

งานที่มีคุณค่าสำหรับแรงงานทำงานบ้าน:
กรณีศึกษาประเทศไทย

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บทคัดย่อ

ลูกจ้างทำงานบ้านหลายล้านคนทั่วโลกยังคงไม่ได้รับการคุ้มครองจากกฎหมาย เนื่องจากกฎหมายแรงงานในหลายประเทศมองว่า งานบ้านไม่ใช่งานหรือกิจกรรมที่ก่อให้เกิดผลผลิตภาพ และคุณค่าทางเศรษฐกิจ ยิ่งไปกว่านั้นความสัมพันธ์ระหว่างนายจ้างและลูกจ้างทำงานบ้านมีรูปแบบที่ไม่เป็นทางการ ทำให้ลูกจ้างทำงานบ้านไม่มีสถานะของผู้ใช้แรงงาน แต่เป็นบุคคลที่เข้ามาช่วยดูแลงานบ้าน เด็กและคนชราในบ้านแทนแรงงานทั้งหญิงและชายในครอบครัว

ความสัมพันธ์ในการจ้างงานที่ไม่เป็นทางการ และลักษณะงานบ้านที่ถูกลดคุณค่าทางเศรษฐกิจส่งผลให้ลูกจ้างทำงานบ้านได้รับผลตอบแทนที่ต่ำกว่างานประเภทอื่นๆ ลูกจ้างทำงานบ้านจำนวนมากยังคงเผชิญกับความเปราะบางจากการถูกละเมิดสิทธิด้านแรงงาน และเผชิญกับการทำงานที่เสี่ยงและอันตรายเพื่อแก้ไขปัญหาดังกล่าว องค์การแรงงานระหว่างประเทศได้พัฒนาอนุสัญญาองค์การแรงงานระหว่างประเทศว่าด้วยแรงงานทำงานบ้าน (ฉบับที่ 189) และข้อแนะ (ฉบับที่ 201) กำหนดสิทธิลูกจ้างทำงานบ้านและมาตรการคุ้มครองที่ตอบสนองต่อสภาพการทำงานของงานบ้านที่มีลักษณะเฉพาะ

อย่างไรก็ดี บทความทางวิชานี้ศึกษาการทำงานของประเทศไทยเพื่อส่งเสริมให้งานบ้านเป็นงานที่มีคุณค่า ด้วยความเชื่อและความหวัง บทความฉบับนี้จะสามารถสื่อสารให้เห็นถึงประเด็นในการปรับปรุงแก้ไขต่อรัฐบาลไทยต่อการสร้างงานที่มีคุณค่าสำหรับแรงงานบ้าน

คำสำคัญ: ลูกจ้างทำงานบ้าน, การคุ้มครองแรงงาน

Decent Work for Domestic Workers: Thailand please makes it real

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Abstract

Millions of domestic workers worldwide are excluded from legal protection because the domestic work sector is economically undervalued. In addition, employment relationship is rather privatised and poorly regulated by many countries. Underpaid and unprotected nature of this sector is clearly articulated. Many domestic workers are vulnerable to labour abuses and work-related risks and hazards. As a remedy, the ILO's Domestic Workers Convention (No.189) and its accompanying Recommendation (No.201) are meticulously designed through various consultations amongst tripartite members from every corner of the world. The legal instruments set out minimum international labour standards responding to specificities of the domestic work. But, how are these standards being implemented and enforced at the national level? This paper will examine Thailand's actions as an example. With optimism and good faith, the paper will voice areas for improvement towards decent work for domestic workers in Thailand.

Keywords: Domestic work, labour protection

Introduction

In 2006, I wrote the paper "The feminisation of foreign domestic workers: a case study of Thai perspectives for global gender justice" (Jangjumrus, 2006). One of my recommendations was that rather than words more actions were needed to create a gender-based legal framework and policy for all domestic workers. Four years later, the International Labour Organization (ILO) - the only tripartite U.N. specialised agency that brings together government, employer and worker's representatives from 187 state members to set labour standards, for all concerned sectors, since 1919 - inserted a decent working conditions agenda for domestic workers in its 99th session of the International Labour Conference (ILC) (ILO, 2010c.). Later, the first Labour Standard concerning domestic work was adopted in the 100th ILC in 2011 (ILO, 2011b). The International Labour Convention No.189, a landmark treaty, came into force in September 2013 with 22 ratifications.¹

Despite the Convention coming into being, Thailand is one of the 165 state members that has neither ratified the Convention nor has any roadmap or plan for ratification in the very near future. On the contrary, the Government's plan for ratification of the ILO Conventions has focused on more visible and formalized sectors that most people think contribute more to the growth of the country's economy. These are the ILO Conventions No.187

¹ Information of Ratification, please visit

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460:NO

concerning the Promotional Framework for Occupational Safety and Health Convention², and the Maritime Labour Convention 2006³. In 2015 the EU issued a yellow card to Thailand for its failure to fight Illegal, Unreported and Unregulated Fishing (IUU). Since then Thailand has put all its efforts in overhauling its legal and policy framework and providing strong enforcement to ensure that the country is not subjected to a total export ban to European Union, a key fish export sector, worth around \$ 1 million per year (Royal Thai Embassy, 2015). Promotion of a decent working environment for domestic workers has not been a priority for Thailand.

