RATIFICATION AS INTERNATIONAL SOLIDARITY – REFLECTIONS ON SWITZERLAND AND DECENT WORK FOR DOMESTIC WORKERS

Gabriela Medici*

&

Adelle Blackett**

---

* Doctorate in Law, 2015, University of Zurich, Director, Centre for Human Rights Studies, University of Zurich, Member, Labour Law and Development Research Laboratory, McGill University.

** Professor of Law & William Dawson Scholar, McGill University, Director, Labour Law and Development Research Laboratory. The authors thank Renz Grospe, LL.B. & B.C.L. candidate at the Faculty of Law, McGill University for his research assistance, which facilitated finalizing the article.
TABLE OF CONTENTS

INTRODUCTION ............................................................................................................. 189
FRAMING SWISS RATIFICATION AS AN ACT OF INTERNATIONAL SOLIDARITY...... 191
INFORMING DECENT WORK FOR DOMESTIC WORKERS I: THE INFLUENCE OF SWISS LAW ON CONVENTION NO. 189 AND RECOMMENDATION NO. 201.......................... 194
INFORMING DECENT WORK FOR DOMESTIC WORKERS II: THE INFLUENCE OF CONVENTION NO. 189 AND RECOMMENDATION NO. 201 ON SWISS LAW .......... 203
SWISS LABOR LAW AND SOCIAL SECURITY LAW AND THEIR EXCLUSIONS........ 204
THE COMPLEXITY OF REGULATING LABOR MIGRATION ......................................... 208
CONSEQUENCES, CHALLENGES AND OPPORTUNITIES: BEYOND THE LEGISLATIVE REPORT .............................................................................................................. 212
CONCLUSION: REGULATORY INNOVATION AND THE ILO’S COMMUNITY OF PRACTICE ................................................................................................................... 212
INTRODUCTION

The International Labor Organization (ILO)’s adoption of the Decent Work for Domestic Workers Convention, 2011 (No. 189) and accompanying Recommendation, 2011 (No. 201) was historic. The new treaty and non-binding recommendation came six decades after the ILO adopted its first resolution on the conditions of employment of domestic workers,1 and four decades after its second resolution2 on the “urgent need” for standards for these historically marginalized workers. By the conservative estimate of 67.1 million domestic workers worldwide,3 the employment numbers are staggering when compared with another, predominantly male occupational sector – seafarers – about which the ILO has adopted a vast number of international labor standards over its almost 100 year history. Domestic work includes a vast range of functions, responsibilities and tasks. And during standard setting, there was little contestation by the ILO or its unique tripartite constituents – comprising representatives of workers, employers and governments around the world – that domestic work was frequently rendered ‘invisible’ and was ‘undervalued’ in large measure because of the historical marginalization.

Decent work for domestic workers was framed as a human rights claim to equitable inclusion. Concrete and specific, the claim was made in the ILO’s Law and Practice Report4 in a historically rooted manner, espousing a remedial approach to promote substantive equality for domestic workers.5 In its Law and Practice Report, the ILO recognized that domestic work posed “a particularly significant challenge for national regulators” and offered:

one of the greatest opportunities to reaffirm the importance of international standard setting and technical cooperation for a constituency that is at once central to the work of the ILO, central to the global economy and central to the mandate of promoting decent work for all.6

Standard setting for decent work for domestic workers was an inclusion claim for which domestic workers worldwide organized and struggled.7 It was a claim for the recognition of domestic workers, their work and its social importance as well as for the identification and the development of concrete solutions to improve their working and living conditions through specific regulation.

6. Law and Practice Report, supra note 6, para. 41.
7. Celia Mather, “Yes, We Did It!” How The World’s Domestic Workers Won Their International Rights And Recognition, WIEGO (2013).
Domestic workers lost no time on adoption of the new standards. They immediately called for ratification, and launched a campaign seeking 12 ratifications by member states by the following year, 2012. Their dream was only slightly deferred. Uruguay and the Philippines provided the first two ratifications in 2012, permitting the Convention to enter into force in 2013. The twelfth ratification was received by Costa Rica on January 12 2014. Currently, there are 22 ratifications, which span most major geographic regions, and encompass both receiving and sending states.\(^8\)

The 22 ratifications include Switzerland. On November 12 2014, the Swiss government notified the ratification of Convention No. 189 to the International Labor Organization. This notification was the last step in a rather short and undisputed ratification process, respecting the national procedures. The Convention entered into force for Switzerland in late 2015 and became part of legally binding Swiss national laws.\(^9\) In joining, Switzerland proclaimed that its laws were in conformity with Convention No. 189. Ratification, it was argued, would constitute an act of international solidarity.

Convention No. 189 and Recommendation No. 201 have provided a strong basis of alternative legality to the inequitable ‘law of the home-workplace’\(^10\) that has historically governed domestic work. Ratification provides one point of entry into a community of practice, through which the ILO and its Members may foster an ongoing process of regulatory innovation, and structural social change. In this regard, we reflect on the meaning to be given to Swiss invocations of international solidarity, resolutely situating the notion within a broader framework that extends beyond recognition, to include representation, and redistribution.\(^11\)


\(^9\). It is controversial if Switzerland’s monist tradition finds its source in the Constitution. See BUNDESVERFASSUNG [BV][CONSTITUTION] Apr. 18, 1999, SR 101, art. 5(4) (Switz.). Or, if it is part of customary constitutional law, see BUNDESVERFASSUNG [BV][CONSTITUTION] Apr. 18, 1999, SR 101, art. 189(1)(c) (Switz.) [hereinafter Swiss Constitution]. Notwithstanding, it is recognized in practice. See, e.g., BUNDESGERICHT [BGer] [Federal Supreme Court] Dec. 3, 1881, 7 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 774 (Switz.); WALTER KALIN ET AL., 112 VÖLKERRECHT, EINE EINFÜHRUNG (3rd ed. 2010); TOBIAS TSCUMI & BENJAMIN SCHINDLER, Die Schweizerische Bundesverfassung St. Galler Kommentar, art. 5, para. 65 (Bernhard Ehrenzeller et al. eds. 3rd ed. 2014); DANIEL WÜGER, ANWENDBARKEIT UND JUSTIZIABILITÄT VÖLKERRECHTLICHER NORMEN IM SCHWEIZERISCHEN RECHT: GRUNDLAGEN, METHODEN UND KRITERIEN 33 (2005). The understanding that ILO Conventions become integral parts of federal law after their ratification without further legislative action but by promulgation, was already acknowledged when Switzerland became a Member of the ILO. Nevertheless, this does not mean that all ratified obligations are justiciable before Swiss Courts. See, e.g., LES DÉCISIONS DE LA PREMIÈRE CONFÉRENCE INTERNATIONALE DU TRAVAIL [DECISIONS OF THE FIRST INTERNATIONAL LABOR CONFERENCE], FF V 457 (1920) (Switz.).


In the following paragraphs, we will look at the ratification process in detail, and situate it within Switzerland's broader ratification policy. We continue with a discussion of how the Swiss regulatory framework informed the drafting of the new convention and recommendation before looking into whether the ratification could challenge Swiss law.

**FRAMING SWISS RATIFICATION AS AN ACT OF INTERNATIONAL SOLIDARITY**

The federal government provided an explanation for the ratification of the Decent Work for Domestic Workers Convention in its legislative report of 2013.\(^{12}\) This report remains the most significant consideration of Convention No. 189 from a Swiss perspective to date. It summarizes the Convention’s content as understood by Swiss authorities, and analyzes whether the current legal framework in Switzerland is in conformity with it.

In its first chapter, the report introduces a list of international treaties ratified by Switzerland, and mentions all Swiss laws and regulations in some way related to the regulation of domestic work. The report’s overview shows the multiple policy layers already existing and applicable, regarding domestic workers in Switzerland. It does not provide an assessment of implementation of those policies, their more specific content and relationship within the Swiss regulatory framework, or more specifically, their actual impact upon domestic workers’ lives. The overview frames the ensuing discussion of the Convention’s specific provisions, to emphasize Swiss action in the field; it is not a comprehensive analysis.

The same impression prevails regarding the second chapter, which evaluates the content of the Convention and relates it to the Swiss framework. The Federal Council alludes to other international treaties, and highlights special protective measures for domestic workers where they exist without analyzing their scope, discards their necessity in other areas without further reasoning, and stresses both the inherent flexibility clauses in the ILO Convention and the important role of the social partners in its implementation. The chapter concludes that no legislative changes to the Swiss framework are necessary in order to ratify the Convention. The Federal Council further argues in the report that ratification of Convention No. 189 would demonstrate that Switzerland is a role model on the regulation of domestic work, as it played an active part in drafting the Convention. The report concludes that ratification is chiefly to be understood as an act of international solidarity. This framing of the reasoning proved to be crucial throughout the ratification process.

