised to lift the veil to expose any exploitation of child domestic workers employed in third party private households.¹¹⁵ Children aged 16–17 are also significant beneficiaries of the protective regulatory environment enabled by the Act by the inspections it compels, conducted by the Department of Labour (DOL). However, ignorance of the law by both the employer and child employee impedes enforcement; sometimes, due to lack of education that makes difficult understanding the legal jargon.¹¹⁶ BCEA gives expression to Section 23(1) of the Constitution regarding the advancement of fair employment practices, in fact providing the basic foundation for basic employment conditions.¹¹⁷ ILO C189 highlight the need for state to be deliberate in the protection of domestic workers noting both the gender and class dimensions as women and girls from economically disadvantaged communities dominated the sector, their invisibility and vulnerability expose them to discriminatory employment conditions and other forms of human rights abuses. Article 14 of the C189 enjoins state parties to honour their obligation as the protector of democratic rights.¹¹⁸ The state's duty to care also flows from its obligations as a member of the Southern African Development Community. To this end article 13 of the Maputo Protocol focuses on Economic and Social welfare rights enjoins states to adopt and enforce legislative and other measures guaranteeing women equity at work and career opportunities.¹¹⁹ Special attention must be paid to women in informal sector which includes third-party private domestic spaces.

¹¹¹ BCEA, 2013

¹¹² Occupational Health and Safety Act 85 of 2004.

¹¹³ du Toit D & Hysamen E 'Implementing domestic workers' rights in a transformative constitutionalism' (2013) du Toit, D (ed) *Exploited, undervalued -and essential domestic workers realisation rights* 73.

¹¹⁴ LRA Act No. 66 of 1995 sec. 85 prohibits unfair dismissals of any employee, including those employed in the domestic sector in private households.

¹¹⁵ OHSA, 2004.

¹¹⁶ ILO (Jakarta) *Tackling child domestic labour in domestic work: A handbook for action for domestic workers and their organization* (2017).

¹¹⁷ BCEA art. 2 gives the purpose of the act as including the establishment and enforcement of basic employment conditions and regulation of variations in employment conditions as honouring the South African Government's obligation to the ILO by virtue of its membership.

¹¹⁸ Article 14 of C189 of 2011

¹¹⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003.

Child domestic labour manifests the many vulnerabilities children experience relating to their labour conditions as well as the consequences thereof.¹²⁰ The government has recognised the need for sector-specific protection for domestic workers.¹²¹ Thus the annual Special Dispensation specifically aligns with the BCEA¹²² which provides for the minimum wage and regulation of minimum standards of employment for workers in the domestic sector, including child domestic workers.¹²³

Section 50 of the BCEA affords special protection for children aged 16–17 their employment rights.¹²⁴ However, both these measures can only be effective for child domestic workers in private third party households if the children themselves are conscious of their rights when they are being violated and know available redress measures; employers must also be responsible and abide by the specified directives aimed at protecting worker’s rights of the children in their employ.¹²⁵

Employment of children below the minimum legal age and in poor work conditions that compromise their well-being constitutes a serious breach of the law, with severe consequences for the perpetrator.¹²⁶ Nevertheless, such still manage to escape detection and consequences.¹²⁷ Section 43 of the BCEA¹²⁸ protects children from any form of exploitation, including performing work that is harmful to their psychological, moral and physical development, while Section 50(2) enforces prosecution of perpetrators.¹²⁹

¹²⁰ Southern African Catholic Bishops Conference Parliamentary Liaison Office Briefing Paper ‘Child Labour in South Africa’ (2006) *Multiple Vulnerabilities* (briefing paper) 165.

¹²¹ du Toit D & Hysamen E (2013).

¹²² BCEA Act 75 of 1997 (as amended).

¹²³ Sectoral Determination 7: Domestic Sector, refer to part A that stipulates the scope of coverage, part B addresses the setting of minimum wage region and municipal boundaries.

¹²⁴ BCEA sec. 43(2)(a) and (b) ensures the protection of socio-economic rights of children above the compulsory school-going age; sec. 43(3) criminalises the employment of children when such employment deprives children of their basic right to development.

¹²⁵ Antislavery International ‘Small grants, big changes. Influencing policy and practice for child domestic workers’ (2013).

¹²⁶ BCEA Act of 2013 s 43.

¹²⁷ See McBride M ‘Cleaning up the Industry: Improving Protections for Precarious and Child Domestic Worker’ (2015) 41:5 1335-1399 *Fordham International Law Journal* available at <https://ir.lawnet.fordham.edu/ilj> (accessed on 30 October 2020). Also see International Centre for Migration Policy Development *DemandAT Working Paper 12 - Trafficking in Domestic Work: Looking at the Demand--Side* (2016)

¹²⁸ BCEA Act 20 of 2013.

¹²⁹ BCEA Act 20 of 2013.

