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**REGULATORY INNOVATION IN THE GOVERNANCE OF DECENT  
WORK FOR DOMESTIC WORKERS IN CÔTE D'IVOIRE: LABOUR  
ADMINISTRATION AND THE JUDICIARY UNDER A GENERALIST  
LABOUR CODE**

***Adelle Blackett with the collaboration of Assata Koné-Silué***

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# IDRC Research Project: Regulatory Innovation in the Governance of Decent Work for Domestic Workers in Côte d’Ivoire: Labour Administration and the Judiciary under a generalist Labour Code\*

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## Introduction

Côte d’Ivoire is a classic example of a country that has regulated decent work for domestic workers through generalist labour regulation, under a Labour Code.<sup>3</sup> Article 2(1) of the 1995 Labour Code and Article 2(1) of the 2015 Labour Code define a “worker” to include any physical person, whatever his or her sex, race or nationality, who works for remuneration under the direction or “authority” of another physical or moral person, be they public or private (the employer).<sup>4</sup>

In light of its colonial history, it is not surprising, either, to learn that Côte d’Ivoire has long applied its labour law to domestic workers. Colonized peoples dispossessed from their lands became colonial migrants,<sup>5</sup> and some of those migrants who entered urban areas became domestic workers for their colonizers. Those historical domestic workers – largely male<sup>6</sup> - were a key example of the

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<sup>3</sup> Loi n° 95/15 of 12 janvier 1995, portant Code du travail, JORCI 23 February 1995, n° 8 was in force throughout the timeframe of this study (1995 Labour Code). On 20 July 2015, a new Labour Code was adopted. It was published on 14 September 2015 and is currently applicable, subject to the adoption of the decrees that it foresees. Loi n° 2015-532 du 20 juillet 2015 (2015 Labour Code). This study focuses on the application of the 1995 Labour Code. It offers occasional references to the 2015 Labour Code but a comprehensive discussion is beyond the scope of this working paper. It should be noted that in Côte d’Ivoire, an Interprofessional Collective Agreement of 19 July 1977 has also been applicable. According to Article 1, the Interprofessional Collective Agreement applies to the labour relations between employers and workers in establishments and enterprises in Côte d’Ivoire working in industries and businesses of all natures as well as general mechanics. For a discussion, see Assata Koné-Silué, *La négociation collective comme source de normativité en droit du travail ivoirien*, Labour Law and Development Research Laboratory Working Paper No. 4, 2014, at 14 – 17, available at [http://www.mcgill.ca/lldrl/files/lldrl/assata\\_kone-silue.pdf](http://www.mcgill.ca/lldrl/files/lldrl/assata_kone-silue.pdf).

<sup>4</sup> The 2015 Labour Code introduces the language of « employee » (« salarié »). Seven categories of domestic workers are set out in Circulaire no 1258/EFPPS/DERT du 20 août 1998 portant application du barème des salaires 1998.

<sup>5</sup> See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996) at 218ff.

<sup>6</sup> This historical reading was confirmed by the Secretary General of the Syndicat National des employés de maison during interviews in December, 2013.

paradigmatic “industrial man”<sup>7</sup> that “modern” labour laws introduced before independence in the francophone West African region, were meant to cover.<sup>8</sup>

Moreover, the contemporary ubiquity of domestic work – estimated at 1 million persons for a population of 5 million in the economic capital, Abidjan, alone<sup>9</sup> - operates in a more generalized social and economic context in which the Ivoirian developmental state is itself deeply challenged in a post-structural adjustment, post financial devaluation context.<sup>10</sup> Labour market informality is the norm, as are precarious working conditions for many workers. In that sense, there is nothing exceptional about domestic work. One unavoidable irony, however, is that it is precisely other employees – the flailing “middle” class – who have witnessed their own post-colonial promise of citizenship at work dwindle with the demise of the developmental state, who may also resist extending the citizenship at work to domestic workers. Domestic workers’ low cost labour allows them to palliate the absence of the state as a provider of social welfare protections like subsidized childcare or quality elder care, or even low cost electricity to operate labour saving technology, and effective public transportation systems. Domestic workers in Côte d’Ivoire are therefore, still, treated as “invisible”.<sup>11</sup>

This study looks closely at Ivoirian initiatives to acknowledge and redress the paradox of domestic workers’ simultaneous ubiquity and invisibility. It takes a close look at the nature and quality of domestic workers’ inclusion under the generalist labour law framework. In some contexts, including neighbouring Ghana,<sup>12</sup> it has been affirmed that domestic workers may textually be included in a generalist code, but in practice, excluded from its application.<sup>13</sup> This study has shed light on a more complex dynamic at play in Côte d’Ivoire. Without a doubt, the prevalence of domestic work undertaken under particularly precarious conditions<sup>14</sup> attests to the significance of domestic workers’

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<sup>7</sup> Frederick Cooper, *Decolonization and African Society: The Labor Question in French and British Africa* 2-3 (Cambridge University Press 1996). Cooper is careful to address the gendered characterization of “industrial man”.

<sup>8</sup> For a discussion, see Adelle Blackett, “The Paradox of OHADA’s Transnational, Hard Law, Labour Harmonization Initiative” in Adelle Blackett & Christian Lévesque, eds., *Social Regionalism in the Global Economy* (Routledge, 2011) 243 at 261.

<sup>9</sup> See Background Study to the Private Member’s Bill establishing the Conditions of Domestic Work and Organizing Domestic Work Placement Agencies, 30 April 2014, presented by Deputy Adjaratou Traoré-Fadiga (First Ordinary Session, 2014, Second Legislature, National Assembly). (*Domestic Workers Private Members Bill*) at 3.