A consultative process is foreseen in Switzerland prior to ratification. The report was therefore submitted to the Swiss Federation’s cantons, as well as the national (federal) tripartite body, comprising employers’ and workers’ representatives alongside the state.

While the employers’ representatives judged Swiss ratification to be premature and associated with a number of uncertainties, both the workers’ representatives and the participating cantons supported the government’s initiative to ratify. The ensuing

\(^{12}\) **MESSAGE RELATIF À LA CONVENTION (NO 189) DE L’ORGANISATION INTERNATIONALE DU TRAVAIL (OIT) CONCERNANT LE TRAVAIL DÉCENT POUR LES TRAVAILLEURS ET LES TRAVAILLEUSES DOMESTIQUES [MESSAGE RELATIVE TO THE 189TH CONVENTION OF THE INTERNATIONAL LABOR ORGANIZATION CONCERNING DECENT WORK FOR DOMESTIC WORKERS], FF 6215 passim (2013) (Switz.) [hereinafter Legislative Report].**
parliamentary discussions of the topic remained rather short: the first chamber followed the government’s reasons to ratify the Convention without discussing its content and without any dissenting vote.13 Meanwhile, the matter was received with more skepticism in the second chamber with almost half of the parliamentarians not willing to discuss the ratification in the first place.14 Doubts were raised as to whether the Swiss framework is in fact in conformity with the detailed provisions of the Convention. Parliamentarians were concerned that ratification could restrain Switzerland’s ability to meet the demand for migrant domestic workers in the future. Yet, the report’s reasoning prevailed: Switzerland – as the ILO’s host country – would without any necessary changes be able to take a leadership role in the protection of domestic workers worldwide. Ratification should be understood as an act of international solidarity.

At least at first blush, the ratification of Convention No. 189 seems to be in line with current Swiss policy on ratification of ILO instruments. While Switzerland became a Member of the ILO as early as 192015 and had played an active role beforehand in the creation of the International Labor Organization, the Swiss government has adopted a prudent approach to the ratification and implementation of international labor instruments.16 Initially, the allocation of competencies between the federal government and the cantons in labor protection matters was one of the main reasons for this prudence, but as a result of several constitutional revisions, labor protection measures as understood by the ILO, fall under federal competency since 1947.17 Nevertheless, the official Swiss ratification policy, explicitly articulated by the government for the first time in 1969, and enhanced since then on several occasions by both the Executive and the Parliament, has remained modest. Simply put, Switzerland ratifies ILO conventions only if the Swiss legal framework in place is already considered to be in conformity with international labor standards under consideration or if there are merely minor changes necessary to bring it into conformity.18


15. La Question de l’Accession de la Suisse à la Société des Nations [The Question of Switzerland’s Accession to the League of Nations], FF IV 567, 672 (1919) (Switz.).


According to a comprehensive study on the ratification of international labor instruments and their impact on the Swiss labor framework until 1999, the main reasons given for non-ratification of ILO Conventions relate first, to the Swiss federal, democratic system and the ability to launch popular referenda against contested legislation; second, to the wish to regulate an area merely through the initiative of social partners; and third, to the Swiss economic order, which includes a broad understanding of the constitutional right to economic freedom.21

However, according to the same study, the majority of ratified ILO Conventions led to at least minor changes in the Swiss framework.20 For example, in the case of the Maritime Labour Convention, 2006, a few arguably minor changes were required,21 and in one of the ILO's 'fundamental' conventions, the Worst Forms of Child Labour Convention, 1999 (No. 182), a specific minimum age provision for active duty in the armed forces in the case of war needed to be increased from 17 to 18.22 In both cases, the social partners and the government unanimously deemed the necessary changes positive, and no formal pre-legislative consultation process was needed before enacting them; hence, the Parliament opted for ratification.

In 2011, the Parliament refused to mandate an updated, comprehensive analysis on which ILO Conventions could be ratified without major legislative changes.23 More recently, the government has seemed less reluctant and is reviewing the possible impact of revising its ratification policy.24 Yet for the time being, ratification of ILO instruments reflects Swiss law, but does not significantly change it.
INFORMING DECENT WORK FOR DOMESTIC WORKERS I: THE INFLUENCE OF SWISS LAW ON CONVENTION NO. 189 AND RECOMMENDATION NO. 201

The ILO’s Law and Practice Report attests to the fact that Swiss regulatory initiatives on domestic work had some influence on the direction taken by ILO standard setting. The ILO’s Law and Practice Report recognized that despite nominal inclusion in labor legislation in most countries, paid domestic work remained:

virtually invisible as a form of employment in many countries. Bound up as it is with notions of the family and of non-productive work, the employment relationship is thought not to ‘fit’ neatly into the general framework of existing labour laws, despite their origin in the ‘master-servant’ relationship. As a result, in most legislative enactments the specific nature of the domestic employment relationship is not addressed. And yet, at the level of local, informal norms and common assumptions about the work and the workers concerned, that same specificity tends to be relied upon to justify denying domestic workers their status as ‘real workers’ entitled to full legislative recognition and protection.25

The Law and Practice Report recognized the legacy of the ‘status’ based regulation of the master-servant or master-slave relationship26 on the contemporary ‘invisibility’ of domestic work in many countries’ legislation, and articulated a theoretical basis upon which to regulate for ‘decent work’. It looked beyond formal legal inclusion, therefore, to consider the impact of informal norms or ‘custom’ in the ‘home workplace.’27 The theoretical framework reflected a thick understanding of labor market informality, one that sought to move beyond mere legislative inclusion, to consider how to address and change pluralist norms and create an alternative legality. Consequently, the ILO’s law and practice report made the case for specific regulation, as a substantive equality claim to move from status-based relationships to inclusion of domestic workers into the corpus of labor law.28 In doing so it underscored both an ILO standard setting paradox, and an international labor standard setting challenge:

Although ILO Members have expended considerable efforts in the drafting of flexibility clauses, few have resorted to them in practice. Although many governments may exclude domestic workers from the scope of their legislation... the fact is that the ILO’s constituents are seeking guidance from the Office on how to ensure decent conditions for this category of workers. A regulatory instrument that recognizes the specificity of domestic

25. Law and Practice Report, supra note 6, para. 44.
26. See B.W. Higman, Colonial Continuities in the Global Geography of Domestic Service, in COLONIZATION & DOMESTIC SERV.: HIST. AND CONTEMP. PERSP. 19 (Victoria K. Haskins & Claire Lowrie, eds., 2015) (analyzing statistical data to confirm that domestic work predominates in societies that were former colonies - including settler colonies - and that had histories of slavery).
27. Blackett, supra note 12, at 22.
28. Id. at 11-15; Law and Practice Report, supra note 6, para. 45-54.
work and responds to the decent work deficit ... provides precisely the kind of technical cooperation guidance that is needed.29

A key purpose of the ILO’s Law and Practice Report was to provide not only an overview of member state practices, but to highlight instances in which regulatory action could guide standard setting. It should be underscored that some of the key examples influencing the direction of the new instruments came from developing countries that had needed to grapple carefully with the regulation of decent work for domestic workers as an invariably fraught exercise in democratic inclusion.30 At the time of drafting the Law and Practice Report, its accompanying questionnaire that formed the foundations of the new international labor standards, and other preparatory documents were in the process of being drafted, the Swiss cantons formed part of the governmental entities that had implemented contemporary, specific regulatory texts to govern the domestic work relationship under the so-called Standard Employment Contract (SEC). The SEC of the Canton of Geneva was one of the documents reviewed in the ILO Report.31

Each of the available forms of specific regulation identified in the Law and Practice Report was at best a work in progress, and several have since been revised in light of the new international instruments.32 As concerns Switzerland, the particular challenge to relying on Swiss law is nuanced: domestic workers are largely excluded from the corpus of generally applicable labor law, and while the specific regulatory text guiding their inclusion is innovative, it is also limited and even potentially conflicting. To understand the manner and extent to which Swiss law supported international standard setting, therefore, it is necessary to understand the innovation in context.

In Switzerland, labor law is usually regulated at the federal level.33 The cantonal regulations specific to domestic work, the so called standard employment contracts (SEC), are in addition to the federal sources. Despite the name, SEC are not model contracts, but rather forms of state regulation, which apply to domestic workers. Moreover, a separate regime is in place covering the work performed by domestic workers employed by members of diplomatic missions, permanent missions, of consular posts and of international organizations.