The Constitution's Section 2, BCEA's Article 48 and Article 141 of the Children's Amendment Act prohibit forced labour of children. Working without a formal employment contract is not within the spirit of the ILO's Decent Work Agenda.¹³⁰ Studies show that compliance with signing employment contracts procures better working conditions for domestic workers in general.¹³¹ Article (6) (2) of ILO 189¹³² distinctly stipulates employment conditions for the child domestic worker in third party private households.¹³³

2.4.3 Other relevant statutes for child protection and states obligations

Legislative statutes for children's rights dovetail with other domestic legislation to further protect children's rights.¹³⁴ This entrenches indivisibility of children's rights.¹³⁵ These include, among others, family law statutes, domestic violence laws and national action plans for children based on UNCRC and ILO standards, in particular ILO C138, C182 and C 189 on the Decent Work Agenda which entails access to quality jobs, dignity, justice, voice and personal development.¹³⁶

The Unemployment Insurance Act (UIA) of 2013 extends social protection rights to all workers, including domestic workers, guaranteeing them benefits that include paid maternity leave and unemployment insurance dependent on contributions.¹³⁷ This is a huge step towards protecting domestic workers in general. Enforcement is still a challenge though, UIF contributions depend on agreement between the two parties, problematic in an unequal employer-employee relationship.¹³⁸ For example, Vettori finds that employment location or sector influence enforcement of labour policy and legislation, increasing the precarity of certain employees, and child domestic workers are such employees.¹³⁹

However, these legislative measures to protect domestic workers appear to hardly benefit children employed in private third-party households, with no reduction or partial reduction in

¹³⁰ ILO-C189 rec 201.

¹³¹ De Villiers B & Taylor M 'Promoting a positive work experience for South African domestic workers' (2019) 17 (0) *SA Journal of Human Resource Management* 1-13 available at <https://doi.org/10.4102/sajhrm.v17i0.1206> (accessed on 29 October 2020)

¹³² ILO-C189 rec 201.

¹³³ UNICEF 'Handbook on Legislative Reform' (2008) *Realising Children's Rights Vol 1*.

¹³⁴ UNICEF 'Handbook on Legislative Reform' (2008) 1.

¹³⁵ UNICEF 'Handbook on Legislative Reform' (2008) 1.

¹³⁶ Somavia J Decent work for domestic workers (2010) Geneva: International Labour Office.

¹³⁷ Unemployment Insurance Act 39 of 2013.

¹³⁸ Vettori S. *Challenges facing the Department of Labour in implementing labour policy and labour legislation in the hospitality industry in South Africa* (2018). *African Journal of Hospitality, Tourism and Leisure*, 7

¹³⁹ Vettori S (2018) 8.

their vulnerability to unfair labour practices.¹⁴⁰ The next section looks at the administrative setup for implementing legislation and policies to protect children's rights.

2.5 State's responsibility in issues related to the violation of children's rights.

Flowing from its legal obligations, the state must enable its organs to undertake actions to protect children involved in domestic work as a worst form of child labour.¹⁴¹ It must undertake such functions as inspections of workplaces, including domestic spaces suspected of employment regulations contravention.¹⁴²

2.5.1. Child protection services towards children's rights

As mentioned, children's socio-economic rights straddle various state departments as the UNCRC stipulates 'visible cross-sectoral coordination to recognise children's rights'.¹⁴³ The state has positive responsibility to forge government-civil society partnerships that directly include children themselves participating in actions towards attaining their rights. In terms of the UNCRC,¹⁴⁴ state parties' responsibilities are:

- (a) Make remedies available and accessible to children in cases where the rights recognised by the Convention have been violated.
- (b) Support for programmes geared towards children where such cooperation is needed, to properly implement the provisions of the CRC and thereby advance the social, economic, and cultural rights of children through international assistance or development aid.
- (c) Publicising and awareness-raising of the principles and provisions of the Convention widely known to both adults and children.'

¹⁴⁰ CPLA Cabinet Report; also see ILO IPEC report.

¹⁴¹ UNCRC, 1989 and ACWRC, 1990.

¹⁴² Alpmann PN *Mandatory reporting: The legal protection of the child victims of trafficking for the exploitation of Child Labour in South Africa* Unpublished Masters Thesis, University of Zululand (2014). 8-12

¹⁴³ UNCRC Committee on the Rights of the Child GC 5 on the General Measures of Implementation on the Rights of the Child UN Doc CRC/GC2003/05

¹⁴⁴ See UNCRC, 1989 art. 32 stipulating that states parties are obliged to protect children from economic exploitation, performing any work that is likely to be hazardous or compromise the child's access to education, or harmful to the child's health or psychosocial development.

Apart from civil society, cross-sectoral collaboration is aimed at fostering an integrated approach towards improving service delivery by government. In terms of protecting the rights of child domestic workers, the critical departments include Education, Social Development, Health, and police services, and the courts as well as Chapter 9 institutions such as the SAHRC.

2.5.2 Inspection and monitoring

As mentioned, state intervention regarding the regulation of child labour is multi-pronged and cross-sectoral, involving multiple departments with different complementary roles towards fulfilling the state's mandate for children's rights' protection.¹⁴⁵ The Inspectorate Division of the DOL is responsible for inspecting and monitoring compliance with legal and labour standards relating to child labour, including domestic work as the worst form of child labour. BCEA's Article 50(1), as amended, prohibits the employment of children below the age of 18 years,¹⁴⁶ while Article 48 prohibits their forced labour.¹⁴⁷ The prohibitions aim to prevent children, including children aged 16–17 years, labouring in exploitative conditions such as long hours and performing hazardous work.