<sup>10</sup> See Achille Mbembe, *On the Postcolony* (University of California Press, 2001) at 55 (on the impact of the deregulatory policies of structural adjustment).

<sup>11</sup> See the explanation provided in the *Domestic Workers Private Members Bill*, *supra* note 9 at 1. The text notes that Côte d’Ivoire has moved from a primarily rural economy to an urban one in less than 40 years. The preparatory study conducted to prepare the Domestic Workers Private Members Bill revealed that 8 out of 10 households rely on personal services, which are defined broadly to include “servants”, nannies, male cooks (“boy”), hairdressers and persons who braid hair on a part time basis, as well as masseurs and masseuses.

<sup>12</sup> See Dzodzi Tsikata, *Domestic work and domestic workers in Ghana: An overview of the legal regime and practice*, ILO Conditions of Work and Employment Series No. 23 (Geneva: ILO, 2009).

<sup>13</sup> International Labour Office, Decent Work for Domestic Workers, Report IV(1), International Labour Conference, 99th Sess., 2010, Geneva (*ILO Law and Practice Report*).

<sup>14</sup> See generally Assata Koné-Silué, *Précarité et droit social ivoirien*, these de doctorat, 2011, Université Paris Ouest Nanterre La Défense.

marginalization under labour law. However, the working paper similarly reveals that inclusion under the Labour Code, and specialized institutions dedicated to the enforcement of workers' rights, is not a mere chimera. On the contrary, throughout one of the most destabilizing moments in Côte d'Ivoire's history, during the crisis from 1999 – 2011,<sup>15</sup> the labour administration and the specialized labour tribunal regularly addressed an appreciable number of cases of domestic workers' rights under the employment relationship. Coupled with the interviews conducted for this study, we were able to identify a sensitivity amongst the labour inspectorate, as well as some jurisprudential evolution affirming that domestic workers are workers like any other, to whom key aspects of general labour law should apply. However, the application of the Labour Code and related labour laws to domestic workers was limited in its depth and breadth. The case law showed a solid appreciation of basic employer obligations that might lead to termination, as well as the variety of termination damages that an employee may claim. In some cases the courts attentively applied the minimum wage provisions or awarded the employee indemnities for the employer's failure to register the domestic worker for social security protections. However, the inquiry stopped short when the specificity of the domestic work paradigm – as witnessed through working time law and the live in relationship – was more squarely before the courts. It is not surprising, therefore, that labour relations and civil society actors continue to call for specific regulation of decent work for domestic workers in Côte d'Ivoire, and that an initiative to adopt a special decree on domestic workers is underway. We argue that there is a need for initiatives on decent work for domestic workers to be built through multi-level social dialogue, to ensure that the legislative and regulatory initiatives are informed both by the generalist courts' decisions, by the international standard setting and by domestic workers' transnational social movements.

## Background to the IDRC Study

Decent work for domestic workers has moved from the margins of sustained international solidarity work to the centre of historic international prioritization. The ILO built on innovative regulatory practices in a growing number of countries worldwide<sup>16</sup> to adopt the Decent Work for Domestic Workers' Convention (No. 189) and Recommendation (No. 201), 2011.<sup>17</sup> No longer servants, or “like one of the family”, domestic workers received international validation of their status as workers.

The promise of international standard setting is that it will galvanize actors locally and transnationally to promote implementation in a broad cross-section of states. The international standard setting took a crucial first step, in that it renders visible many of these dynamics and calls for a regulatory response. The peril is that it will simply superimpose a layer of law without reaching the places where domestic work norms are mediated.

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<sup>15</sup> President Alassane Ouattara was elected and sworn into office in 2011.

<sup>16</sup> See ILO, *Law and Practice Report*, supra note 13. See also Adelle Blackett, “The Decent Work for Domestic Workers Convention and Recommendation, 2011” (2012) 106 *American Journal of International Law* 778.

<sup>17</sup> June 16, 2011 (Convention No. 189 and Recommendation No. 201), 53 ILM 254 (2014); see also Introductory note by Adelle Blackett, 53 ILM 250 (2014).

There is a troubling gap in the existing legal knowledge of the regulation of domestic work. This gap is perhaps masked by the abundant literature on the exploitation faced by this particularly marginalized category of workers, compellingly elucidating the North South dimension of domestic work, and the extent to which the global economy depends on transnational, subsidized care extraction. The transnational character is belied by the ‘everydayness’ of the personal interactions of the South in the North in individualized households.

A premise of this IDRC project is that assessments of implementation must go far beyond compiling state laws, particularly those of general application; they mask the informal norms that are pervasive in domestic work, and that govern the home workplace with starkly unequal, but mediated power relationships often beyond the gaze of state regulation and enforcement.<sup>18</sup> Those concerned with implementation need also to assess the role and practices of state actors in a broad cross-section of governmental ministries and agencies.<sup>19</sup>

This project has sought to evaluate the burgeoning development of innovative, specific regulatory initiatives by multiple state and non-state actors to address regulatory and compliance challenges in domestic work. Many of these initiatives have emerged from the global South, with domestic workers themselves as the catalysts. They creatively redress some of the worst employment practices, bringing domestic workers within the scope of labour and social security protections, infusing human rights into migration practices, and fostering worker self-organization. A sophisticated approach to social exclusion and legal regulation is required to ensure that the root causes of the social undervaluation of domestic work are addressed through innovative regulatory responses. This project looks to the African continent, the third largest employer of domestic workers, where approximately 10 % of domestic workers worldwide are distributed,<sup>20</sup> to offer a close look at emerging innovation on decent work for domestic workers.