This article aims to counterbalance Thailand's efforts on promoting a decent working environment for all (workers). Having acknowledged the economic pressure, I think that trade sanctions can only pressurize Thailand, affecting not only domestic work but other sectors that provide a fundamental contribution to the

² The Convention was ratified on 23 March 2016 and will enter into force on 23 March 2017, 12 months after ratification. The Convention No. 187 is one of the ILO's core instruments in safety and health in the workplace. The member states that ratify this Convention are obliged to formulate a policy and issue supporting domestic laws and regulations to ensure occupational safety and health and to effect its implementation. For more information on Thailand's Ratification, please visit http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102843

³ The National Legislative Assembly unanimously agreed for the ratification of the Maritime Labour Convention with 174 votes and 3 abstentions, at the NLA meeting, 23/2558, 1 May 2015, for more information please visit, <http://www.labour.go.th/th%20/attachments/article/25818/25818-1.pdf>

country's economy. This article will first elaborate on the extent of domestic work around the globe at both regional and national level, then it will critically analyse the conceptual clarity by tackling the following questions: Have we now fully realized the 'economic value of domestic work'? How far have the articles of the Convention been welcomed by the World, including Thailand? And what is the scope of international labour standards concerning the protection of domestic workers?

In addition, the article will focus on the national level, in Thailand, to assess the Government's attitude to domestic workers since the adoption of the ILO Convention No.189. In particular, the article will tackle the legal framework and relevant policies on protection of all domestic workers in Thailand. The article will then analyse how Thailand can promote a decent working environment for domestic workers. Finally, the article will provide a set of concrete recommendations on actions to be taken for Thailand to ensure that international labour standards can be adopted in the home.

The extent of domestic work: global, regional and national estimation

I. Closer look at the global picture: How big is the domestic work sector?

The global economic restructuring since 1970 has increased the demand for care/domestic work. This rise is also tied with incidences such as the incorporation of more (local) women into the labour force, the aged/ageing societies faced by many industrialised

countries, and the feminisation of migration for domestic work. In the 2013 ILO benchmark report for the situation of domestic workers around the world, it was estimated that between 52.6 and 67.1 million men and women were employed as domestic workers across the world (ILO, 2013, p.24; ILO, 2015a, p. XIII) However, this figure may have been underestimated because data were not available for all countries. In addition, the different systems of data collection used and the frequency of study can also err the estimation. Also, taking into account the irregular form of migration of the feminization of migration of domestic workers, administrative records cannot, indeed, capture those numbers. The true extent of domestic workers is thus likely to be greater, closer to 100 million, around the world. Of this number, women domestic workers outnumber men in all countries and in every region of the world (ILO, 2013, p.24 -32)

Moreover, of all domestic workers around the world, migrants accounts for 17.2 per cent. This means that more than one in every six domestic workers in the world is an international migrant workers. According to recent ILO global estimates on migrant workers there are 150.3 million migrant workers in the world, of these 11.5 million are domestic workers of which about 73.4 per cent (or 8.5 million) are women.

II. Domestic Workers: Where about are you?

At the regional level, despite the general feminisation of migration in domestic work, only in Arab states is it seen that male migrant domestic workers are in the majority (over 50%). By contrast our region, South Eastern Asia, hosts a small proportion of male migrant domestic workers and a much larger proportion of their female counterparts. Asia and the Pacific region hosts the largest share, accounting for 24 per cent (one in four), of the world's female domestic workers. In addition, it is estimated that a large proportion of migrant domestic workers are employed in just 4 regions: Eastern Asia, South Eastern Asia and the Pacific, Arab States and Latin America and the Caribbean (ILO, 2015a, p. 21-24)

III. Demographic and Profile of Domestic Workers in Thailand: Guesstimation

According to Thailand's labour force survey, in the 4th Quarter of 2015, of the 38.7 million who are in the labour force, 233,300 workers are employed in households as domestic personnel.⁴ Of this

⁴ The National Statistic Office adopts the Thailand Standard Industrial Classification: TSIC 2009, which is identical to the international standard, the International Standard Industrial Classification of All Economic Activities: ISIC Rev.4. Class 9700 defines that households employ domestic personnel such as maids, cooks, waiters, valets, butlers, laundresses, gardeners, gatekeepers, stable-lads, chauffeurs, caretakers, governesses, babysitters, tutors, secretaries etc. It allows the domestic personnel employed to state the activity of their employer in censuses or studies, even though the employer is an individual. The product produced by this activity is

total in domestic work, female workers take up a large proportion (85%), which means that 197,700 are female, whereas only 35,600 are male workers. Thus, Thailand has experienced the global trend of the increase in feminisation of migration of domestic work over the past few decades. Thailand's economic growth has also attracted more Thai women joining the labour force.