The Code of Obligations in the Swiss Civil Code recognizes the work performed in private households as an employment relationship. It applies equally to domestic workers, and covers issues such as overtime compensation, weekly rest, and holidays.34 It also contains a provision protecting employees’ personality rights

29. Law and Practice Report, supra note 6, para. 82.
31. Law and Practice Report, supra note 6, at 121; see also Contrat-type de Travail avec Salaires Minimaux Impératifs de l’Economie Domestique, J 1 50.03 (Jan. 1, 2012).
32. See generally Law and Practice Report, supra note 6; International Labour Conference, supra note 3; Blackett, supra note 7.
33. Swiss Constitution, supra note 11, arts. 110, 122.
34. Schweizerisches Zivilgesetzbuch [ZGB] [Code of Obligations], Mar. 30, 1911, SR 220, art. 319-362 (Switz.) [hereinafter Swiss Code of Obligations]. A contract is deemed to have been concluded where the employer accepts the performance of work over a certain period of time. A written employment contract is not
(Article 328) and introduces a special obligation for employers of live-in domestic workers, as they must provide adequate board and appropriate lodgings as well as care and medical assistance for a limited period in case of illness or accident (Article 328a). The Swiss Code of Obligations provides domestic workers with basic protections in labor relationships, a fact that is emphasized on various occasions in the Swiss legislative report mentioned above. However, the code of obligations is generally considered to provide employees with insufficient protections in the Swiss context. Normally, this code is complemented by widely applicable labor legislation, but this is not the case for domestic workers. Moreover, short labor contracts that are of a duration of under three months are excluded from several protective measures in the civil code, such as employees’ right to salary if they are prevented from working through no fault of their own, such as a case of illness (Article 324a). The latter fact becomes particularly relevant in relation to the current migratory schemes.

SEC have been introduced to provide the principal source of employment protection for domestic workers in Switzerland, to fill the gap resulting from domestic workers’ exclusion from federal labor regulation. There are two kinds of SEC, which can exist both at the federal and cantonal levels.

The first kind of SEC is a form of subsidiary regulation with clauses governing the formation, nature, and termination of certain types of employment relationships. They apply whenever the parties to an employment relationship have no other, written agreement. Since 1973 the cantons are expressly required to draw up such SEC for domestic workers in order to regulate their working hours, leisure time and implement special measures for female (pregnant) employees. 25 out of 26 Swiss cantons complied with this legislative mandate.

The second kind of SEC is a relatively new regulatory instrument. It was introduced in 2004 as an accompanying measure to the Free Movement of Persons
between Switzerland and the European Union and is designed to protect Swiss workers from repeated and unfair wage undercutting through European workers, due to significant differences in wages between Switzerland and other countries in the European Union. These SEC only contain sectoral, mandatory minimum wages and are designed to provide temporary protection. The second kind of SEC is introduced when a tripartite labor commission, set up both on the national level and in the cantons, observes dumping on customary wage levels in a specific area of the labor market without collectively negotiated minimum wages that may otherwise be declared universally binding. They are proposed by the geographically responsible tripartite body and finally decided by the government of the concerned state level. Both the Canton of Geneva – since May 2005 – and subsequently in 2011, the Federal government, relied upon this instrument to introduce mandatory minimum wages for domestic workers.

The Canton of Geneva’s SEC includes forms of innovation that were analyzed in the ILO’s comparative Law and Practice Report, which was the basis upon which international labor standards on decent work for domestic workers were developed. Notably, the Canton of Geneva’s SEC represents in large measure the first kind of SEC with subsidiary regulations. This SEC specifically refers to the provisions of the Swiss Code of Obligations that are the same as, or related to, protective measures that the SEC contains. Only the minimum wages in bold print contained in article 10 are regulated in the form of a “second kind SEC” and thus not revocable in written agreements.

The SEC deems any person who undertakes household tasks of a familial or housekeeping nature, whether on a full-time or part-time basis, to be an employee falling within the scope of this regulation. This inclusive approach was underscored in the Law and Practice Report, as the deeming approach shows regulatory leadership by circumventing often court-derived, private law, vicarious-liability inspired definitions of who is an employee. The deeming approach has at times been considered more suitable to ensuring some of the purposes of various remedial components of labor and social security law. The Law and Practice Report highlighted the similarity between the Canton of Geneva’s approach to deeming, and the solution adopted through quite different legislative instruments in both France and South Africa. Convention No. 189 ultimately defines a ‘domestic worker’ as someone who is in an ‘employment relationship’. The reference directly alludes to the capaciously framed Employment Relationship Recommendation, 2006 (No. 198), which provides indicia to nation states on how to identify an employment relationship. Moreover, it is important to note that in Switzerland, the employee status of domestic workers is primarily recognized in the Swiss Code of Obligations, and court-derived.

Another, related constant remains. The Canton of Geneva’s SEC reflects an express intent to cover migrant domestic workers, whether or not they are...
undocumented. Article 4 contains a particularly interesting provision. It stipulates that a contract concluded with a foreigner who does not have the necessary legal migration authorization cannot be terminated without respecting the legal or contractual notice periods. It adds that employer obligations continue, even if the worker is unable to provide the agreed work. This guarantee further enhances the general, court-derived protection of undocumented workers in the Swiss Code of Obligations where domestic workers contracts are recognized and their wage claims are protected. However, the employer still has a right to terminate the employment relationship with immediate effect.  

Convention No. 189 and Recommendation No. 201 offer historic coverage of migrant domestic workers, but contain no similar provision. The international labor standards take pains to ensure that the convention applies broadly to domestic workers irrespective of their immigration status in host countries. The reference to the ‘employment relationship’ may introduce ambiguity given the extent to which national jurisprudence varies on the effects of migrant status on the continuance of the employment relationship. However, the focus on the employment relationship, rather than the strict employment contract, offers an opportunity to interpret the notion in a capacious manner, as did the South African Labour Court in *Discovery Health Ltd. v. Commission for Conciliation, Mediation and Arbitration*, 46 and as the Canton of Geneva’s SEC suggests, to regulate domestic workers, including migrant domestic workers, as workers within the instrument’s scope.  

The Law and Practice Report also emphasized the relationship between Article 328a(1) of the Swiss Code of Obligations and Section 17 (current Section 11) of the Canton of Geneva’s SEC, which are complementary in their requirement that food provided for domestic workers must be healthy and sufficient. The Canton of Geneva’s SEC further upgrades the protection, with the requirement that full-time employees whose accommodation is provided by the employer have a right to a separate room that can be locked by key, and that is well lit, well heated, and appropriately furnished.  

These humble but crucial provisions, found in varying form in a number of specific regulatory texts drawn upon in the ILO Law and Practice Report, had an influence on Section 17 of Recommendation No. 201, which reads as follows:

17. When provided, accommodation and food should include, taking into account national conditions, the following:

---

45. **Bundesgericht [BGer] [Federal Supreme Court]** Jun. 21, 1988, 114 **Entscheidungen des Schweizerischen Bundesgerichts [BGer] I** 279 (Switz.); **Bundesgericht [BGer] [Federal Supreme Court]** Aug. 22, 2011, 137 **Entscheidungen des Schweizerischen Bundesgerichts [BGer] IV** 305 (Switz.).

46. *Discovery Health Ltd. v. Comm’n for Conciliation, Mediation and Arbitration* 2008 (29) I.L.J (LC) at 1480 (S. Afr.); see Blackett, *supra* note 7, at 787 (noting that “[t]he convention does interact with national legal doctrines, however, with a consequent risk that in some jurisdictions, the convention’s use of the language of ‘employment relationships’ could be interpreted to exclude from its coverage those migrant workers without legal migration status – if their employment contracts are considered to be unenforceable.”); see also Jennifer N. Fish, *Rights across borders: policies, protections and practices for migrant domestic workers in South Africa, in Exploited, Undervalued - and Essential: Domestic Workers and the Realisation of Their Rights* 213, 237 (Darcy du Toit, ed., 2013) (discussing the “deep gulf” between policy and practice on migrant domestic workers in South Africa).

47. See Blackett, *supra* note 7, at 787.

(a) a separate, private room that is suitably furnished, adequately ventilated and equipped with a lock, the key to which should be provided to the domestic worker;
(b) access to suitable sanitary facilities, shared or private;
(c) adequate lighting and, as appropriate, heating and air conditioning in keeping with prevailing conditions within the household; and
(d) meals of good quality and sufficient quantity, adapted to the extent reasonable to the cultural and religious requirements, if any, of the domestic worker concerned.