In Côte d’Ivoire, it becomes apparent that creative, locally-rooted strategies have been developed, by actors who administer labour law, and who apply the law through the judicial system. There is a disconnect, however, between the initiatives undertaken within the labour administration and the courts, and the everyday law of the home workplace on the ground. Labour laws of general application are applied in many of the cases of termination of employment that come before the labour administration and the courts. However, the application is limited, such that it appears rarely to reach and challenge elements of the specificity of domestic work, notably as concerns hours of work. Parallel legislative initiatives under way in Côte d’Ivoire on the specific regulation of domestic work may complete these measures, by turning attention to matters like hours of work and the regulation of agency workers. However, they may well underestimate the extent to which the labour administration and the courts are already applying existing laws of general application to domestic

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<sup>18</sup> See Adelle Blackett, “Introduction: Regulating decent work for domestic workers” (2001) 23 *Canadian Journal of Women and the Law* 1 at 22-23.

<sup>19</sup> See interview with Mr. Sibahi Edouard Ladouyou, Confédération générale des Entreprises de Côte d’Ivoire, Abidjan, 19 December 2013.

<sup>20</sup> ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection*, Geneva, 2013, at 21, 33. It is recognized that the statistical base is extremely low in both West and East Africa, to the point where the ILO hypothesizes that the workers may not actually have been counted as workers in labour forced surveys. *Ibid.* at 35.

workers.<sup>21</sup> This study suggests that it is in the interplay of the various initiatives, actors, and the international standard setting that one observes how critical it is to consider domestic work both as work like any other, and work like no other.<sup>22</sup> This study seeks to contribute to the dialogue, both within Côte d’Ivoire amongst a range of institutions and actors, and in the international campaign for decent work for domestic workers set in motion around Convention No. 189 and Recommendation No. 201.

## Methodology

The Côte d’Ivoire study is built upon a two-pronged strategy, which complemented a classic review of existing legislation and secondary sources on labour law generally, and the regulation of domestic work specifically. First qualitative interviews were conducted in December 2013 in the economic capital, Abidjan, with members of the Ministry of Labour, the labour administration (inspectors), and the specialized labour tribunal. Representatives of labour unions (including the domestic workers union, and two current domestic workers who were being represented by the union in complaints) and employers’ organizations were also interviewed, along with members of the NGO community representing child domestic workers. In particular in this study, we were able to meet with the Syndicat des employés de maison, a trade union formed during the colonial period, when domestic workers were chiefly male, and that continues to represent domestic workers who come to it. We also met with the president of a leading NGO, the Bureau international catholique pour l’enfance (BICE), which has undertaken significant public awareness and legislative reform campaigns on behalf of child domestic workers. The data for actors other than the Syndicat des employés de maison representative, the representatives of the general employer and union federations, and the BICE have been coded, to preserve the confidentiality of the informants. Second, court archives were canvassed, which revealed a rich body of written decisions involving domestic workers and their employers. Sixty (60) decisions were identified, from the specialized labour tribunals in Abidjan, Bouaké and Gagnoa, as well as appellate level decisions from Daloa and the Supreme Court. They are current to 20 December 2013.

Despite the breadth of this research study, it remains important to bear in mind that this is a micro-study, based on a small interview sample and a short timeframe. It offers a snapshot into regulatory possibilities, rather than a definitive overview. Every reasonable effort has been employed to provide an accurate, comprehensive portrait, within the existing constraints on case reporting and legislative follow up.

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<sup>21</sup> The *Domestic Workers Private Members Bill* reports that the labour code and the interprofessional collective agreement make no mention of domestic work, and that no legal protection for domestic workers exists. However, this study underscores the extent to which domestic workers are interpreted by the labour administration and the courts to be included within the definition of “worker”. See *supra* note 9 at 5.

<sup>22</sup> See *supra* note 13; *supra* note 18.

## Situating Domestic Workers in the Country Context

Domestic workers hail from the most historically marginalized communities in the countries in which they are located, and Côte d'Ivoire is no exception. In her ethnographic study of residential patterns of domestic workers in Abidjan conducted from 2002 - 2006, Anne-Marie Kouadio found that over 85% of domestic workers in Abidjan were born outside of the city, and 53% were recent arrivals. Few had more than a primary school education, if that at all. Over 89% lived with their employer.<sup>23</sup> A Domestic Workers Private Members Bill proposed on 30 April 2014 and accompanying background study underscore the significance of a range of unlicensed, informal placement agency practices that connect a vast range of persons providing personal services with household employers.<sup>24</sup>

Conditions of employment are challenging and reflective of broader patterns of “boundariless” time typified by domestic work worldwide,<sup>25</sup> despite regulation in the generalist Labour Code. The prevalence of oral employment contracts can be gleaned from the case law, which takes orality in domestic work as a given, and has developed rules to ensure that oral employment contracts are interpreted in the event of ambiguity a manner that favours the weaker party in the employment relationship.<sup>26</sup> The “boundarilessness” of domestic workers’ time<sup>27</sup> is compounded by reported invasions of their physical bodies: privations of food, physical violence, poor living quarters<sup>28</sup> and sexual violence were reported by informants to be prevalent.

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<sup>23</sup> See Anne-Marie Kouadio, *Stratégies résidentielles d'une catégorie de citoyens du bas de l'échelle de qualification: les personnels domestiques féminins de la ville d'Abidjan*, available at codesria.org (detailing migratory patterns).