Monitoring child labour entails unannounced and announced visits to workplaces suspected of employing children to check on the type of work being performed, observance of health and safety standards, and working hours, as well as the employer-employee relationships.¹⁴⁸ Inspectors must verify the age of the child as per the requirements of the ILO Minimum Age Standards and the BCEA.¹⁴⁹ The BCEA and Occupational Health and Safety Act (OHSA) authorise labour inspectors to remove any child found engaging in hazardous work inappropriate to their age.¹⁵⁰ However, staff capacity in the DOL limits the frequency of such inspections.

¹⁴⁵ UNCRC *Concluding observations on the second periodic report of South Africa* (2016) CRC/C/ZAF/CO/2 available at <https://www.refworld.org/docid/587ce86b4.html> (accessed on 29 October 2020).

¹⁴⁶ BCEA (amended) Act No. 20 of 2013 sec. 50(1)(2)(3)

¹⁴⁷ BCEA sec. 48

¹⁴⁸ Labour Administration and Inspection Programme. 'Labour Inspection: What it is and what it does.' A guide for workers. ILO Geneva 8-37.

¹⁴⁹ BCEA No. 20 (amended) of 2013 sec. 44(2).

¹⁵⁰ BCEA No. 20 (amended) of 2013 sec 50(2).

Data collected from the “raid” must be handed over to other social partners, for example, the Department of Social Development (DSD) that facilitate interventions in the best interest of the child domestic workers through the courts.

2.5.3 Enforcement challenges

As mentioned, legislation must be adequately enforced for it to be meaningful to those it is supposed to benefit.¹⁵¹ Thus, the legislation must reach child domestic workers being abused and exploited in private third-party households.¹⁵² Enforcement of legislation depends on institutional arrangements being put in place and properly used, that is, effective application and execution.

The South African Schools Act of 1996¹⁵³ and BCEA¹⁵⁴ do grant exceptions from the ministers of education and labour regarding employment of children under the age of 15. However, this is only for children employed in the performing arts and in advertising, and on condition that ‘the child’s participation does not place the child’s well-being, education, physical or mental health, spiritual, moral or social development at risk’.¹⁵⁵ All other types of labour thus require monitoring to ensure the same, including child domestic work in third party private households.

2.5.4 Reporting

Reporting suspected violations of children’s rights in employment spaces is critical to state oversight of child labour.¹⁵⁶ In addition to inspectors, Section 100 of the Children’s Act makes reporting of child abuse and exploitation compulsory,¹⁵⁷ including child domestic workers in private third-party households. Section 110(1) lists persons legally compelled to report suspicion of child abuse and exploitation, includes health and mental health professionals, ministers of religion, and the DOL inspectors¹⁵⁸ who are required to submit a report of their

¹⁵¹ de Villiers B & Taylor M ‘Promoting a positive work experience for South African domestic workers’ (2019) 17 *SA Journal of Human Resource Management* 1206.

¹⁵² ILO Joining forces against child labour: Interagency Report for The Hague Global Child Labour Conference of 2010 (2010) ILO Geneva

¹⁵³ South African Schools Act No 84 of 1996.

¹⁵⁴ BCEA (amended) Act No. 20 of 2013.

¹⁵⁵ BCEA Amended Act No. 20 of 2013.

¹⁵⁶ The BCEA criminalises the employment of children under the age of 18, particularly in hazardous conditions.

¹⁵⁷ Children’s Act 38 of 2005.

¹⁵⁸ Children’s Act 38 of 2005.

suspicious to DSD, or any designated agency involved in child protection.¹⁵⁹ Officials who receive reports are expected to possess the requisite knowledge and skills and to act promptly to assist the child and assist in successful convicting of the perpetrator.

Social workers investigating an allegation must act within 48 hours to verify its veracity, bringing the child before the court where a magistrate must declare the child in need of care and protection. If the child needs to be removed from his/her primary residence or workplace, the social worker must be accompanied by a police officer to effect this. Processing an allegation can also involve, multi-departmental and disciplinary teams, comprising social workers, DOL inspectors and police officers.

Multiple challenges impede reporting of child abuse and exploitation, including children's general mistrust of law enforcement officers¹⁶⁰ and the intimate relationship between the child and the perpetrator.¹⁶¹

Moreover, the regulatory child protection framework can only be achieved if reporting child exploitation becomes community practice, as per earlier mention of the ACRWC's recommendations regarding family and community obligations. Article 38 of the Constitution lists persons who could enforce the rights stipulated in Bill of Rights on their behalf or on another person's behalf.¹⁶² Failure of reporting unfair child labour practices in private households denies their basic human 'rights to education, social assimilation, social integration and psychological development as a result of their domestic confinement'.¹⁶³

Section 9 of the Children's Act of 2005¹⁶⁴ confers participative rights to minors in every age category, with or without adult professional support, which means a child can report abuse and exploitation directly to the police. However, the lack of empowerment of child domestic workers through rights knowledge and education, including unfair dismissal is discernible.