The Law and Practice Report mentioned, in passing, the fact that Article 11 of the 2004 Geneva SEC articulates protection against anti-union discrimination, and protections against firing, for workers covered by the SEC, or more generally for workers who defend their rights.49 The Law and Practice Report immediately added that “[t]he greatest challenge for collective bargaining is how to give effect to the nominal rights of domestic workers living in relative isolation in individual households.”50 Convention No. 189 is attentive to the challenges surrounding domestic workers’ equitable access to collective bargaining.51 In the absence of many models in transnational labor law, Convention No. 189 and Recommendation No. 201 none the less try to move beyond the merely “expressive and symbolic, in which case formal legal change does not fundamentally change normative orientations but, at best, gives a sense to a relevant audience that a problem is being addressed.”52

A final important, but at some level implicit, manner in which the Geneva SEC influenced the direction of international standard setting was on the issue of a minimum wage. Stipulating a minimum wage is, as mentioned above, central to the second kind of SEC’s raison d’être. From a regulatory point of view in relation to the promotion of substantive equality for domestic workers, this issue should however be understood in the context of minimum wage protection in Swiss labor law.

Traditionally, wage policies in Switzerland are negotiated by social partners or based on the contractual freedom of the involved parties.53 In 2013, around 42% of

49. See Law and Practice Report, supra note 6, at para. 287. It is observed that this provision no longer appears explicitly in the 2011 SEC, however, the protection against anti-union dismissals is still guaranteed in the Swiss Code of Obligations, supra note 36, art. 336(2).
53. More recently, three cantons (Ticino, Neuchâtel and Jura) introduced cantonal minimum wages while a generally applicable federal minimum wage was rejected in a popular vote in May 2014. For the following see Roman Graf, Case Study, L’Introduction du Salaire Minimum pour les Travaillerdes Domestiques en Suisse [The Introduction of the Minimum Wage for Domestic Workers in Switzerland], OBSERVATOIRE
employees in Switzerland were covered by mandatory minimum wages in collective agreements. However, under certain conditions, state authorities can – and do – declare such minimum wages universally binding. One of the circumstances in which Swiss authorities engage in minimum wage policies is in an express regulatory logic to resist “dumping”. This was the case for the minimum wages for domestic workers crafted through the Geneva SEC and the federal SEC.

The logic of dumping reflects a concern to intervene against an inequality of bargaining power resulting in ongoing unfair competition, and leading to an inability on the part of workers to resist lowered wages. Whilst designed to protect Swiss employees, it is not a surprise that the minimum wage applies to documented and undocumented migrants performing domestic work. The stipulated wage for untrained domestic workers in the federal SEC corresponds to about 55% of the average gross wage. Only approximately 4% of employees in the Swiss labor market have a comparably low wage. Furthermore, domestic workers’ minimum wage level is lower than the negotiated minimum wage for comparable workers in the cleaning and hospitality sectors.

The minimum wage measures for domestic workers are accompanied by legislative simplification schemes, to ensure that social security measures are calculated and remitted via a social enterprise on the salary paid to domestic workers. Through the mechanism of rendering the salary paid compliant with the minimum wage, and remitted by the means of service checks, in place in French and Italian speaking cantons, some level of formalization of the domestic work relationship is accomplished. This simplification measure was to some degree complemented by a mechanism under the Federal Act on Measures to Combat Illegal Employment. Employers who employ domestic workers on an occasional basis are thus provided with a simplified procedure to declare and pay the obligatory social security contributions, as discussed above, as well as federal taxes.
The extent of that formalization is of course limited; it may be circumvented through declarations of fewer hours than were actually worked, and as reports from other jurisdictions suggest, may enable deregulation. Moreover, further study is needed to assess whether the minimum wages established in the SEC reflect or raise the “customary” wage and actually assist to ensure a common wage level, across the board. Existing qualitative sources tend to suggest that for major Swiss cities, the hourly wage actually paid to live-out domestic workers might in fact be higher than the minimum wage prescribed in the relevant SEC.

Nonetheless, the Swiss approach to minimum wages and simplification schemes for domestic workers was important to the ILO standard setting process. Chiefly, it provided a concrete illustration of the prospect of regulating through a “simple, supportive and smart” mechanism that could render domestic work – formal or informal – visible beyond the formal conferral of a paper right. Drawing also on the Swiss experience, the ILO was able to point to early indicia that regularization of domestic workers was fostered in Geneva, subsequent to the introduction of a new law to combat work in the informal economy. In some jurisdictions, mechanisms of this nature have had a tangible impact on some domestic workers’ access to social security measures, although the measure is met with ambivalence across different governance levels. The focus is not on broadening reliance on the so-called tertiary economy, but rather on broadening the Canton’s tax contributions base and raising social security incomes. And in the context of Convention No. 189, the measure in the Canton of Geneva’s SEC, as well as in a number of other states, could also be cited to suggest that alternative, innovative, targeted strategies could be devised and implemented. Even the circumvention strategies alluded to above and discussed below, like declaring only partial wages or hours worked, and which affect the viability of formalization measures, are instructive. It is possible that some resistances to formalization initiatives force us to look beyond the mixed objectives, which may not be entirely worker-centered, to question underlying assumptions about informality.

Finally, it should be noted that the Law and Practice Report was tellingly brief on the issue of international organizations and diplomats, and without referencing the specific regime in place in Switzerland that might have influenced standard

61. See e.g. Louise Boivin, Réorganisation des services d’aide à domicile au Québec et droits syndicaux: de la qualification à la disponibilité permanente juste-à-temps 32 REVUE INTERNATIONALE FRANCOPHONE: NOUVELLES QUESTIONS FEMINISTES (2013) (discussing the Quebec experience).
62. ALEX KNOLL ET AL., WISCH UND WEG! SANS-PAPIERS-HAUSARBEITERINNEN ZWISCHEN PREKARITÄT UND SELBSTBESTIMMUNG (Scissmo 2012); Alleva & Moretto, supra note 59; PIERRE-ALAIN NIKLAUS, NICHT GERÜFEN UND DOCH GEFRAGT, SANS-PAPIERS IN SCHWEIZER HAUSHALTEN (Lenos 2013).
63. Law and Practice Report, supra note 6, at paras. 336-38; Blackett, supra note 12, at 25.
66. Law and Practice Report, supra note 6, at paras. 240-41.
setting in precise and potentially helpful ways. Yet the regime governing domestic workers in diplomatic households in Switzerland, at least formally, is of some interest in its navigation of the Vienna Convention and the thorny question of diplomatic immunity.67 It is based on the position of the Swiss federal Supreme Court that employers of domestic workers are not entitled to diplomatic immunity in labor conflicts.68 Concretely, the Swiss regime foresees compulsory written employment contracts based on a binding standard form, a minimum wage, and compulsory social security coverage paid by the employer.69 The implementation of these obligations is safeguarded through certain procedural instruments. For example, there is a basic requirement for the domestic worker to attend in person at a Swiss mission in order to receive her work permit. On that occasion, the domestic worker is provided with relevant information regarding the cost of living in Switzerland. In addition, the authorities verify whether the domestic worker understands the conditions of her employment contract, particularly the provisions relating to working hours, holiday leave, remuneration and social insurances.70 In 1995, the Canton of Geneva created a mediation structure aimed at resolving labor conflicts involving people benefiting from diplomatic and consular privileges and immunities in an amiable manner. This procedure is free of charge, and is prior to the institution of court proceedings.71

Ultimately, the last paragraph of Recommendation No. 201 addresses diplomatic immunity, alongside provisions on international cooperation. The provision stipulates:

26(1) Members should consider cooperating with each other to ensure the effective application of the Domestic Workers Convention, 2011, and this Recommendation, to migrant domestic workers.

(2) Members should cooperate at bilateral, regional and global levels for the purpose of enhancing the protection of domestic workers, especially in matters concerning the prevention of forced labour and trafficking in persons, the access to social security, the monitoring of the activities of private employment agencies recruiting persons to work as domestic workers in another country, the dissemination of good practices and the collection of statistics on domestic work.

(3) Members should take appropriate steps to assist one another in giving effect to the provisions of the Convention through enhanced international cooperation or assistance, or both, including support for social and

---

67. Siobhan Mullally and Cliodhna Murphy, Double Jeopardy: Domestic Workers in Diplomatic Households and Jurisdictional Immunities, American Journal of Comparative Law, forthcoming.
68. See Bundesgericht [BGer] [Federal Supreme Court] Jul. 9, 2008, 134 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 570 (Switz.).
economic development, poverty eradication programmes and universal education.

(4) In the context of diplomatic immunity, Members should consider:
(a) adopting policies and codes of conduct for diplomatic personnel aimed at preventing violations of domestic workers’ rights; and
(b) cooperating with each other at bilateral, regional and multilateral levels to address and prevent abusive practices towards domestic workers.