<sup>24</sup> See Domestic Workers Private Members Bill and accompanying background study, *supra* note 9 at 3-4. Of the 100 agencies visited for the study, none held the approval necessary to exercise formally as placement agencies.

<sup>25</sup> See *supra* note 9 at 4. Decision No. 823/CS4 of 24 November 2001, Abidjan-Plateau Labour Court,

<sup>26</sup> Decision No. 30 of 13 January 2000 (Abidjan Court of Appeal, 1st Social Chamber), *Le Juris-Social* December 2001 is an exception, in which the fact that the contract is oral is specifically mentioned. Interestingly, it is a case in which abandonment of position is alleged, and the employee alleges having received the verbal authorization by the employer to return to Bouaké on the death of his brother's wife, for a period of a “few” days. Another important example is the Abidjan Court of Appeal, 1st Social Chamber, Decision No. 83 of 31 January 2002, in which a live-in domestic worker becomes pregnant. See also *supra* note 67 and accompanying text.

<sup>27</sup> *Supra* note 18 at 33.

<sup>28</sup> In our interviews with domestic workers at the Syndicat National des employés de maison, the domestic workers emphasized that they literally slept two in a closet where luggage was stored, and were required to keep the door open in order to have enough space to lie down. Abidjan, 20 December 2013. In their words, the space was “not made for them”.

The average wage in Côte d'Ivoire is well below the legislative minimum wage previously set at 36,607 FCFA for industrial workers and recently raised to 60,000 FCFA.<sup>29</sup> Kouadio offers the following table of salaries, from 2005 to 2010, to which small amounts of payment in kind were sometimes added:

Salary	Percentage of the Total
Less than 5000 CFA (approximately 12 \$ CAD)	0,6%
5000 – 10000 CFA	5,2%
10 000 – 15 000 CFA	34,6%
15 000 – 25 000 CFA	45,4%
25 000 – 35 000 CFA	8,2%
35 000 CFA and above (approximately 83 \$ CAD)	2%

Kouadio is careful to delineate the neighbourhoods where domestic workers are employed and reside, thereby showing the prevalence of employment of domestic workers not only amongst societal elites, but amongst a broader swathe of the general population, including in relatively modest neighbourhoods. Kouadio situates the average in Abidjan in 2010 at 17 020 FCFA, or 40\$ CAD per month, for approximately 9 ½ hour long work days that may begin before sunrise and end after 10pm.<sup>30</sup>

Through the court decisions, it was possible to supplement Kouadio's study with information on salaries gleaned from the cases. The cases suggest that domestic workers' salaries ranged widely.<sup>31</sup> One of the lowest observed salaries was 15,000 FCFA in 1990 for a live in domestic worker; her salary was raised to 30,000 FCFA when she became a live out domestic worker.<sup>32</sup> This was lower than the 22,609 FCFA monthly salary paid to a male cook in 1974<sup>33</sup> or the 20,000 FCFA paid to a house guardian in 1995.<sup>34</sup> On the higher end, a monthly salary of 50,000 FCFA was paid to a female cook and house cleaner in 2011,<sup>35</sup> 70,000 FCFA was paid to a live-in domestic worker hired as a "cleaning lady" in a 2002 decision,<sup>36</sup> and 75,000 FCFA was paid in 2011 for a female cook hired in 2005<sup>37</sup> and

<sup>29</sup> Decree No. 2013-791 of 20 November 2013 revising the Guaranteed Inter-professional Minimum Wage (SMIG).

<sup>30</sup> *Supra* note 23. These patterns were consistent with those revealed across informants, and in particular by our interviews with domestic workers at the Syndicat National des employés de maison in Abidjan, 20 December 2013.

<sup>31</sup> Due to the manner in which decisions are reported without necessarily providing full identifying information of the litigants, and the rare allusion to nationality or ethnic origin, it was not possible to test a hypothesis, raised by a number of informants during interviews, that many of the employers brought to court were expatriates, generally perceived to pay higher than average salaries, whether or not those salaries exceeded the statutory minimum wage.

<sup>32</sup> Supreme Court, Judicial Chamber, Social Formation, Decision No. 351 of 18 April 2002, *Le Juris-Social* July 2003.

<sup>33</sup> Abidjan Labour Court, 1 April 1975, *Travail et profession d'outre-mer* no 421 of 2 July 1976.

<sup>34</sup> Bouake Court of Appeal, Social Chamber, Decision No. 93 of 12 July 1995, *Le Juris-Social* August 2001. It is important to note that the Court of Appeal awarded the employee the difference between the salary paid (20,000 FCFA) and the operative guaranteed inter-professional minimum wage (33,279 FCFA) for a 15 month period.

<sup>35</sup> Abidjan Court of Appeal, Decision No. 1290/CS4/2013.