¹⁵⁹ Ramos-Carbone E *Tackling child labour in domestic work: A handbook for action for domestic workers and their organisations* (2017) Geneva: International Labour Office.

¹⁶⁰ Retief R & Green S 'Some challenges in policing domestic violence' (2015) *51 (1) Social work Stellenbosch. Online*) 135-147.

¹⁶¹ Children's Act No. 38 of 2005 sec. 151 authorises the removal of a child with a court order and sec. 152 without a court order to an alternative place of safety.

¹⁶² Article 38 of the South African Constitution of 1996 stipulates the persons who could enforce rights derived from the Bill of Rights through the court system in the country.

¹⁶³ King Hussein Foundation (2014) *'Homebound girls in Jordanian'* Information and Research Center King Hussein Foundation, Save the Children 1-60

¹⁶⁴ Children's Act 38 of 2005.

Section 9 also enables child domestic workers to participate in decision-making promoting their best interests.¹⁶⁵ The Act also provides standards for assessing the best interests of the child through guidance on advancing their human rights.¹⁶⁶ The Act is thus a critical empowering tool for children aged 16–17 to assume juristic self-authority towards their best interests under diverse contexts.¹⁶⁷ These legal avenues also enable children to exercise self-agency and influence their rights attainment as children and workers.

2.5.5 Institutions advancing children’s rights: Children’s Court and the SAHRC

The Children’s Court and SAHRC (mentioned previously)¹⁶⁸ are specialised judicial institutions set up by government towards realisation of children’s rights. Thus, children in domestic employment in private third-party households could also find relief in them if identified as requiring protection and care. The Children’s Court is a specialised judicial instrument, critical in the administration of justice for children. Its purpose is to ensure the care and contact of children, their protection and wellbeing.¹⁶⁹ These courts are headed by magistrates who specialise in children’s and family issues. Social welfare and mental health professionals, including social workers and psychologists, assist the magistrates to enforce the best interests of the child.¹⁷⁰ As mentioned above in section 2.4.3 of this paper, the SAHRC has a dedicated portfolio and commissioner dedicated to advancing the human rights of children.

Given the above, child protection must include rights of child domestic workers aged 16–17 years employed in private third-party households. Yet, the state’s inability to provide adequate protection for these children renders them vulnerable to abuse and exploitation, making it important to elaborate the challenges of enforcing their rights as child domestic workers.

2.6 Main challenges in enforcing rights for child domestic workers

With regard to enforcement of protection of children’s rights linked to delivery of state services three main challenges may be identified—the difficulty of legal enforcement of children’s rights in the private space of domestic work in which child domestic workers suffer abuse and

¹⁶⁵ See Children’s Act 38 of 2005 s 7 that explains the child’s best interest standards.

¹⁶⁶ UNCR, 1989 art. 3.

¹⁶⁷ Children’s Act No. 38 of 2005 s 28.

¹⁶⁸ Children’s Act 38 of 2005.

¹⁶⁹ See Department of Justice website on www.justice.gov.za available accessed on 30 October 2020).

¹⁷⁰ Children’s Act 38 of 2005.

exploitation, the challenge of inadequate budget allocation to address children's socio-economic rights and inadequate funding to support civil society efforts towards child rights attainment, including for their labour rights, and oversight over government responsibilities. To begin with, it is first important to understand the domestic space of employment in private households, including for child workers.

2.6.1 Characteristics of the domestic employment space

The workplace for domestic workers is essentially a private, intimate space, the nature of which as a site of employment is one of the main impediments to effectively apply current legal regimens for the protection of child domestic workers in private third party households in South Africa.¹⁷¹ Domestic work that takes place in a private home makes its regulation different from and more challenging than for other industries.¹⁷² This employment location potentially creates conditions of isolation, denying the child domestic worker solidarity with other similarly placed workers to negotiate better working conditions and effectively resist exploitation.¹⁷³ This isolation of domestic employees, particularly in the case of children, poses a challenge to protecting their rights as employees and as children too. Many children are lured into domestic work by deceptive promises of brighter futures,¹⁷⁴ which Munubi, in a study based on child domestic workers in Dar Es Salaam, Tanzania opines the consequence to be their entrapment in abusive, unequal and treacherous working conditions that tarnishes their prospects.

Their exploitation is related to deprivation of playtime, access to health care, rest and education, and almost total dependence on their employers for all their basic needs.¹⁷⁵ Such dependency increases their vulnerability to all forms of abuse, including physical, sexual and emotional.¹⁷⁶ This occurs despite Article 5 of Recommendation 201 of the Decent Work Agenda in ILO

¹⁷¹ du Toit D (ed) *Exploited, Undervalued Essential Domestic Worker Realisation of their rights* (2013) (hereafter *Exploited*).