It stands to reason that Swiss law could have influenced the international standard setting, although the issue could also have derailed international discussions. Moreover, the Swiss regime governing domestic workers in diplomatic households was changed in June 2011, a couple of days before Convention No. 189 was adopted at the International Labour Conference. The older regime was less comprehensive. Likewise, the new Swiss regime may have been influenced by the direction the international standard setting process had taken as illustrated in foreseeing written standard employment contracts for migrant domestic workers.72 As the issue grabs international headlines and is the basis of ongoing litigation, it will doubtlessly also remain the basis of ongoing struggles to construct an alternative legality.

INFORMING DECENT WORK FOR DOMESTIC WORKERS II: THE INFLUENCE OF CONVENTION NO. 189 AND RECOMMENDATION NO. 201 ON SWISS LAW

As the previous section attests, there is no doubt that Switzerland’s regulatory framework contains innovations from both an international and comparative law lens. Swiss law informed the drafting of Convention No. 189 and Recommendation No. 201. In addition, there is no doubt Switzerland has innovated in its regulatory framework, at least in an international and comparative light. Moreover, we recognize that different governmental entities both at the federal and cantonal levels have been actively looking for new and innovative regulatory schemes to address with the growing phenomenon of paid domestic work in Switzerland during the last couple of years.

While acknowledging these important contributions and ongoing developments, we argue that Switzerland’s ratification of Convention No. 189 should not chiefly be understood unidirectionally, as an act of international solidarity. First, we suggest that Switzerland could benefit from understanding several challenges within its current regulatory framework through to the aims and provisions of the ratified Convention. These challenges relate to the Convention’s main concern, which is the claim for equality of domestic workers in comparison to other workers while recognizing the specificities of domestic work. In order to understand these concerns, and how Switzerland is currently shaping the vulnerability of domestic work, especially in cases of transnational migration and live-in-domestic work, it is necessary to deepen the discussion on the complex system of regulations applicable to domestic work within its broader context. This discussion touches on labor law,

the regulatory framework for intermediaries in the context of migrant domestic workers, migration law, and the regime of social security in place as well as the interplay between these regulations. They will be presented in the following subsections.

In the final part of this article, we offer a thicker, less unidirectional notion of international solidarity, as part of an emergent community of practice on the construction of an alternative legality for decent work for domestic workers.

**SWISS LABOUR LAW AND SOCIAL SECURITY LAW AND THEIR EXCLUSIONS**

Swiss labor law as it relates to domestic workers has created and maintained exclusions. Domestic workers are essentially excluded from the broader labor regulatory framework.\(^73\) Exclusion means that domestic workers do not benefit from the usual mandatory maximum hours of work regulation, periods of daily rest and the occupational health framework, with, for instance, specific protective measures for pregnant employees. Most importantly, and one of the key differences to the Swiss Code of Obligations, is the governmental labor inspection framework introduced through the labor legislation,\(^74\) which does not apply to domestic workers either. Indeed, one reason given for domestic workers’ exclusion was the difficulty of applying inspections in private households. This exclusion was already foreseen in the first drafts of the Labor Act in 1960.\(^75\) This is precisely the kind of exclusion to which Convention No. 189 and Recommendation No. 201 turn their attention, providing specific guidance on how to address labor inspection in respect of domestic workers, rather than excluding those workers from the coverage of labor law.

It should be noted that in Switzerland, for the most part, legislative protection for domestic workers was ultimately and undisputedly not considered necessary when the labor act was initially adopted; thus, the exclusion did not lead to any discussion in the Parliament.\(^76\) Even to date, the exclusion has received only limited academic attention and has so far not been analyzed in the Federal Supreme Court’s case law.\(^77\)

Cantonal SEC were established in part to respond to some of the lacunae, yet they remain underinclusive from an equality perspective in relation to the protection provided by Swiss law to workers generally. A number of cantonal SEC conflict even with the minimal protection provisions in the (prevailing) Swiss Code of Obligations. The fact that they have been amended on a regular basis does not necessarily lead to greater coherence. As an example we can cite the SEC of the Canton of Jura. It was first introduced in 1978 and last updated in January 2013. In

---

73. **Bundesgesetz über die Arbeit in Industrie, Gewerbe und Handel [ArG] [Federal Act on Labour], Mar. 13, 1964, SR 822.11, art. 2, para. 1 (Switz.).**

74. Tschudi, supra note 38, at 93.

75. **Conseil Fédéral a l'Assemblee Fédérale Concernant un Projet de Loi sur le Travail dans l'Industrie l'Artisanat et le Commerce [Federal Assembly Concerning a Legal Project on the Artisan and Commercial Industries], FF II 922 (1960).**

76. BO NR 1962 p. 146 (Switz.); BO SR 1963 p. 38 (Switz.).

77. **See, e.g., Thomas Geiser, Arbeitsgesetz Handkommentar, art. 2, para. 39 (2005); Roland A. Müller, ArG Kommentar, Arbeitsgesetz 30 (7th ed. 2009) (reproducing the wording and the legislative history of the clause); see also Tschudi, supra note 38, at 27 (judging the exclusion a matter of expediency and practicability).**
article 6(1) the SEC states that employers must allow domestic workers during each year of service at least three weeks of holidays, later on referencing the relevant article in the Code of Obligations for “further details”. 78 However, since a revision in 1984, this provision in the Code of Obligations foresees a minimum of four weeks of holidays per year (article 329a). While, from a legal point of view, the Swiss Code of Obligations prevails, the Canton of Jura has not changed the holiday-provision in its SEC in order to provide clarity.

The institution of cantonal SEC has, within a framework of exclusion, yielded problems for Swiss labor law. Firstly, they are often unclear or incomplete. For example, the SEC generally do not provide regulatory frameworks for working hours at night and most of them do not regulate occupational health issues, measures for pregnant employees nor labor inspection. 79 Secondly, dissemination can be uneven; if they are not well known by their designated populations, their protective character may be weakened. However, if they are known their protective measures may be circumvented through written agreements, for the benefit of the party with more bargaining power. Not surprisingly, several authors have therefore raised similar doubts regarding the actual protective character of this first kind of SEC. 80


79. The SEC for domestic workers in the Canton of Geneva (art. 24) and Ticino (art. 31) are currently the only regulations providing the necessary legal source for inspections of labour conditions in Swiss households. However, it is unclear if inspections for the enforcement of migratory and social security schemes as well as the implementation of the federal minimum wage are possible, several cantons seem to be conducting such inspections. See, e.g., Swiss Code of Obligations, supra note 36, at art. 360b(5); see also Bundesgesetz über die flankierenden Massnahmen bei entsandten Arbeitnehmerinnen und Arbeitnehmern und über die Kontrolle der in Normalarbeitsverträgen vorgesehenen Mindestlöhne [EntsG] [Posted Workers Act], Oct. 8, 1999, SR 823.20, art. 7 (Switz.) [hereinafter Swiss Posted Workers Act], and Verordnung über die in die Schweiz entsandten Arbeitnehmerinnen und Arbeitnehmer [EntsV] [Posted Workers Regulation], May 21, 2003, SR 823.201, art. 16, para. c (Switz.) [hereinafter Swiss Posted Workers Regulation]; Message concernant la loi fédérale révisant les mesures d’accompagnement à la libre circulation des personnes [Message of the federal government on the revision of 1 October 2004 of the Accompanying Measures to the free movement of labour] FF 6196 (2004); Message concernant la loi fédérale portant modification des mesures d’accompagnement à la libre circulation des personnes [Message of the federal government on the revision of 2 March 2012 of the Accompanying Measures to the free movement of labour] FF 3186 ff. (2012). For indications of cantonal inspections in private households, see Rapports du SECO sur la Mise en Oeuvre des Mesures d’Accompagnement, http://www.seco.admin.ch/dokumentation/publikation/00008/00022/04563/index.html?lang=fr (reporting the yearly enforcement of the Accompanying Measures to the free movement of labour); Swiss Act Against Illegal Employment, supra note 62, at art. 6; Message concernant la loi fédérale contre le travail au noir [Message of the federal government on Federal Act on Measures to Combat Illegal Employment of 16 January 2002]FF 3417 (2002); Parliamentary Debate on the draft Federal Act on Measures to Combat Illegal Employment, first chamber, BO SR 927 (2004) (Switz.) https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=8255, Parliamentary Debate on the draft Federal Act on Measures to Combat Illegal Employment, second chamber, OB NR 215 (2005) (Switz.) https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=8504; Bolliger & Féraud, supra note 66, at 9, 69; Legislative Report, supra note 14, at 6242.