In addition, changes in higher education attainment and the booming of the export driven and service sectors have created more employment opportunities for women in all social classes. More Thai female domestic workers have also opted for better paid jobs with recognisable status. With the shortage of Thai domestic workers, domestic work, including household services, child care and elderly care has become a demand driven sector for migrant workers from Thailand's neighboring countries in the Greater Mekong Sub-region: Myanmar, Cambodia, Lao PDR, and possibly Vietnam. Due to the lack of up-to-date official records on how many migrant domestic workers there are in Thailand only a guesstimate can be given in this article.

According to the Department of Employment's monthly record in April 2016, the stock of migrant domestic workers (who obtained national verification) is 37,800 from the total of 1,061,607, of which 73 percent is female. The data also shows that of 315, 722 MOU workers, there are 5,163 MOU migrant domestic

consumed by the employing household. Class 9700, however, excludes provision of services such as cooking, gardening etc. by independent service providers.

workers, of which 69 per cent are female. It is interesting to note that 44 migrant domestic workers are border card holders, who can get in and out of Thailand daily or weekly. The above numbers make up 43,007 migrant domestic workers in all categories in Thailand. These figures are far too low and do not reflect the extent and scale of migrant domestic workers in Thailand, thus I am not convinced to use them.

Having reviewed the relevant reports, I believe that the numbers of migrant domestic workers have been politicized. In 2004, according to the Department of Employment's (DOE's) records, around 129,000 registered migrant workers were permitted to work in the domestic work sector. However, the number could have had been underestimated by excluding the undocumented workers whose numbers were unknown. Huguet and Punpuing estimated that there could have been around 150,000 – 200,000 migrant domestic workers in Thailand (Huguet & Punpuing, 2005, p. 44). In addition, according to the DOE's records, during 2009 and 2010 there were around 130,000 registered migrant domestic workers (Huguet, Chamrathirong & Richter, 2011, p.12). With reference to Ryrattana Rangsitpol's chapter in the recent Thailand Migration Report 2014, she quoted the number of migrant domestic workers in 2011 as being 83,066 (Rangsitpol, 2014, p.112).

However, the above figures were probably underestimated. Why I do believe this? First, Thailand's inbound labour migration relies heavily on the flow of irregular migrant workers from neighboring countries. This means that it is difficult, and unlikely to be feasible, to

obtain the actual figures. Second, although inbound labour migration is broader than the topic discussed here, the numbers of migrant domestic workers cannot be guesstimated without analysis of the overall picture of migrant workers in Thailand. If one looks at the estimation of migrant workers, figures calculated are around 2–4 million (Huguet et al., 2005, 2009, 2011 & 2014). However, if we were to seriously monitor how the Government records the data on migration management, a big challenge faced would be the data discrepancy between different periods/rounds of registration taking place. The data is a combination between the flow and the stock figures, however there is a lack of systematic data analysis. In addition, duplication of the data has become a chronic problem. The Government fails to monitor who has been registered in the past. I have also noticed that the inconsistent approach to data collection and the lack of data integration and sharing amongst concerned agencies can also err the figure.

Having admitted that the actual figures of migrant domestic workers in Thailand cannot be obtained for the time being, my proposed formula for calculation is based on the number of registered domestic workers in 2004, 2009 and 2011 against the estimated number of overall migrant workers in each period. I use the mean as the figure for the calculation and assume that migrant domestic workers take up 5.5% of the number of migrant workers. Huguet et.al assumed that there are around 2.7 million migrant workers in Thailand (Huguet, 2014, p.1)

Of these, the guesstimate for the number of migrant domestic workers is 148,500, which I have rounded up to 150,000.