<sup>36</sup> Abidjan Court of Appeal, 1st Social Chamber, Decision No. 83 of 31 January 2002.

for a male cook hired in 2009.<sup>38</sup> The cases do not allow a straight line to be drawn between level of pay and gender, although informants suggested that chauffeurs – typically male - tended to be paid more than the SMIG (between 60 000 – 100 000 FCFA per month).<sup>39</sup> It should be borne in mind that in several cases, the Courts alluded to the fact that the employers were expatriates and in one case, the employer’s employment in an international organization was specifically mentioned.<sup>40</sup> This dimension might have some explanatory weight for salaries, as might the gendered dimension of the occupational categories. The study prefacing the 2014 *Domestic Workers Private Members Bill* repeats, and the Bill itself seems to build upon, a more commonly held perception amongst local household employers, which challenges the appropriateness of granting a domestic worker the SMIG when the workers are considered poorly educated. They issue a warning that is prevalent in contexts where there is an abundance of low cost labour in the informal economy: to set and enforce a minimum wage might lead employers either to do without the services of domestic workers, or to hire them informally.<sup>41</sup>

Informants underscored that child domestic work in Côte d’Ivoire is the source of significant concern.<sup>42</sup> The minimum age for work under the 1995 Labour Code was 14 years of age,<sup>43</sup> and is currently 16 years of age with age 14 accepted for apprentices,<sup>44</sup> there is legislation on trafficking and worst forms of child labour, child labour is endemic to a number of industries, including cocoa and coffee plantations, and street work in a country in which education is neither free nor compulsory. Child domestic workers are primarily, but not exclusively girls, who leave rural regions to work sometimes with relatives, sometimes with strangers, in cities. It is estimated that 22% of all domestic workers in Côte d’Ivoire are children. Some are confided to distant family members by rural relatives; increasingly, others are placed by essentially informal, unlicensed agencies. The growing importance of agencies since 2001 is in particular underscored by Jacquemin, who notes that the agencies may merely “place” the child with an employer, or remain quite actively involved in the relationship to the point of referring to themselves as “mothers of the domestics” (mamans des bonnes) and increasingly denounced in the media as “domestic traders”(marchands et marchandes des bonnes).<sup>45</sup> The

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<sup>37</sup> Abidjan-Plateau Labour Court, Decision No. 823/CS4 of 24 November 2011.

<sup>38</sup> Abidjan-Plateau Labour Court, Decision No. 844/CS4 of 13 June 2013.

<sup>39</sup> Interview with Mr. Kone Tadjaga, General Secretary, SYNEMCI, Abidjan, 20 December 2013. See Interview with Labour Court Judges, 18 December 2013.

<sup>40</sup> Abidjan Court of Appeal, 5th Social Chamber, Decision No. 552 of 22 June 2006, *Juris Social* August 2007. See also *infra*, note 126 and accompanying text.

<sup>41</sup> *Supra* note 11 at 5. The preliminary study in the Bill uses the language of the “black” market (“au noir”) without a hint of irony, despite the colonial history and the fact that by some measures, the entire sector would be considered to be organized by “informal” norms.

<sup>42</sup> Interview with Mr. Koukoui, director of the BICE, Abidjan, 20 December 2013.

<sup>43</sup> 1995 Labour Code, Art. 23.8. Moreover, the work is not to exceed the physical ability of the child worker over the age of 14. See 1995 Labour Code, Art. 23.9 (which also applies, incidentally, to women generally).

<sup>44</sup> 2015 Labour Code, Art. 23.2. See also 2015 Labour Code, Art. 23.13 (which continues to apply to women generally as well as children under the age of 18).

<sup>45</sup> See Mélanie Jacquemin, “Travail domestique et travail des enfants: Le cas d’Abidjan (Côte d’Ivoire)” (2002) 43 *Revue Tiers-Monde* 307 at 314 (describing the recruitment practices, and underscoring the diversity of tasks and conditions faced by child domestic workers).

phenomenon of child trafficking is increasingly documented, but there remains a dearth of literature.<sup>46</sup> It is a painful historical irony that child domestic work is exchanged at the Kunta Kinté market, in Abidjan.<sup>47</sup> Physical and psychological violence are reported to be prevalent, and these children rarely have opportunities to pursue a formal education.<sup>48</sup> While the cases occasionally referred to domestic workers as “girls”, none of the cases described the worker as an underaged minor. Combined with the salary data arising from the case law, there is some room to speculate as to whether the domestic workers who use the available labour administration and labour court services are those domestic workers who are the least marginalized.

Finally, it is important to underscore that domestic workers in Côte d’Ivoire are mostly unrepresented by traditional trade union structures. However, this study does offer a glimpse into the ways in which the historical structure – the Syndicat des employés de maison – continues to represent those primarily female domestic workers who come to it for assistance.

## The Application of Generalist Law

### Context

There is therefore a considerable decent work deficit for domestic workers in Côte d’Ivoire. In light of the social reality facing domestic workers in Côte d’Ivoire described in the previous section, a plausible starting premise would be that the generalist state labour law manages to scratch the surface of the largely informal governance of domestic work through the broadly understood – but rarely challenged – law of the home workplace. Wages and working conditions are overwhelmingly set by informal labour market networks for domestic labour, locally constituted and consolidated through familial, friendship and professional – including expatriate – networks, through a normative governance framework that has largely been internalized.<sup>49</sup> The work undertaken on a day-to-day basis is so ubiquitous that it is invisible, and when seen, considered inevitable. It operates in this way despite the existence of generalist laws, which can be, and as the Côte d’Ivoire study illustrates have been, applied.

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<sup>46</sup> Jacquemin notes that agents may not only bring the domestics from northern regions in Côte d’Ivoire, but also from neighbouring countries via Ghana through the route of the Northern Ivoirian border at Bondoukou. *Ibid.* at 315.

<sup>47</sup> Interview with Mr. Koukoui, director of the BICE, 20 Dec. 2013 (indicating, however, that the age of the children is now rarely below 14).

<sup>48</sup> *Ibid.* See also BICE documentation in the Annex to this Working Paper.