The critiques are not surprising and can be expanded to the second generation of SEC. As highlighted before, this kind of SEC is by definition designed to cover only minimum wages; they do not articulate any boundaries on working time. Moreover, from a protection perspective, these SEC are designed as temporary measures, their establishment and extension is subject to the proof of prevailing dumping and abuse, and they must not conflict with the public interest or damage the legitimate interests of other economic sectors or sections of the population.\footnote{Swiss Code of Obligations, supra note 34, at art. 360a (according to this legislation, repeated and unfair undercuts of customary wages for a geographical area, occupation or industry are considered as dumping. The definition and application of these terms remain largely in the discretion of the geographically responsible tripartite labor commission, for more details); see Graf, supra note 55, at 12.} Despite these limits, commentators accept that they have played a considerable role in ensuring that domestic workers’ wages are protected in Switzerland since their introduction, in particular in mediating cases prior to bringing them before the courts.\footnote{Alieva & Moretto, supra note 59, at 30.}

The SEC raise complex questions linked to defining their geographical and personal scope, as well as their definition of covered activities. For instance, currently Switzerland has three different mandatory minimum wages for domestic workers. Sometimes, this leads to a situation where the same domestic worker undertaking the same activities may be subject to different wage levels depending on various factors. One factor is whether the worker provides work to a household in Geneva or in Nyon, a municipality in the Canton of Vaud approximately 25 kilometers northeast of Geneva. Another factor is whether or not her employer is a diplomat. Moreover, the mandatory minimum wages may or may not be applicable to domestic workers performing their duties in agricultural households. These mandatory minimum wages may be complemented with sometimes higher, but only subsidiary applicable and individually modifiable wage regulations in part of the cantonal SEC on domestic work or on agricultural work.

These difficulties may particularly tend to arise at the borders between cantons. Moreover, the Swiss approach allows one to account for diverse local and sectorial contexts and circumstances. However, they are also the source of substantial complexity and hardly justifiable disparities in both regulation and implementation – in a sector particularly craving for regulatory simplicity and clarity.\footnote{See Graf, supra note 55, at 5, 15.} For instance, the current regulatory framework struggles to take into account pertinent local differences between urban and rural areas.

A further example is similarly illustrative: the scope of the federal minimum wage was meant to cover an expressly enumerated list of chiefly domestic activities but excludes ‘medical’ care work. The wage level for all work other than the ‘medical’ care work was, accordingly, fixed at a comparatively low level.\footnote{Erläuternder Bericht zum Entwurf für einen Normalarbeitsvertrag (NAV) mit zwingenden Mindestlöhnen für Arbeitnehmerinnen und Arbeitnehmer in der Hauswirtschaft [Explanatory Report on the Introduction of a National Minimum Wage for Domestic Workers], Oct. 8, 2010, 16, 20 (Switz.) “Medical” carework is understood as services performed by casual or professional nurses under their own responsibility and generally covered by the mandatory Swiss health insurance. It encompasses basic care services as assistance and support in dressing, bathing, grooming and hygiene, cooking and feeding. Providing this care work on a
However, in practice the boundaries between these activities undertaken by domestic workers remain blurred. Indeed, there is a real risk that the average wages in the care sector themselves will be undermined.\(^{85}\)

The related system of social security is regulated both at the federal and at the cantonal levels.\(^{86}\) Generally, domestic workers fall within the scope of the social security regimes when working in Switzerland, as do other categories of workers.\(^{87}\) In some regards, they even enjoy selected special protective measures. For instance, all salaries of domestic workers fall under the scope of the mandatory social security contributions, regardless their amounts. This avoids a situation where domestic workers lose the social security coverage if they work for several employers. Otherwise, they would risk falling below the usually obligatory minimal wage levels.\(^{88}\)

Other special measures are less comprehensive and characterized by a series of exclusions. As an illustration, the Federal Act on Measures to Combat Illegal Employment contains simplified procedures for the payment of obligatory social security contributions.\(^{89}\) The simplified procedure is designed to facilitate the employer’s registration and dues payment. The procedure is available in all cantons of Switzerland. As such, it provides employers with a single form to declare its employees to different branches of the Swiss social security system, including federal tax payments, and to proceed with a yearly payment of all contributions at once. However, the mandatory occupational accident insurance has not been included into the simplified procedure.

Further, the scope of the federal procedure is narrowed to a certain maximum amount of salaries declared to the authorities by one employer. Therefore, it only applies to domestic workers working on an occasional basis; live-in domestic workers do not fall within the scope of the procedure. The Federal Council overlooks these questions in its legislative report, only highlighting that domestic workers are...
subject to the same conditions as other employees in the field of social security.90 Other published reflections on the effectiveness of the simplified procedure have so far been framed around the questions of employer’s benefits and estimated administrative efforts.91 The question of domestic workers’ _de facto_ access to social security schemes and benefits has not yet been analyzed.

These challenging issues at least call for clarification and more likely for a tailored, comprehensive approach to the specific regulation of domestic workers under Swiss labor and social security law. While Convention No. 189 and Recommendation No. 201 will not resolve the challenge of inter-jurisdictional coherency, they do provide the kind of comprehensive, inclusion-based framework that would enable Swiss regulators to embark upon a holistic approach to regulation. Moreover, and as a part of this holistic approach, we acknowledge that the challenges in the regulatory framework do not exclusively relate to labor standards law, narrowly defined, but also concern labor migration and the regulation of intermediaries.

**THE COMPLEXITY OF REGULATING LABOUR MIGRATION**

Swiss migration law is regulated at the federal level. It distinguishes between EU/EFTA-citizens and citizens of other countries.92 Currently, there are three different migratory schemes in place for migrants willing to work in private households in Switzerland. To begin with, the agreement on the free movement of labor between Switzerland and EU/EFTA Member States provides EU/EFTA-citizens with unlimited access to work in Switzerland, the right to obtain a work permit and the right to equal treatment with Swiss employees.93 According to Article 8(2) of Convention No. 189, the special provision that migrant domestic workers should receive a written job offer or employment contract before travelling to the host country in Article 8(1) of the Convention does not apply to workers who enjoy freedom of movement for the purpose of employment under a regional agreement. It is logical that the free movement of labor as provided in the agreement between Switzerland and the EU/EFTA should be affirmed rather than undermined, and considered in keeping with Convention No. 189. However, it is still important to acknowledge that the framework differentiates between different types of work permits delivered, depending on the length of a work proposal or contract. For contracts with a length of up to three months, there is no work permit required.94

---

91. See Bolliger & Féraud, _supra_ note 66, at 31.
92. _Swiss Constitution, supra_ note 11, art. 121.
93. Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit [PFZ] [Agreement on the free movement of labour between Switzerland and EU Member States], Jun. 21, 1999, SR 0.142.112.681 (2015), art. 4 with Annex I, Arts. 2, 6 (Switz.) [hereinafter Swiss-EU Bilateral Agreement on the Free Movement of Persons]; Übereinkommen zur Errichtung der Europäischen Freihandelsassoziation [EFTA] [Agreement Establishing the European Free Trade Association], Jan. 4, 1960, SR 0.632.31 (2014), art. 20 with Annex K, (Switz.). For citizens of Bulgaria, Romania, and Croatia, the access to the Swiss labor market has not yet been fully liberalized. Therefore, their possibility to work in Switzerland remains subject to certain conditions as set out in arts. 10(1b), 10(2b), and 10(3b) of the Swiss-EU Bilateral Agreement on the Free Movement of Persons.
94. Swiss-EU Bilateral Agreement on the Free Movement of Persons, _supra_ note 96, Annex I, art. 6, para. 2. However, employers of short time migrant workers are supposed to report those employment relationships to the cantonal authorities according to the Swiss-EU Bilateral Agreement on the Free Movement
combined effect is that the current framework ultimately encourages reliance upon short, precarious work contracts of a duration of less than three months.

Moreover, national citizens of countries outside the EU/EFTA usually do not have access to work as domestic workers in Switzerland, with two main exceptions. Firstly, domestic workers who have been employed by an admitted migrant for at least a 2-year period prior to the migrant’s admission can get a special permit to follow their employers. Secondly, and as discussed in the previous section, there is a special regime in place for domestic workers of diplomats and members of international organizations. The legislative report credibly affirms that the current migratory schemes conform to Convention No. 189.

Finally, the concrete impact of the special regime for domestic workers in diplomatic households remains questionable. The Federal Department of Foreign Affairs states that in July 2013, only 423 domestic workers were accredited through this special regime, and only 24 worked in private households of diplomats and consuls. If these numbers are understood in relation to the 47,371 people recognized as being part of the “International Geneva Community,” the actual impact of the special regime for domestic workers of employers with diplomatic immunity remains questionable and is likely to continue to be a complex and problematic regulatory area.