¹⁷² McBride M 'Cleaning up the Industry: Improving Protections for Precarious and Child Domestic Worker' (2018) 41 (5) *Fordham International Law Journal* 1335-1399 available at <https://ir.lawnet.fordham.edu/ilj> (accessed on 29 October 2020). See also Mabilo M *Women in the informal economy: Precarious labour in South Africa*. (unpublished Master's dissertation, Stellenbosch University, 2018). 10.

¹⁷³ Belay, YD 'Migration and State Responsibility: Ethiopian Domestic Workers in Lebanon. (2014) 4 (5) *International Journal of Scientific and Research Publications*.

¹⁷⁴ Manubi H 'Assessment of the causes and effects of domestic child labour and impacts on society: A case study of Dar Es Salaam-Tanzania' (2013) 1 *Journal of Global Gender Studies* 1-27. available at www.jghcs (accessed on 29 October 2020).

¹⁷⁵ See the Children's Act 38 of 2005 s 141 on child labour and exploitation of children.

¹⁷⁶ United Kingdom Department for International Development Work K4D Know evidence and learning for development Helpdesk Report *Child Domestic Work* (2017). United Kingdom Department of International Development

C189 that prohibits any form of domestic workers abuse. Furthermore, as per Item 5(2) of this same Recommendation, domestic workers below the age of 18 are prohibited from performing night duties and must be afforded adequate time for rest, education and training, leisure activity and family contact.

Moreover, the obscure nature of the employer-employee relationship in the private domestic space decreases protection for child domestic workers in particular.¹⁷⁷ Apart from the dependency issue, mentioned above, this relationship is also often premised on race, class and gender differences.¹⁷⁸ Generally, the majority of domestic workers are women from depressed social strata, characterised by factors of extreme poverty, hunger and unemployment.¹⁷⁹ The intersectionalities of gender and race relating to poverty and unemployment amongst black women ensure their over-representation in low level and unskilled informal sector work, including domestic work. Such differentiation is identified as one of the key factors that militate against domestic workers claiming their rights to fair employment practices as can other workers.¹⁸⁰ This occurs in South Africa too, despite the country having adopted a rights-based constitution 26 years ago and promulgating myriad human rights legislation for the protection of workers and children.

Du Toit observes that workplace regulations fail domestic workers because of a general lack of social justice in South African society.¹⁸¹ Thus, addressing poverty, which is a key factor that feeds the pool of unskilled and unorganised domestic work, and which also forces and channels children into domestic employment, is critical.¹⁸² Moreover, gross violations of children's rights happen in private households that escape public and legal scrutiny.¹⁸³ As one study found, 'many [child domestic workers] are banned from attending school, or have so much work that they cannot attend classes'.¹⁸⁴ Thus some propose banning of all forms of child

¹⁷⁷ United Kingdom Department for International Development Work K4D Know evidence and learning for development Helpdesk Report *Child Domestic Work (2017)*. United Kingdom Department of International Development

¹⁷⁸ Romero M, Preston V & Giles W(eds) *When Care Work goes Global: Locating social relations of domestic work* (2016). Introduction.

¹⁷⁹ Human Rights Watch 'Bottom of the Ladder: Exploitation and Abuse of Girl Domestic Workers in Guinea' (2007) accessed on www/hrw.org/report2007/06/15/bottom_ladder 54.

¹⁸⁰ Community Resource Information Center *South African Domestic Workers Booklet: Fighting for Our Rights*.

¹⁸¹ du Toit D *Exploited, Undervalued and Essential: Domestic Workers and the Realisation of their rights* (2013) 26.

¹⁸² Dessy S & Phellage S. 'A Theory on the Worst Forms of Child Labour' (2005) 115 (500) *Economic Journal* 68-87.

¹⁸³ Blagbrough J. "They respect their animals more": Voices of child domestic workers' (2005) *Anti-slavery International* 1-62.

¹⁸⁴ Hesketh T, Gamlin J, Ong M & Camacho A 'Psychosocial Consequences of Child Domestic Work: A Study from India and the Philippines' (2012) 97 (9) *Archives of Disease in Childhood* 9

labour, while others argue that this might likely drive child labour underground, thus increasing child domestic workers precarity.¹⁸⁵ Save the Children Foundation cautions too that driving child domestic employment underground would deny children an ‘important source of employment and income, especially for millions of girls.’¹⁸⁶

2.6.2 Rights enforcement challenges in private third-party space.

Enforcement of legislation, as previously discussed, impedes child domestic workers in private third party households from accessing their human rights, which impacts their life opportunities.¹⁸⁷ Recommendation 190 supplementing ILO182 calls attention to ‘the problem of hidden work situations, in which girls are at special risk’.¹⁸⁸ Private domestic spaces are documented to significantly compromise child workers, as these children work with instruments that can cause them harm or engage in age-inappropriate work.¹⁸⁹ Isolation denies children of any solidarity with other domestic workers, and their freedom of association is restricted, counteracting the doctrine of decent agenda.¹⁹⁰