Conceptual Clarity: towards visibility and decent working environment

I. From unpaid to paid work, yet overworked, underpaid and unprotected

Mainstream economic development very much emphasises activities that contribute to economic growth, viewed as productivity. By contrast, any activity, despite contributing to the growth but uneconomically measurable, is socially constructed as reproductive work which is unpaid work and gendered (Jangjumrus, 2006, p.19-20). Reproductive work also entails various activities from care work to all house work/domestic work activities. Historically speaking, debates on reproductive work can be dated back to the first and second wave Marxist feminist thinkers. Marxist feminists see that unpaid work is rooted from social reproduction of capitalism. Sexual division of labour in productive and reproductive work does make women unequal to men and thus allows profitability and opportunity for exploitation to women in capitalist societies (Fedirici, 2012, p.97-111). This norm has been materialised across space and time and around the globe (Anderson, 1988; Huang, Yeoh and Rahman; 2005; Gutierrez-Rodriguez, 2014, p. 45-53).

The shift of reproductive work as unpaid work amongst housewives/women in family (during 1960s and 1970s) to paid work of “another” women during 1980s and 1990s towards the

globalisation is rather “a race to the bottom phenomenon”. In general sense, Fedirici (2012) criticises that globalisation has caused not only crisis in the social reproduction in many developing countries but has also led to the colonality of poor, migrant and minoritised female labour who are still paying the price for global restructuring of reproductive work. According to various feminist writings during this period, domestic work is a multi-faceted issue; it is an occupation in which most marginalised women are in isolated, privatised and personalized employment relations (Anderson, 1998, p.36 - 42; Perreñas, 2000; Huang, Yeoh & Rahman, 2005; Gabrielle, 2013, p.27 - 32). Domestic work is still invisible and poorly regulated in many countries. Many domestic workers continue to be overworked, underpaid and unprotected.

II. Recognition of paid work and protection of domestic workers: Before turning the tide

The discussion whether domestic work is a paid work was first captured at the International Labour Conference (ILC) in 1936 that adopted the Holidays with Pay Convention, 1936 (C.52). A debating point between employer and worker’s organisations from Switzerland was that whether “domestic servants [...] are wage-earners, and therefore entitled to protection in the same way as other wage-earners” (ILO, 1936, p.465). It was unfortunate, however, that the C.52 excludes domestic workers from holidays with pay (ILO, 1936a, p.740). If a domestic worker is seen as a human being, though less explicitly mentioned, the protection could arguably guarantee in the 1948 Universal Declaration of

Human Rights (UDHR) that “all human beings are born free and equal in dignity and rights”.

In the same year, at the 31st session of the ILC in 1948, Mr. Roberts, the worker’s representative of the United Kingdom submitted the Resolution concerning the Conditions of Employment of Domestic Workers requesting the ILO to consider the advisability of placing on the agenda to discuss the concerned topic (ILO, 1948, p.7) This movement alerted the ILO to insert an agenda item of the 49th session for the discussion on the employment conditions of domestic workers as an agenda item for the 49th session of the ILC in 1965. The Resolution concerning the Conditions of Employment of Domestic Workers was adopted therein (ILO, 1965, p.6). The Resolution recalled an urgent need for standards for domestic work and that member states to make all practical efforts to promote the protection of domestic workers. Prior to 2011, the development of normative actions for domestic work at national and international levels continued but rather fragmented.

Game changing: Towards the Promotion of a Decent Working environment for Domestic Workers

At the 100th session of the ILC, the ILO adopted a Convention and a Recommendation to protect domestic workers. The legal instruments were marked as groundbreaking standards that extended into a largely unregulated and unprotected sector of the economy in which women workers prevail (Tomei & Belser, 2011, p.432) According to the ILO system, labour standards can be in the form of legally binding or non-legally binding instruments.

A Convention is a legally binding treaty open for ratification by the ILO member states. A Recommendation does not create legal obligation; it is a non-legally binding instrument. By its name, Recommendation provides more detailed guidance on the application of the Convention and is to be read in conjunction to the Convention. However, in some cases a Recommendation stands alone and is not linked to any Convention (ILO, 2012, p.1). Both instruments will be adopted by the International Labour Conference, according to Article 19 of the ILO Constitution.⁵

The adoption of the ILO Domestic Workers Convention (C.189) achieved a vote of 396 members for, 16 against and 63 abstentions. The Domestic Workers Recommendation (R.201) achieved a vote of 434 members for, 8 against and 42 abstentions. It is noted that of the 40 countries (of 183 state members) whose tripartite members all voted for the Convention only 6 have already ratified the Convention (one in seven) (ILO, 2011a, 30/42-47 and 30/48-52).⁶ Only 48 employers voted for the Convention. Of the

⁵ Article 19 of the Constitution provides:

1. When the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of an international Convention, or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.
2. In either case a majority of two-thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the Convention or Recommendation, as the case may be, by the Conference.