<sup>49</sup> See also Sarah Van Walsum, “Regulating Migrant Domestic Work in the Netherlands: Opportunities and Pitfalls” (2011) 23 *Canadian Journal of Women and the Law* 141 (explaining that national labour markets for domestic work may be constituted and hierarchized on the basis of race).

## Innovative Practices: Domestic Workers before the Labour Administration and Judiciary in Côte d'Ivoire

However, what this study also reveals is that there have been appreciable attempts to redress some of the abuse that domestic workers are acknowledged to experience, through the labour administration, and through the judiciary, in termination of employment cases. Those attempts have taken place through, rather than despite, conventional mechanisms like the generalist labour code, the labour administration structure, and the specialized labour tribunal. The initiatives are rarely researched, and consequently are not well known nor have they informed contemporary debates on regulating for decent work for domestic workers in Côte d'Ivoire. Yet the initiatives are effective in applying a “work like any other” framework to many aspects of domestic workers’ employment relationship in the cases that come before it. The initiatives are also deeply limited, whenever the specificity of domestic work would require a substantive equality approach to challenge the pluralist law of the home workplace – including on working time regulation. Tellingly, actors closest to the innovation foregrounded in this paper recognize both the possibilities and the limits of the mechanisms, and have spearheaded specific regulatory initiatives to promote specific regulation of decent work for domestic workers. Those specific regulatory initiatives should be built in relation to, and upon, the jurisprudence, rather than assume it does not exist or is unhelpful.

### Overview of the mechanisms

#### *The Labour Administration*

In Côte d'Ivoire, the Labour Administration is part of the Ministry of Labour, and includes General Labour Inspection service responsible for assuring the effective application of labour law.<sup>50</sup> The Labour Administration also holds general information and guidance functions to the general public, notably on proper hiring and employment practices, and are engaged in the conciliation of labour disputes (*règlement amiable*).<sup>51</sup> The Labour Administration in Côte d'Ivoire is part of a tradition in many parts of the world in which inspectors have broad authority to tailor the enforcement of labour codes to the work context.<sup>52</sup>

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<sup>50</sup> 1995 Labour Code, Art. 91.1ff; 2015 Labour Code, Art. 91.3 ff. In fact, their formal title is “inspectors of labour and social laws”.

<sup>51</sup> 1995 Labour Code, Art. 81.1 & Art. 81.3. See generally Philippe Auvergnon, Sandrine Laviolette and Moussa Oumarou, *Labour administration in sub-saharan Africa: Functions and challenges in light of ILO Convention No. 150 (2011) 150 International Labour Review 81*. In the 2015 Labour Code, Art. 81.2 clarifies that mediation efforts before the labour inspectorate have become mandatory.

<sup>52</sup> See e.g. Michael J. Piore & Andrew Schrank, “Toward managed flexibility: The revival of labour inspection in the Latin world” (2008) 147 *International Labour Review* 1 (contrasting this model with the U.S. model of less flexible and expansive administrative capacity). See also Maria Luz Vega Ruiz, “L’administration et l’inspection du travail dans le domaine du travail domestique: les expériences de l’Amérique latine (2011) 23 *Canadian Journal of Women and the Law* 341 (addressing the resource

Conciliation through the Labour Administration entails formally convening both parties, and while an effort is made to assess whether the employment relationship can be retained, if this is not possible or desirable the labour inspector will calculate the monetary rights under the Labour Code in the event of termination by the employer, termination by the employee or a negotiated resiliation of the contract of employment.<sup>53</sup> The only exception contains damages flowing from a determination that a termination was abusive, which is within the exclusive jurisdiction of the Labour Court.<sup>54</sup>

In the process of undertaking calculations, if the labour inspector determines that the salary paid to the domestic worker was below the general minimum wage (SMIG), the inspector is empowered to readjust the salary paid to reflect the difference, as the courts would appear often do in respect of domestic workers.<sup>55</sup> Moreover, members of the labour inspectorate recognize that social security coverage is mandatory, and that domestic workers – like other workers covered by the Labour Code to whom the Code of Social Security is deemed to apply – should be declared under the Caisse Nationale de Prévoyance Sociale.<sup>56</sup> This issue has been the basis of challenged decisions, in the labour courts.<sup>57</sup>

While the overall calculations can turn out to be quite significant, employers may well negotiate a reduction in the amount that must be paid, at the conciliation stage. We were informed that domestic workers often accept these negotiated arrangements, based both on immediate need and a fear that they might lose their case should the matter proceed to the labour court. Moreover, one informant suggested that a noted tendency in Ivoirian culture to be averse to litigation is exacerbated by a

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challenges that may none the less plague the enforcement of labour laws by the labour administration, in particular in relation to domestic work).

<sup>53</sup> 1995 Labour Code, Art. 91.4; 2015 Labour Code, Art. 91.6.

<sup>54</sup> See discussion *infra*, note 63 and accompanying text. Consider also a Supreme Court decision that allowed lower courts to make an inference that an employer who settled a case before the labour inspector by paying the calculated damages and indemnities for termination accepted responsibility for the termination when a live out domestic worker contested a change to her terms of employment in which she no longer was permitted to take meals at the household where she worked. Supreme Court, Judicial Chamber, Social Formation, Decision No. 351 of 18 April 2002, *Le Juris-Social* July 2003.

<sup>55</sup> See e.g. Bouaké Court of Appeal, Social Chamber, Decision No. 94 of 24 July 1996, *Le Juris-Social* July 2001. Despite a settlement on back pay arrived at by the Bouaké Labour Inspector on 24 August 1995, the Court of Appeal calculated the difference in salary between the amount actually paid per month (20,000 FCFA) and the statutory minimum wage for household guardians (50,780 FCFA), for a 12 month period.