As already noted, the ILO identifies precarity in the employment of child domestic workers in terms of their working long hours, often with toxic chemicals and sharp instruments for cutting and chopping, and subjection to degrading treatment that causes long-term psychosocial damage.¹⁹¹ Furthermore, their precarity is also linked to limited or lack of information that immunises public response to their plight and increases the enslavement of these children in domestic labour in private third party households¹⁹² Thus, the state’s failure to honour its duty to care for children is doubly exposed as children living and working in exploitative

¹⁸⁵ King Hussein Foundation (2014) ‘Homebound girls in Jordanian’ Information and Research Center King Hussein Foundation, Save the Children 1-60

¹⁸⁶ King Hussein Foundation (2014) ‘Homebound girls in Jordanian’ Information and Research Center King Hussein Foundation, Save the Children 1-60. Also see Blagbrough J Guichon A & Brealey L ‘Small Grant, Big Changes: Influencing policy and practice for child domestic workers’ (2013) *Anti-Slavery International*

¹⁸⁷ Horwood C Haskins L Alfors L et.al ‘A descriptive study to explore working conditions and childcare practices among informal women and workers in KwaZulu-Natal, South Africa: identifying opportunities to support childcare for mothers in informal work’ (2019)19(382) *BMC Pediatrics* 1-11.

¹⁸⁸ ILO-C182 rec 190.

¹⁸⁹ Archer S ‘Buying the maid Recofy: Domestic workers, employers and food’ (2011) 40 *South African Review of Sociology*. 66-82.

¹⁹⁰ McBride M ‘Cleaning up the Industry: Improving Protections for Precarious and Child Domestic Worker’ 2015 *Fordham International Law Journal* 1335-1399 available at <https://ir.lawnet.fordham.edu/ilj> (accessed on 30 October 2020).

¹⁹¹ ILO-IPEC, Helping hands or shackled lives? Understanding child domestic labour and responses to it, ILO-IPEC, ILO Geneva 2004, III ff.

¹⁹² Socio-Economic Rights of South Africa. *Domestic Workers Rights. A legal and Practical Guide* (2018) (Accessed on 21 November 2020)

employment environments are neither identified as in need of care nor recognized as victims of exploitation and crime.¹⁹³

As already noted in the discussion on legislative provision towards child protection and rights, inadequate staff competence in the child protection services, inadequate departmental program funding and insufficient cross-sectoral co-operation militate against effective enforcement and eradication of worst forms of child labour in third party private domestic households.

2.6.3 Funding challenges impeding realisation of children's rights.

The South Africa government's commitment to the advancement of children's rights may be measured by, amongst other things, its enforcement of protective legislation, including appropriate budgeting for inspection, monitoring, and children's programs.¹⁹⁴ In the 2019/20 financial year, the national budget allocated R207 billion for social development, amounting to approximately 11% of public spending, ranked among the highest in the world. This budget also targets children below the age of 18.¹⁹⁵ Yet while the government may be commended for its progressive legislation and huge spending per child, child poverty still exists, the reasons for which must be understood.

Factors militating against the reduction of child poverty, which forces children to seek employment in the domestic sector, include staff shortages, unequal prioritisation of children's services at provincial levels where program implementation takes place as well as poor governance and corruption amongst state officials. The COVID 19 national lockdown, has exposed the depth of child poverty in the country which has led civil society bodies, including child rights organisations, to litigate against the government to ensure realisation of children's socio-economic rights. Of particular concern is school Nutrition Program, especially in early childhood development centres that were closed during certain phases of lockdown. School

¹⁹³ Children's Act 38 of 2005.

¹⁹⁴ UNICEF-South Africa Social Development Brief South Africa (2019) available at www.unicefsouthafrica/media/2126/file/ZAF/Social-Development-Budget2019-20.pdf (accessed on 11 October 2020). See also the UNCRC Committee of Experts that has made the following remarks to the SA report on the status of children: 'With reference to its general comment No. 19 (2016) on public budgeting for the realization of children's rights, the Committee recommends that the State party set up a budgeting process that includes a child-rights perspective, that specifies clear allocations to children, in the relevant sectors and agencies, and that includes specific indicators and a tracking system to monitor and evaluate the adequacy, efficacy and equitability of the distribution of resources allocated for implementation of the Convention.'

¹⁹⁵ UNICEF-South Africa Social Development Brief South Africa (2019) available at www.unicefsouthafrica/media/2126/file/ZAF/Social-Development-Budget2019-20.pdf (accessed on 11 October 2020).

closure and the state's dismal performance to deliver food assistance to poor and working-class families, impacted by the loss of income resulted in countless children going hungry daily.¹⁹⁶

Moreover, state misspending directly impacts child domestic workers because it fails to relieve their poverty and forces them to seek labour, including in private third-party households in which they are vulnerable to exploitation. Strengthening child-centred budget is still clearly missing.