⁶ A group of countries voted for and ratified are Belgium (2015), Bolivia (2013), Mauritius (2012), Paraguay (2013), Portugal (2015) and South Africa (2013)

Thailand delegation, only one member that from the workers organisation voted for the Convention, the rest abstained. However, the Thai delegation was unanimous in voting for the R.201. It is noted that state members that voted for the R.201 have an obligation to submit the said Recommendation to the competent authorities in their countries and inform the Director – General of the ILO of the action taken.⁷ However no such action has yet been taken by Thailand.

That a high number of the members voted in favour is indicative of the fact that these instruments were welcomed by the tripartite members, who were ready to take serious action to scale up the economic and social value of the domestic work sector. It is expected that labour standards, therefore, will be

⁷ Article 19 of the Constitution

6. In the case of a Recommendation:

(a) the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise;

(b) each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months after the closing of the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action;

(c) the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them;

enforced or applied at the national level. According to Article 21.1, the Convention shall come into force twelve months after the date on which the ratifications of two members have been registered with the Director-General. As of now, the Convention has been ratified by 22 countries and has been in force since 5th September 2012.⁸

The Convention No. 189 and the Recommendation No. 201 are legal instruments that offer a window of opportunity for significant improvements for domestic workers. These labour standards seek to address atypical working conditions where workers are overworked, underpaid and unprotected. The ILO is committed to facilitate discussion and jointly set standards that seek to help long standing undervalued and poorly regulated sectors to become visible and recognisable in the modern world. The Convention No. 189 and the Recommendation No. 201 aim to better protect domestic workers with vulnerable status from abusive labor practices. However, the main focus of this article will be a thorough analysis of the Convention.

⁸ For more information of the list of ratifications, please visit

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460:NO

Scope of the First Comprehensive International Labour Standards concerning the Protection of Domestic Workers: Highlight and Key Features

I. Introduction: What are the principles enshrined in the Convention?

In its preface, the Convention 189 highlights the ILO's commitment to promote decent work for all and to achieve the goals set under the ILO Declarations concerning fundamental rights at work and social justice for fair globalization. The Convention recognizes that despite the significant contribution of domestic work to the global economy, this sector, as well as the workers therein, continue to be undervalued and unrecognized. Often, due to the unconventional working conditions kept at private households, domestic workers face vulnerability to discrimination and other abuses of human and labour rights.

The Convention 189 was developed based on key relevant international labour standards and international treaties which lay out basic principles and articulate duties for tripartite members on the protection of domestic workers.⁹ Following structural elements

⁹ The ILO instruments are the Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), the Workers with Family Responsibilities Convention, 1981 (No. 156), the Private Employment Agencies Convention, 1997 (No. 181), and the Employment Relationship Recommendation, 2006 (No. 198), as well as of the ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration (2006). The other international instruments are

of the ILO Convention, in the operative provisions, the Convention 189 contains definitions and scope (Articles 1 and 2), establishes a series of Articles which are substantive and process-oriented standards and obligations (Articles 3 – 19), and sets out an administrative process for implementation and supervision, including final provisions for a reporting mechanism (Articles 20 – 27) (ILO, 2007, p. 11 - 16)

II. Definitions and Scope: What is Domestic Work and Who is a Domestic Worker?

The Convention 189 is the first international instrument providing definitions and scope of the domestic work and domestic workers. The definitions laid in Article 1 (a), (b) and 2 of the Convention 189 capture the nature of domestic work that considers all kind of household related activities and services, either performing in or out of the household. These entails a wide array of caretaking functions for instance, cooking, butler, caregiving, gardening, driving and shopping. (ILO, 2010a, p.28 - 33).

for instance the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Convention against Transnational Organized Crime, and in particular its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

To reflect current employment trends, the ILO wisely addressed that under the scope of the Convention, a domestic worker - whether a male or female and local or migrant worker perform domestic work - is employed in any type of employment – either full/part-time, or live in or out. However, this definition excludes any person performing domestic worker only occasionally or sporadically or working independently rather than professionally (ILO, 2010a, p.28 - 33).

Having read the definitions, my concern is about the lacking definition of “employment relationship” which is risk taking. No minimum bar as such would leave this quite open for interpretation. In addition, the Convention gives a flexible clause to permit some exclusions of particular categories of domestic worker. I see the use of flexibility, despite the close monitoring and assessment offered by the ILO for the usage, would paradoxically undermine the legal definition of “domestic worker”. (ILO, 2011b, p.20-22; Oelz, 2014; Tomei & Belser, 2011, p.434).