The activities of employment and recruitment agencies and other intermediaries are heavily regulated at the federal level in Switzerland. The Federal Council concluded in its legislative report that Switzerland could therefore ratify Article 15 of Convention No. 189 without changing Swiss law. This conclusion is somewhat of a surprise. Without detailing the current Swiss framework, for the purposes of this article it is important to note the following concerning the regulation of private intermediaries. In September 1999, when the Federal Council presented the ILO Private Employment Agencies Convention, 1997 (No. 181) to Parliament for ratification consideration, it found important incompatibilities between the ILO’s approach towards employment agencies and the regulation in Switzerland; according

of Persons, supra note 96, Annex I, art. 2, para. 4, read in conjunction with Verordnung über die schrittweise Einführung des freien Personenverkehrs zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Union und deren Mitgliedstaaten sowie unter den Mitgliedstaaten der Europäischen Freihandelsassoziation [VEP] [Regulation on the free movement of labour], May 22, 2002, SR 142.203 (2015), art. 9, para. 1bis (Switz.); Swiss Posted Workers Act, supra note 81, art. 6; Swiss Posted Workers Regulation, supra note 81, art. 6 para. 3(c). This obligation is presumably not well-known by many employers of migrant domestic workers.

95. As they are not recognized as qualified workers according to Bundesgesetz über die Ausländerinnen und Ausländer [AuG] [Federal Act on Foreign Nationals], Dec. 16, 2005, SR 142.20 (2015), art. 23 (Switz.). There is a third exception to the regime, although it has not been used very often until now and is not mentioned in the legislative report: authorities will exceptionally grant a permit to provide domestic care for a person with severe disabilities, if both the future employer as well as the future caregiver fulfill a certain number of conditions beforehand, see Weisungen und Erläuterungen Ausländerbereich [Weisungen AuG] [Directive on Labour of Foreign Nationals], point 4.7.15.3 (Switz.). Usually the duration of these permits does not exceed one year.

96. Directive on Labour of Foreign Nationals, supra note 98, at point 4.7.15.2.

97. However, the current schemes are very likely going to change in the next couple of years, as the Swiss government has been asked to create a new system for labor migration in a popular vote in early 2014. See Swiss Constitution supra note 11, art. 121 a

98. Message Concernant les Mesures à Mettre en œuvre pour Renforcer le Rôle de la Suisse comme Etat Hôte [Message Concerning Measures to Implement for Strengthening the Role of Switzerland as Host State], FF 9037 (2014) (Switz.).
to the Swiss ratification policy, the parliament was advised against ratification due to the important incompatibilities. However, Article 15 of the Domestic Workers' Convention is – even if slightly different – based on Convention No. 181, a fact that the Swiss government readily acknowledges. One would expect that this will be a further site for ongoing evolution in which Switzerland will be able to draw upon emerging examples in comparative law, to address the labor migration of domestic workers.

One recruitment dilemma identified in the past and still prevalent in Switzerland today, relates to the permission granted in Swiss law to deduct recruitment fees from employees’ salaries, but the amount of the fee deduction is capped. This feature of the Swiss framework would not appear to be in conformity with the wording in Article 15(1)(e) of Convention No. 189. According to the analysis in the Swiss legislative report, however, there is no actual incompatibility because, in practice, the fees are generally assumed by the employers alone. The reasoning in the legislative report is that the Convention’s goal is to prevent abuses, so the Swiss approach is in conformity. However, both the statistical base and the legitimacy of this reasoning remain unclear.

Another, maybe less obvious, but more challenging concern arises in relation to the conditions governing the operation of private employment agencies. According to the current framework, foreign recruitment agencies do not have access to the Swiss labor market, while service providers based in the European Union do benefit from limited access. European service providers can operate in the Swiss market for 90 days per year, or send their employees on a temporary basis to carry out the proposed contract. The transnational delivery of services through the “posting” of workers is subject to certain conditions and procedures. Importantly, the temporarily deployed, posted worker must remain under the supervision of the foreign employer throughout the delivery of a service in Switzerland. This right to give instructions and to supervise an employee is the distinguishing element between allowed posting of employees and forbidden transnational, triangular employment relationships.

In the attempt to remedy and prevent abusive practices of foreign service providers, which were posting live-in-caregivers to the Swiss labor market, the Swiss government asks intermediaries of live-in domestic workers to be based in


100. See Blackett, supra note 7, at 788-89.

101. Legislative Report, supra note 14, at 6239 passim.


103. See Swiss-EU Bilateral Agreement on the Free Movement of Persons, supra note 96, arts. 5(1), read in conjunction with Swiss-EU Bilateral Agreement on the Free Movement of Persons, supra note 96, annex I, arts. 17, 22(3)(ii).
Switzerland and state-licensed as service hiring agencies.104 By doing so, they exclude European agencies from providing live-in domestic work in Switzerland, while hardly being able to enforce this prohibition in a foreign country. Instead, the measure encourages triangular temporary employment relationships for all live-in domestic workers in Switzerland. Yet, the regulation of triangular temporary employment relationships is recognized to leave workers with some of the most precarious employment conditions in Switzerland. The current regulatory approach therefore shifts the economic risk back onto live-in domestic workers, enabling their agencies to resort to extreme forms of flexibility without respecting the limits on working hours usually in force for other triangular employment relationships.105

The Federal Council does not address that challenging question in its legislative report. However, Convention No. 189 requests member states to govern the operation of private intermediaries in a thorough manner, taking into account the specificities of domestic work. For instance, Article 15(e) suggests the conclusion of bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment. The legislative report would seem to suggest that Switzerland does not anticipate embarking on such a process.106 But ILO follow-up on ratification through the Committee of Experts’ observations, and Switzerland’s participation in the community of practice on decent work for domestic workers might become the basis for ongoing learning and reform in this area. And to the extent that the regulatory framework in Switzerland lacks actual implementation,107 Swiss ratification of Convention No. 189 might also become important for its precise attention to meaningful access to justice.108

104. According to the current interpretation of the framework, European service providers would share the employers’ responsibilities with members of the private households if they were to send their employees to work as live-in domestic workers into Swiss households, although the assessment of a relationship has to be analyzed in a case-by-case approach. See Seco, Weisungen und Erläuterungen [Directive and Explanations on Recruitment and Hiring Services] 153. This practice is confirmed by the Federal Supreme Court, see BUNDESGERICHT [BGer] [Federal Supreme Court] Feb. 11, 2013, 2C.356/12, Schweizerisches Bundesgericht [BGE], E. 4.2.1 (Switz.); and BUNDESGERICHT [BGer] [Federal Supreme Court] Nov. 26, 2014, 2C.534/14. But see Michael Kull, Die Abgrenzung des einfachen Auftrags zum Personalverleih am Beispiel der hauswirtschaftlichen Tätigkeit, AKTUELLE JURISTISCHE PRAXIS, 1492 (2013); see also Christoph Senti, Auftrag oder Personalverleih? Rechtliche Gratwanderung mit drastischen Folgen, AKTUELLE JURISTISCHE PRAXIS, 360 passim (2013).

105. For example, a two day notice of termination during the first three months of a contract and a weakened protection against consecutive short-term employment contracts. See Federal Act on Recruitment and Hiring of Services, supra note 105, art. 19(4); BO SR 549 (1987); BUNDESGERICHT [BGer] [Federal Supreme Court] Jun. 19, 1991, 117 BUNDESGERICHT [BGE] [Federal Supreme Court], V 248 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] (Switz.); BUNDESGERICHT [BGer] [Federal Supreme Court] Jan. 7, 2003, 129 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] (Switz.); BUNDESGERICHT [BGer] [Federal Supreme Court], III 124 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] (Switz.); BUNDESGERICHT [BGer] [Federal Supreme Court] Jun. 11, 1997, 123 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] (Switz.); BUNDESGERICHT [BGer] [Federal Supreme Court], III 280 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] (Switz.).

106. Legislative Report, supra note 14, at 6240.


108. See, e.g., supra note 107, at arts. 17-18.
CONSEQUENCES, CHALLENGES AND OPPORTUNITIES: BEYOND THE LEGISLATIVE REPORT

The Federal Council argues in the legislative report that the current framework provides domestic workers with significant, minimum standards protection. We do not deny this. Nor do we take the position that ratification should only occur when a state is in compliance. Quite to the contrary, in the face of several challenges in the framework, we urge active participation by ILO member states in the construction of an alternative legality on decent work for domestic workers, through ratification, submission to Committee of Experts comments, reliance upon technical cooperation, and participation in ongoing communities of practice, mediated in the labor context by a range of transnational actors and social movements.

In this regard, to the extent that the currently available legal protection in Switzerland may be seen to fall short of providing substantively equal treatment to domestic workers in relation to workers generally, in fundamental aspects such as working time, safety and health, labor inspections, and the effective exercise of freedom of association and collective bargaining rights, as set out in Article 10 of Convention No. 189, decent work for domestic workers remains an ongoing process. It is particularly problematic that the relationship between different aspects of the current regulations on migration, labor and social security creates an incentive to employers and recruiters to render employment precarious, through the reliance on consecutive short time contracts of maximum 3 months duration for migrant domestic workers and on triangular temporary employment relationships for live-in-caregivers.