<sup>56</sup> See Article 5, Loi no 99-477 du 2 août 1999 portant modification du code de prévoyance sociale, JORCI no 35 du 2 septembre 1999, pp. 705-720, which provides that all workers as defined by Article 2 of the Labour Code should be affiliated with the social security mechanisms. This is confirmed by a more specific mechanism, Article 4 of the Décret no 96-209 du 7 mars 1996 relatif aux obligations des employeurs, JORCI no 19 du jeudi 9 mai 1996, pp. 447-448. For an exhaustive review See Koné-Silué, *supra* note 14 at 29-32.

<sup>57</sup> See e.g. Case No. 538/3S of 8 December 2011, from the Abidjan Court of Appeal, which was dismissed due to the failure of the appellant to attend. The Abidjan Labour Court's decision No. 152/CS4/2010 that was the basis of the appeal found that the employer had dismissed his domestic worker abusively, and amongst other damages, ordered him to pay 300,000 FCFA for its failure to register the employee at the CNPS. This practice was confirmed in our interviews with labour court judges, 18 December 2013.

prevailing lack of confidence in the independence of the judiciary.<sup>58</sup> In the event of a settlement, the labour inspectorate would prepare a record (process verbal) of the settlement. In the absence of a settlement, or in the case of a partial settlement, the dossier is transferred to the Labour Court.<sup>59</sup>

### *The Labour Court*

The labour court system is part of the general judicial system in Côte d'Ivoire. In reality, the labour court based in Abidjan and a few other regions of Côte d'Ivoire is not as such an autonomous jurisdiction, but rather the social chamber of the first instance court. Yet the subject matter demarcation is significant, as it attests to the understood specificity of labour law, and reflects the significant number of decisions that are litigated in the field. This includes an appreciable number of cases on domestic workers, sufficient to justify a judicial organization of these dossiers primarily into a special chamber of the Court (Chamber 4) of the six chamber structure in Abidjan. Cases on domestic workers are heard both when a domestic worker seizes the court directly, and following a failure to conciliate a decision through the labour inspection services.<sup>60</sup> It should be recalled that the labour court is also called upon to attempt to conciliate a matter prior to adjudicating it (*règlement contentieux*).<sup>61</sup>

Recall that only the Labour Court judge can render a decision for damages in the event of a termination that only the Court may deem to have been abusive (that is, rendered without a legitimate reason<sup>62</sup>, or contrary to Article 4 of the 1995 Labour Code and Article 4 the 2015 Labour Code (essentially, non-discrimination provisions).<sup>63</sup> In this regard, the Labour Court offers a safeguard in relation to settlements that may intervene at the level of the Labour Administration. The domestic worker, including through the labour administration, may still seize the court to obtain a determination that the termination was undertaken by the employer without a legitimate reason, pursuant to Article 16.3 of the 1995 Labour Code, and therefore is abusive. If the termination was abusive, then the Labour Court has read Article 16.11 (2) of the 1995 Labour Code to clarify that it may award damages

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<sup>58</sup> For example, Decision no. 131 of 29 July 1999, the first level tribunal of Bouaké noted that a house guardian who was claiming 1 000 000 FCFA based on 15 months of unpaid salary for a contract terminated without serious reason and without *force majeure* would be entitled to damages pursuant to Art. 14-8 of the Labour Code, but since he entered into a negotiated settlement before the labour inspector pursuant to Article 81.3(2) of the Labour Code for one-tenth of that amount (100 000 FCFA) plus the payment of 90 320 FCFA for salary, no further amounts could be claimed before the court.

<sup>59</sup> 1995 Labour Code, Arts. 81.4 & 81.6. See also 2015 Labour Code, Arts. 81.5 & 81.7.

<sup>60</sup> 1995 Labour Code, Art. 81.16. As mentioned earlier, under the 2015 Labour Code, Art. 81.2, conciliation before the labour inspector is rendered mandatory before a matter may be brought before the Labour Code.

<sup>61</sup> 1995 Labour Code, Art. 81.21ff. Our interviews with labour court judges also underscored the challenges to achieving a conciliated settlement once the matter comes before the courts, particularly if lawyers extend the proceedings. One judge insisted that although at times it might be possible to sense that the parties wish to conciliate, the courts are wary to oblige them to conciliate to avoid adverse publicity. That particular judge had been successful in conciliating past employment cases, but not with domestic workers. Interviews of 18 December 2013.

<sup>62</sup> 1995 Labour Code, Article 16.3; 2015 Labour Code, Art. 18.3.

<sup>63</sup> 1995 Labour Code, Art. 16.11; 2015 Labour Code, Art. 18.15.

relating to the abusive termination, over and above the settlement on the statutory rights relating to other monies due on termination of employment.<sup>64</sup>

A further important dimension is worth noting: domestic workers who appear before the Labour Court tend to be represented by a lawyer, likely on a contingency fee arrangement or with the support of the labour inspection services. As the awards for past non-payment may well be significant, some lawyers have been willing to assume the risk of representation without prior payment, in light of the fee arrangement.<sup>65</sup>

## The Decisions

The decisions of the Labour Court arose primarily in the economic capital, Abidjan, as well as another major urban centre, Bouaké. Most were first instance decisions, although several appellate decisions were also identified.<sup>66</sup> The gender composition of the decisions is itself interesting. Most of the cases appear to have been brought by male domestic workers, with women clearly identified as plaintiffs in only 14 cases.<sup>67</sup> The men were typically house guards, personal chauffeurs, personal cooks, and gardeners. The women were overwhelmingly general household domestic workers,<sup>68</sup> and in only three