III. Promotion and Protection of Domestic Workers: Echoing Basic Human Rights and Fundamental Rights at Work but incomplete

The Convention affirms basic human rights and fundamental rights at work.¹⁰ However, in light of the protection of minors, the Convention fails to capture unsafe and unhealthy working conditions and home-based environment risks in the private workplace i.e. household. Without preliminary caution, the Convention only requires that minimum age for this sector is on the same foot as other sectors and is to be set, in line with, the Minimum Age Convention (No.138) and the Worst Forms of Child Labour Convention (No.182) and national law. Taken into consideration the cases already adjudicated in different regions – Europe as in *Siliadin V. France*¹¹ and South East

¹⁰ Fundamental Rights at Work are guaranteed in the eight Fundamental ILO Conventions: Forced Labour Convention, 1930 (No. 29), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Equal Remuneration Convention, 1951 (No. 100), Abolition of Forced Labour Convention, 1957 (No. 105), Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Minimum Age Convention, 1973 (No. 138), and Worst Forms of Child Labour Convention, 1999 (No. 182)

¹¹ *Siliadin v. France*, no. 73316/01, ECHR 2005-VII, the victim was a Togolese minor, whose age is 15 years and 7 months. She was trapped by the employer who promised her to find her place at school if decided to work as a domestic. But she was unpaid maid whilst her passport was confiscated. The victim worked seven days a week, without a day off, from early morning to late evening. One day the victim escaped from the house, but she returned as the employer promised to keep initial words. However, the situation remained unchanged.

Asia as in the Thailand's Supreme Court Case No. 15189/2556 (2013),¹² minors are more vulnerable to serious violation than other workers, due to the nature of hard to reach sector making difficulty in state's monitoring and inspection and vulnerable status of being children. Thus, the minimum age threshold should arguably be set equally to the minimum age allowed to perform work which is hazardous in nature, that is, 18 years of age

Finally, in order to make decent working conditions a reality, under the Convention, domestic workers are to be protected against all forms of discrimination, violence and harassment (Article 5). The Convention also requires that fair terms of employment and decent working conditions for domestic workers shall be guaranteed on an equal footing with other workers (Article 6).

IV. International Labour Standards on Working Conditions for Domestic Work:

Operative Provisions:

Prior to the adoption of the Convention 189, the ILO had conducted a series of fact finding research to address decent work deficits prevalent in domestic work, along with other international, regional and national movements (ILO, 2010). The ILO was able to

¹² The Supreme Court ruled that working conditions that force a **child domestic worker** to perform all types of housework round the clock, that prevent a worker to enjoy rest hours and days off, that do not provide sufficient food and that are unpaid are considered slavery conditions.

crack common features of domestic work that are decent work deficits. In a nutshell, the ILO shares its similar view to Marxist Feminists. That, current employment trend in domestic work is gendered that ties with the coloniality of labour, so – called feminisation of migration (ILO, 2010, p.5-7). In addition, with the dynamic of regulatory landscape, domestic work in many countries is beyond the reach of the law – whether it is totally excluded or partially covered but inferior to other sectors. The informality has brought conceptual as well as regulatory challenges to status of domestic worker, employment relationship and decent working conditions for domestic work.

The Domestic Workers Convention addresses important gaps and sets out the following operative provisions as vehicle for overcoming challenges with which all domestic work may have been confronted. According to the Convention, formalized employment contract, preferable in a written format and in understood language, is essential to healthy employment relationship. The right to information on terms and conditions is therefore fundamental adhered to all domestic workers, including migrant workers (Article 7 and 8). To ensure fair and transparent recruitment and employment practices in this sector, the Convention calls for improved recruitment and placement arrangement, including the establishment of complaints mechanism addressing abusive and fraudulent practices in relation to the recruitment and placement of domestic workers including migrant domestic workers (Article 15)

The Convention tackles problems around long working hours which could have a negative impact on the occupational health and safety and private time. With special attention to live-in domestic workers, no distinction is made between working hours and non-working hours as they would be expected to remain available at all times. Long working hours amongst live-in workers are quite common. The period during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household to respond to possible calls is called “on-call”, equally to hours of work. It was a lost opportunity for the ILC that Articles 9 and 10 could not have gone beyond a status of a soft law, let alone unpredictability of working hours through a tailored-made approach at a national level. (ILO, 2010a, p.46-49; ILO, 2013, p.58-59).¹³ The Convention, however, candles the light at the end of tunnel that weekly rest should be at least 24 consecutive hours.

In light of remuneration, the Convention 189 sets out the basic requirements concerning remuneration: minimum wages and wage protection. According to the 2013 ILO Report, only 6 per cent of domestic workers worldwide enjoy minimum wage coverage (ILO, 2013, p.66-70). The Convention No.189 states a requirement to establish measures for minimum wage coverage to be extended to domestic workers where such coverage exists on an equal

¹³ see Article 9 of the Recommendation No.201 provides a series of suggestions as to regulating stand-by work, for instance introducing maximum stand-by hours and determining remuneration for stand-by hours

treatment basis (Art.11). In addition, the Convention does not totally deny payment in kind but only a limited proportion of the Convention. Yet, to make fair remuneration viable, collective bargaining and organising domestic worker are to be promoted and mainstream into the formalization of domestic work. With regards to wage protection, the payment shall be made **at least once a month** and paid directly to the domestic workers.