Innovative regulatory solutions exist for domestic workers both at the federal as well as at cantonal level. Some initiatives to take the specificities of domestic work into account are also discerned in relation to social security law. In other areas, however, the regulatory measures are not well understood in their effects, in their relation to other regulatory schemes and are not taking into account the institutional role and the competencies of the implicated government agencies. In this regards, the implementation of Convention No. 189 in Switzerland offers an opportunity to understand the current framework not only compared to other countries, but within the Swiss context. Implementation provides a chance to consider domestic workers’ claim for substantive equality seriously, and on an ongoing basis, perhaps despite rather than thanks to the legislative report.

CONCLUSION: REGULATORY INNOVATION AND THE ILO’S COMMUNITY OF PRACTICE

The Swiss example of regulation of domestic work is therefore, like many models, a complex one that should raise some degree of ambivalence alongside keen interest. It has both influenced international standard setting, and stands to be influenced by it. It is part of a broader dynamic process of international standard setting and domestic regulatory innovation, built largely on social movements from below.109 Those social movements have operationalized networks across governance

levels, to capture and galvanize change from within the ILO, drawing on examples of innovation for which they fought at national and local levels. In that process, they have challenged decent work to become a content-rich notion, one that has arguably come to have a ‘settled’ meaning that extends beyond the mere invocation of a short declaration of the relevance of fundamental principles and rights at work.¹¹⁰ Through an operationalization of “communities of practice”¹¹¹ across transnational governance levels, the pluralist law governing the home workplace is increasingly challenged. In the process, the normative content shifting the ‘law and practice’ on domestic work is facing dynamic change. Rather than a hollow, minimalist approach to ‘decent’ work, the inclusion of decent work for domestic workers has come to be understood as part of the pragmatic, rooted transnational labor law normative aspiration: social justice.¹¹²

This article has sought to illustrate that regulatory innovation on decent work for domestic workers is anything but unidirectional. The regulatory borrowing at the level of international standard setting was not only from countries of the North, like Switzerland, but also – and arguably most heavily – from countries of the South that have had to grapple with postcolonial, racialized legacies of domestic work. Countries of the global North facing resurgences of migratory domestic work¹¹³ in the light of labor market and demographic changes, and facing rising inequality, may at once draw upon the international standards and foster a proliferation of normative framings and ongoing learning.

It is in this regard that the Swiss invocation of ‘international solidarity’ might most fruitfully be situated. The notion of international solidarity has of course been at the center of at times polarized recent international discussions.¹¹⁴ Yet there is little indication that it is in this sense that the Swiss government intends for the notion to be understood. The appeal might be loosely based on the emerging understanding of Switzerland’s constitutional commitment to international solidarity.¹¹⁵ But could the notion also be perceived in the sense of the little commented ILO Resolution concerning efforts to make decent work a reality for domestic workers worldwide,¹¹⁶ drafted to accompany the adoption of Convention No. 189 and Recommendation No. 201, and which it is argued contains seeds of international solidarity to deal with the

---

¹¹⁰. See Halliday & Shaffer, supra note 54, at 44.
¹¹². See e.g. Isabel Martin, Corporate Governance Structures and Practices: From Ordeal to Opportunities and Challenges for Transnational Labor Law, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOR LAW 51 (Adelle Blackett & Anne Trebilcock, eds., 2015).
¹¹⁵. Swiss Constitution, supra note 11, pmbl., arts. 2 para. 4, 54 para. 2; Roland Kley & Roland Portmann, Vorbemerkungen zur Ausschweifassung, para. 32 passim (Ehrenzeller et al., eds.); Mather, supra note 9.
intractable governance challenge?  

The ILO has linked domestic workers as a specific target group in country program outcomes, and responded to a range of ad hoc requests for technical cooperation, while designing new projects “to protect and empower” domestic workers. These include initiatives with other international organizations and networks, like UN Women, the International Organization for Migration, the Organization for Security and Co-operation in Europe and the Global Forum for Migration and Development. They also include initiatives to protect domestic workers employed in diplomatic households. The measures are both based on country-level assistance, and harnessed into knowledge building and sharing. Yet, it is easy to be underwhelmed; the full potential of international solidarity on decent work for domestic workers cannot be gleaned from the reported follow-up. Moreover, the potential contained in paragraph 26 of Recommendation No. 201 to create a ‘space’ for ongoing learning and regulatory innovation remains untapped. A plethora of emerging international and regional resolutions, recommendations, and comments, attest to the heightened concern about the distributive causes and consequences, notably of the movement of persons across borders. The movement of persons to provide care services is often framed as a development strategy linked to a logic of remittances, while removing the burden on individual households in receiving countries, and without challenging pre-established gender and invariably racialized norms. Yet ‘care work extraction’ also leads to care deficits in sending countries. Domestic workers’ own human rights, including to a family life, may be swept under the less than metaphorical carpet. Domestic work – including migrant domestic work – leaves unanswered a range of questions surrounding the borders of ‘labor law’ be they found in the reproductive-productive economy divide, or in heightened inequality within and across societies, within and across the global North and the global South.

International solidarity, in this light, would need to be far more than a unidirectional act of ratification subject to some self-assurance of normative

117. See generally Adelle Blackett, The Space Between Us: Migrant Domestic Workers as a Nexus Between International Labour Standards and Trade Policy, in LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES 259 (Daniel Drache & Lesley Jacob, eds. 2014).

118. Id.

119. Id. at 271.


122. See, e.g., Comm. on the Protection of the Rights of All Migrant Workers and Members of their Families, U.N., Doc. CMW/C/GC/1 (Feb. 23, 2011), http://www2.ohchr.org/english/bodies/cmw/cmw_migrant_domestic_workers.htm.; General Comment No. 2 addresses the Rights of Migrant Workers in an Irregular Situation and Members of their Families, at http://www2.ohchr.org/english/bodies/cmw/docs/CMW_C_GC_2_ENG.PDF.

123. See BLACKETT, supra note 120, at 269.

124. RHAEL SALAZAR PARRENAS, CHILDREN OF GLOBAL MIGRATION: TRANSNATIONAL FAMILIES AND GENDERED WOES, 14 (2005) (capturing a process of first “the exhaustion of state care resources by structural adjustment policies that mandate the servicing of the foreign debt and second via the depletion of the labor supply of care workers from the global south as they move to the global north”).

compliance. We contend, rather, that international solidarity should be marshalled as a normative commitment to contribute to, and engage with, a process of ongoing learning and multi-directional (ex)change – (including South-North and North-South) – to create an alternative legality of and for decent work for domestic workers.

Emerging theoretical engagement with multi-level governance assists us to consider this process of ongoing normative interaction and (ex)change to promote decent work for domestic workers. Jutta Brunnée and Stephen Toope draw on Lon Fuller’s account of domestic legality, to offer a constructivist, international account of how social norms transition to legality; they articulate an interactional theory of international law that includes the role of “communities of practice”.126 Balakrishnan Rajagopal theorizes social movement action, within international law and institutions, through a historicized lens of postcolonial ‘othering’; he accepts social movement engagement as a potential basis through which to “expand political space available for transformative politics.”127 Terence Halliday and Gregory Shaffer offer a non-linear account of the settling, and to some extent unsettling, of what they refer to as transnational legal orders; their framing allows for the prospect that evolving, cyclical or contested meanings will emerge in a potentially layered fashion.128

None of these theorists engages with international solidarity, and Rajagopal for one offers crucial challenges to the basis out of which it has been developed in the UN context, that is the ‘third generation’ international human right to development.129 Without importing that larger debate, this analysis has sought merely to suggest that in understanding the emergence of regulatory innovation in respect of decent work for domestic workers, attention should be placed upon the construction of legality, or the settlement of a transnational legal order, around domestic workers’ deeper social justice claim. States like Switzerland are invariably part of that process, which through social movement action, functioning within and beyond communities of practice, is creating an alternative, and potentially counter-hegemonic process. As this article has demonstrated, Switzerland has both influenced, and stand to be influenced by, the international standards and the transnational legal order surrounding them. Switzerland invokes the idea of international solidarity on ratification; we suggest that decent work for domestic workers provides a critical basis upon which to develop a thick understanding of international solidarity, one that a focus on social justice compels.

126. BRUNNÈE & TOOPE, supra note 114, at 16.
127. RAJAGOPAL, supra note 112, at 23.
128. See Halliday & Shaffer, supra note 54, at 8-9.
129. RAJAGOPAL, supra note 112, at 11-12.