2.6.4 Funding challenges in civil society

As mentioned previously, 'maintaining a healthy working relationship between government and not-for-profit organisations is a key factor in delivering social welfare services.'¹⁹⁷ However, this relationship is generally stunted by inadequate funding for civil society organisations.¹⁹⁸ Funding cuts by government, funders and business have disabled civil society's ability to provide much-needed services for children, including rights education for those in domestic work.¹⁹⁹ NGOs suffer incapacity from austerity measures adopted by the government,²⁰⁰ with some terminating their operations and services, which invariably overstretches their operations and limiting outreach to children disparately needing their services. Moreover, it is critically noted that organised labour has not yet reached out to children employed as domestic workers,²⁰¹ thus leaving them without any support to resist unfair labour practices.

2.7 Conclusion

This chapter has identified the state as the critical role player responsible for the protection of children's rights through its constitutional obligations, legislative and administrative measures,

¹⁹⁶ *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP) (17 July 2020). See also Hoppula M (2022). Eradicating Child Labour Amidst Global Crises. The Global, Regional and Local Politics of Institutional Responses to COVID-19: Implications for Women and Children 45-67.

¹⁹⁷ See South African Department of Social Development Budget Estimates of National Expenditure 2018 available at www.treasury.gov.za/documents/nation%20budget%202018/ene_booklets/vote%20social%20Development.pdf (accessed on 29 October 2020).

¹⁹⁸ Maboya M & McKay T The financial sustainability challenges facing the South African non-profit sector (2019) 15 *Journal of Transdisciplinary Research in Southern Africa* 1 (accessed on 16 November 2020).

¹⁹⁹ UNCRF *Concluding observations on the second periodic report of South Africa* (2016) CRC/C/ZAF/CO/2 available at <https://www.refworld.org/docid/587ce86b4.html> (accessed on 29 October 2020).

²⁰⁰ Maboya M & McKay T The financial sustainability challenges facing the South African non-profit sector (2019) *Journal of Transdisciplinary Research in Southern Africa* 1-10.

²⁰¹ Marias C *Lived Realities of Domestic Workers within the South African Labour Legislative Context: A Qualitative Study* (unpublished Doctoral thesis, North-West University, 2014) 130.

aimed at enabling the advancement of children in South Africa. Administrative failure and inappropriate resourcing of state machinery and other players are seen to be discouraging factors for children's rights' attainment. Yet, it is also acknowledged that South Africa has made significant strides in transformation since the advent of democracy in 1994. Public spending on social development services is significant, with the budget largely aimed at addressing child poverty, which pushes children into domestic employment in the first place.

The employment of children in private households coupled with unequal employment relations militates against children claiming their rights as workers. Moreover, inadequate resources in policy implementation manifest in personnel shortages in child protection services, limited skills base, and lack of access to information towards empowering children to report abuses deny children their rights and dignity. Poor reporting of incidents of child abuse including those in the domestic employment in third party households perpetuates the invisibility and exploitation of these children. The next chapter explores possible redress mechanisms by the identified role players to enforce the protection of the children caught in domestic work in private third-party households.



CHAPTER THREE: RECOMMENDATIONS AND CONCLUDING REMARKS

3.1 Introduction

The objective of this study is to investigate how the rights of children aged 16–17 employed as domestic workers in private third-party households in South Africa are violated. The findings relate to legislative partiality manifesting in practice and administrative processes in human rights protection of child domestic workers. Domestic work performed by these children is shown to entail poor and harmful conditions and constitutes the worst form of child labour. This paper, therefore, makes some recommendations to strengthen rights protection for child domestic workers.

3.2 Recommendations

The laudable legal child protection framework reflects partiality in application and practice; five recommendations are offered below to bridge the deficits.

3.2.1 Building capacity of officials working in child protection services.

The acute shortage of officials who play a critical role in child protection services needs redress. The tertiary education sector offers possibilities for contributing capacity here. For example, student beneficiaries of government funding undertaking social work studies could be employed in the cross-sector of government departments involved in child rights protection. They should be trained in child protection and deployed around the country. Looked at as a priority, this will extend child protection services of monitoring and inspection, youth awareness-raising programmes, including about child and labour rights, engagement in courts of law to secure protection of child domestic workers trapped in abusive conditions in private households and convicting of the perpetrators.

The skills of officials already working in child protection services--social workers, police, human rights monitors, and others--should be regularly upgraded to improve the identification of children at risk of being employed in domestic work and those in bondage there. This can be achieved through constant awareness-raising that communicates the urgency surrounding the plight of these children. Awareness-raising must aim to target children in low-income social

strata and child domestic workers about legal and age-appropriate work, official complaints processes, and state services for children. Such measures will move children closer to their rights.

Child-centred budget must be strengthened through appropriate allocation of funds for such programs. Priority must also be given to establishing a multi-pronged monitoring and evaluation system to measure the impact of government spending on *all* children. These measures will greatly improve government accountability systems to protect vulnerable children, including child domestic workers in private third-party households.

3.2.2 Addressing child poverty.

Youth bear the brunt of poverty and high unemployment in the country. Currently, child hunger is increasing with the Covid 19 lockdown measures that are robbing children in impoverished communities' access to basic nutrition. Civil society interventions to address this are proving positive both in terms of provision of feeding schemes and compelling government to maintain school feeding schemes for children below 18. The current opportunity must be seized to strengthen the compact between government, civil society, communities, and business to reduce hunger and poverty in marginalized communities. Serious attempts must be made towards a basic income grant for poverty-stricken families and households to reduce child poverty that forces poor children into domestic work in private third-party households.