Domestic workers are typically not covered by national occupational safety and health legislation. Due to unregulated nature, a domestic worker faces a range of work-related hazards and risks (ILO, 2010a, p. 61-62). Although Article 13 of the Convention guarantees that domestic workers shall enjoy the rights to safe and healthy working conditions and environment, specificity of domestic work is mistakenly used to prevent more clarified measures towards right to occupational safety and health. Access to social security protection is one of the key objectives of the Convention that state shall ensure that domestic workers enjoy social security protection, including maternity protection on the same footing of others. Although maternity protection is necessary to protect the health of the mother and child, many domestic workers frequently face exclusion from this right in the national context, especially those working in Asia and the Middle East. It is important to note that maternity protection should include rights to maternity leave and access to maternity benefit during the leave. Such protection should be ensured so that domestic workers are protected against dismissal and other maternity-based discriminations (ILO, 2013, p.86-88).

As a hard to reach sector, a number of challenges regarding the compliance and enforcement of labour law in domestic worker are indicated. These are informality, invisibility of workplace, irregular migration, limited access to complaints and justice and other deficits. In addition, the conflicting ideology between the right to privacy and workplace rights cause difficulty for the labour inspectorate to monitor conditions at home. The Committee stipulated that special arrangements allowing labour inspection of private homes with clearly specified conditions are subjected to national laws and regulations (Article 17)

Can Thailand make decent work for domestic workers reality?

After the adoption of the Convention No.189 and Recommendation No.201, the first legislation improving workplace rights of domestic workers in Thailand was adopted and entered into force on 9 November 2012. The adoption is rather incidental as the drafting period has been on-going since 2011 and did not connect with the global movement on decent work for domestic workers. The Ministerial Regulation No.14 (B.E. 2555) is a secondary law issued under the Labour Protection Act. B.E.2541 (1998). The said law applies to employers employing workers to perform domestic work which does not involve business operations, and is read in conjunction with the Labour Protection Act. However, my observation to the Ministerial Regulation No. 14 is that the enactment of labour standards under a specific regulation of domestic work is rather inferior to those applicable to other sectors and thus allows discriminatory practices. It is also noted that the

Ministerial Regulation No.14 was adopted as the Government admits that labour protection and standards therein should therefore be different from protection measures under the Labour Protection Act (LPA) B.E. 2541. Domestic work in Thailand is insufficiently covered by formal employment or arrangements.

For the purpose of the legal analysis, the LPA as well as other branches of Thailand's labour law will be discussed and read in conjunction with the Ministerial Regulation as compared to the Convention No.189 Unlike the previous law regulating standards for domestic work, which was repealed and replaced by the Ministerial Regulation No. 14, the current Law advances some new rights and protection measures to domestic workers in Thailand. It is noted that despite the new development, a legal definitions of domestic worker is lacking either in the LPA and the Ministerial Regulation No.14. Yet, a definition of employee under Section 5 of the LPA – a worker as a person who agrees to work for an employer in return of wages, regardless of the name used - is applicable to a domestic worker, regardless of their legal status, nationality and gender. Without explicit meaning, domestic work regards as any work or service that does not involve business operation. The Thai law therefore sees domestic work as non-economic contributable sector which is under private employment.

With regards to operative provisions, it is unfortunate that around half of the total operative provisions under the LPA is not applicable to the protection of domestic workers in Thailand.

The rights and important protection measures guaranteed for all domestic workers in Thailand, in comparison to the Convention can be listed as followed:

I. Domestic Workers' Rights in Thailand: the State of Play

All domestic workers shall enjoy the right to fair terms of employment, as equal as other categories of workers in Thailand. (Sections 11 and 14/1, to be read in conjunct with Article 6 of the Convention). If violation taken place, only does the court has such power to order a contract to be enforceable to the extent as it is fair and reasonable. To make the right to fair terms of employment viable, the Government should ensure that there is effective mechanism available to ensure that all domestic workers have better access to the labour court, taken into account a hard to reach sector in which most vulnerable workers (migrant or young worker). The right to equal treatment is only guaranteed for male and female in domestic worker whereas all domestic workers do not enjoy treatment on the same footing as other categories of workers (Section 15 of the LPA).