3.2.3 Empowering children to increase their agency.

Lack of voice for child domestic workers is a significant barrier to realising decent work conditions in private households. Strategies for their empowerment and developing their self-agency should include increased access to information about children's rights, with youth in peri-urban and rural areas especially targeted. Materials should be translated into official and local languages. Free hotline services must be established for children at risk or in trouble to use.

Print, electronic media and social media must be utilized. Making technology accessible as a tool for use by children, including those in domestic work, will help enforce labour laws by linking children to each other and various resources for enabling their dynamism and agency. Electronic and social media platforms exist in South Africa, with many children already well

oriented in their use. Organised labour and police resources would be within quick reach of children working in isolated environments.

Empowered children find their own voice and become agents of the struggle for justice, critical too for child domestic workers claiming their rights. Empowered children are confident, have healthy levels of self-esteem and independence, and are better able to negotiate their employment conditions and to act to access education, health care and other basic needs for their well-being.

Public awareness-raising will undoubtedly improve reporting of child exploitation in private domestic households. Civil society organizations, including churches, traditional authorities and community organisations, are well-positioned to identify children working under poor conditions in private households. These groups must be made aware of the vulnerability associated with child domestic workers is linked to their lack of voice, under resourcing of child protection services and non-affiliation to organized labour. Communities must understand the danger of child exploitative labour practices on the future life prospects of these vulnerable children and the importance of the community in being proactive regarding reporting abuse.

Domestic workers should be engaged to form informal inter-generational protective systems within households and neighbourhoods. Older domestic workers and domestic worker organisations can play a significant role in identifying and reporting suspected exploitation of child domestic workers they come across. They could thus become trusted and valuable allies for children trapped in domestic work.

3.2.4 Engaging child domestic workers' employers

As discussed in Chapter Two of this study, high levels of poverty, unemployment, and dropout rates among school children ensure a pipeline of child domestic workers for private households. Redress efforts regarding their exploitation via poor work conditions must therefore crucially involve their employers. Employers must be educated to become proactive towards humanising informal employer-employee relationships. Enlisting employers' support could produce better outcomes for child domestic workers *and* their employers through the creation of decent work environments for the child and improve the employer-employee relations. Legal awareness must be raised with both regarding the domestic employment of children under 18. Towards this end enforcement of legislation and awareness-raising campaigns about legislation to

protect children's and workers' rights must be undertaken by labour inspectors and officials from the DSD and SAHRC.

Empowering girls about their rights via state-civil society undertakings to change familial and community values regarding employment of girls in domestic employment is critical. Their education must include the importance of the employment contract to enforce their rights of decent employment practices via guidance to employers about their contractual obligations. As an enabling strategy for girls, the employment contract will go a long way in supporting regulation of their work conditions, including work hours, and deliver on their fundamental human rights. Crucially, the contract will increase their visibility as legally entitled individuals in the public and workspace, and will lessen their vulnerability to abuse, including sexual abuse.

3.2.5 Start-up funds for youth and trade skills from foundation phase in school

Government has made commendable efforts to promote youth entrepreneurship aimed at facilitating the latter's self-sufficiency. For example, the Umsobomvu Youth Fund assists youth with business consultancy, marketing, tendering, support, business plan development and funding. More such access must be visibly made to youth, including during high school to raise their awareness about self-employment as an alternative and opportunity. Economic empowerment is identified as a strategic intervention towards youth poverty eradication and choking the pipeline for exploitative domestic employment.

Additionally, introduction of occupational skills in early grades in the school curriculum can curb children being exploited in domestic work, especially if they are taught the reasons for domestic work being identified as the worst form of child labour. Training children in basic trade skills will enable those dropping out of school, for one reason or another, to consider alternative means of making a livelihood, for example, self-employment in a trade, hence avoiding domestic employment altogether.

The above recommendations and strategies could significantly contribute to eliminating legislative partiality in implementing and enforcing government's duty to care for the child in accordance with its international and national commitments.

3.3 Concluding Remarks

Domestic work as the worst form of child labour is a complex issue requiring a multi-pronged strategy towards its mitigation and eventual eradication. This study sought to bring into perspective the international norms to curb the detrimental effects of domestic work as the worst form of child labour in the South African context. The study also placed in perspective the state's efforts to advance children's rights, many of which are violated by exploitative, abusive, and hazardous practices in unmonitored domestic workspaces in which children work. The discussion critically reviewed government's interventions and revealed the ways ineffective implementation and enforcement derail state efforts thereby undermining international conventions and domestic legislation, including the country's constitutional imperatives, for the rights of the child.

This indicates urgent need for corrective measures and alternative strategies to enforce children's rights in South Africa. As such, the study culminates in making redress recommendations for consideration by the relevant entities. The five recommendations suggested above are, therefore, presented as an attempt at contributing ideas towards the eradication of this worst form of violation of children's human rights which currently renders child domestic workers in private third-party household invisible.



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