As a snapshot, domestic workers are excluded from the following rights: working hours – neither normal working hours, including the rest period (in case of adult) nor overtime hours apply to domestic work (Ss.23 – 27); minimum wage (Section 90); all sorts of overtime pay (Ss. 53 -55), paid maternity leave (Section 59) and severance (Section 118 -122). On positive development, it is welcome that domestic workers are entitled to the following

rights: a weekly rest day, at least one day a week (Section 28); traditional public holidays (at least 13 days/year) (Section 29), annual holidays, including unused holidays in case of termination (6 days/year if worked uninterrupted for one year or on a pro rata basis if not completed one year) (Ss. 30 and 67), and sick leave without pay (Section 32).

The right to have access to complaint mechanisms is guaranteed where they can lodge a file with the labour inspectorate for violation of their rights. The labour inspectorate can investigate the case and order the employer to take corrective actions (Ss 123-125). Violation of legal entitlements of domestic workers is subject to penalties under the Labour Protection Act. It is noted that labour inspection is not enforced and that no inspection is ever conducted at a private household. This has become a challenging area for the monitoring of employment relationships and the promotion and protection of domestic work.

Finally, Domestic Workers' Rights beyond the scope of labour protection law, for instance, rights to social security protection, to occupational safety and health and to fair recruitment practices and rights to organize and collective bargaining, are still puzzled.

II. Insufficient Protection Measures:

Overall picture of protection measures is insufficient. Domestic workers will be protected against sexual harassment (Section 15). In terms of payment, the law ensures that regular payment at least once a month is guaranteed to all domestic

workers (Section 70). Critically speaking, there are some areas for improvement of protection measures. First, as discussed early, the minimum age for admission for employment of 15 years enshrined in both the international and national law does not fit neatly to the specificity of domestic worker. The laws fail to capture home-based hazardous working conditions and unsafe environments that jeopardize children's health, safety and morals. In Thailand, the majority of domestic workers are those live – in young migrant domestic workers, who could possibly face round the clock working hours including on-call duty. Higher standard of minimum age from 15 to 18 years for the domestic sector is therefore highly recommended (Section 44).

Second, the Ministerial Regulation also exempts all provisions concerning employment of female workers, who take the majority in this sector. For heartbreaking scenarios I can imagine, such legal shortcomings would give a freeride to an employer requesting a pregnant female worker to work round the clock or to lift or carry loads in excess of 15 kg. The shortcomings reinforce the Government's failure to the promotion and protection of female domestic workers.

Third, it is also noted that becoming a domestic worker in Thailand, she/he is vulnerable to wage deduction, which is prohibited to other sectors. This area needs further advocacy and clarification as to which areas the domestic sector does not receive equal treatment.

What more can be done for Thailand

Despite the positive steps towards improving the rights at work for domestic workers, the law is incomplete. For comparative reasons, the Convention should be set as a standardized legal framework for future development. Amongst other things, the Government should firstly take into account the adoption of the specific definitions of domestic work and domestic workers being *work performed in or for a household or households, and any person engaged in domestic work within an employment relationship* respectively.

Right deficits and gaps in protection addressed above should be filled. It is essential that domestic workers are entitled to equal treatment to other categories of workers. With regards to the promotion of decent working and living conditions, the employer should be the primary duty bearer to assess work-related hazards and ensure that domestic workers have the right to decent working conditions that are safe. As stated earlier, employment of a domestic worker under 18 years of age should be prohibited and the law should amend accordingly. In addition, domestic workers should enjoy full rights to social security and maternity protection and these measures should be stipulated in the concerned legislation, i.e. the Social Security Act. The Government should also ensure that the specificities of domestic work, for instance live in workers, provisions dealing with migrant workers, with ethical private recruitment agencies and organising and collective bargaining are considered under the relevant laws. The architecture

of these rights should be encouraged through tripartite consultative process.

Finally, given the conflicting views on the right to privacy within family and the rights at work of the domestic workers, the Government should strive to strike a balance by taking into account any measures that create a more innovative labour inspectorate or alternative systems enabling effective compliance and monitoring of the employment relationship.

Conclusion

The Domestic Workers Convention is the first International Labour Standard that aims to promote decent working conditions in the domestic workplace and protect domestic workers. The Convention was welcomed by a high number of the tripartite members that voted and has now come into force with 22 ratifications. Despite the success at the global level opening a window of opportunity to start the process at the national level, Thailand has struggled with the implementation and intervention of a decent work agenda. Although work on improving the workplace rights for domestic workers in Thailand does not need to start from scratch, more tripartite action still needs to be taken. The Government should now remember its political commitment to vote for Recommendation 201, even though it abstained in the vote on the Convention. This position needs more action. Now is the time to see whether positive progress can be made to achieve decent working conditions for domestic workers in Thailand.

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