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<sup>64</sup> Interview with labour court judges, 18 December 2013. Article 16.11 clarifies that the damage awards granted under that provision should not be confused with awards for a failure to observe notice periods, or severance payments. Abidjan Plateau Labour Court Decision No. 313/CS5 of 8 March 2013 is an example of this principle as applied. A terminated “cleaning lady” entered into an amicable settlement with her former employers entered into before the labour inspector, and confirmed in the written record. The domestic worker then applied to the court, alleging that the dismissal was abusive. The Labour Court agreed, given the absence of justifiable reason for the dismissal. The employers’ allegation that the domestic worker showed herself to be disinterested in her job was therefore judged insufficient reason. The court awarded damages for the abusive dismissal, along with damages for failure to provide the domestic worker with a work certificate, and damages for failure to declare the employee under the CNPS. These damage awards were in addition to the negotiated settlement amount. Similarly, Abidjan-Plateau Decision No. 904/CS4 of 27 June 2013 cites Article 2044 of the Civil Code for the principle that the agreement before the labour inspector is an agreement that puts an end to those elements of the dispute that the labour inspector had the jurisdiction to end. The labour inspector was considered not to be able to resolve the abusive dismissal claim under Article 16.11 of the Labour Code. Moreover, damages were awarded for a failure to apply the monthly transportation allowance under Article 56 and seniority bonus under Article 55 of the Interprofessional Collective Agreement, as well as the payment of damages for non registration of the domestic employee under the CNPS (Article 5 of the Social Security Code).

<sup>65</sup> Interviews with labour court judges, 18 December 2013. For reasons linked to the confidentiality of settlements, we were unable to substantiate this observation with specific examples from our research.

<sup>66</sup> As mentioned at the outset, the data collection for case law extends to 20 December 2013. Any decisions rendered after that date are not analyzed in this study.

<sup>67</sup> This count must be tempered by the fact that the names of domestic workers were not reported in some of the cases, and in the older cases the use of the masculine cannot always be assumed to refer to a male worker. Gender was easier to account for in the more recent, unreported, decisions, in which names were available and the use of feminine pronouns was more prevalent.

<sup>68</sup> In Decision No. 949/CS4 of 4 July 2013, the plaintiff who was hired as a “household employee” contested the stipulation on her work certificate that listed her simply as a “domestic worker”. She challenged the validity of the certificate on that basis, but the Abidjan-Plateau Labour Court simply

cases identified as personal cooks. The age of the domestic worker was mentioned in only a few of the cases, notably where their more advanced age was considered in the determination of damages.<sup>69</sup>

The decisions of the Labour Court dealt exclusively with termination of employment and most entailed determining whether the termination was abusive or not. Procedural issues linked to whether some of the decisions could be received by a labour court were raised in a minority of cases.<sup>70</sup> Some of those decisions, including a case that was appealed to the Supreme Court in 2002, defined the boundaries of domestic work as an employment relationship subjected to certain requirements. In that case, over the protests of the employer, the person who worked for 4 hours per day, for 6 days a week, on a regular basis, as a gardener, was not considered to be an entrepreneur or an artisan, but an employee who normally would be considered to work part time under Decree No. 96-202 of 7 March 1996. However, as the employer had failed to respect the formalities required by that decree for part-time work – namely, issuing the contract in writing, pursuant to Section 7 – the verbal contract was deemed by the Labour Court to have turned into a contract of indefinite duration. Both the Court of Appeal and the Supreme Court confirmed the Labour Court’s decision.<sup>71</sup>

As is common in employment law, moreover, it is the bases on which the courts identify termination that inform the reader of the manner in which the courts understand the domestic work relationship. In one of the earliest identified decisions, from 1971, the Labour Court of Abidjan considered that an employer who tried to convert a house guard’s position into that of a gardener over the employee’s refusal had modified an essential element of the contract of employment. That employee’s refusal could not be considered serious reason for dismissal without notice, as the employer had argued; rather, the employee was entitled to notice pay.<sup>72</sup> The same principle was reaffirmed by the Bouaké Court of Appeal in a 1995 decision, when an employer tried to convert a house guard into a general

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affirmed that the terms “servant” or “domestic” are commonly used words to refer to the same position. On the importance of terminology to recognizing and valuing domestic work, see ILO Law and Practice Report, *supra* note 16, at p. 15 (Box I.1 A note on terminology).

<sup>69</sup> In the Bouake Court of Appeal Decision No. 93 of 12 July 1995, the domestic worker was “about” (environ) 57 years old and had worked for over 6 years with the employer. The labour court also considered the fact that Côte d’Ivoire was in the midst of a crisis, when attributing damages. The Supreme Court in Decision No. 403 of 22 June 2000, *Le Juris-Social* June 2002, the employee was 46 years old at the time of the case; this feature was factored into the amount of damages awarded. In Decision No. 949/CS4 of 4 July 2013, the Abidjan Court of Appeal mentions simply that the domestic worker was born on 30 June 1973 and mentions her place of birth, in the Côte d’Ivoire interior, in Tano Akakro.

<sup>70</sup> For example, in Decision No. 293/CS3 of 6 March 2013, the Abidjan Court of Appeal quashed a default judgment, on the basis that the domestic worker had not worked for the former employer for over four (4) years, and had instead been hired by a friend of the former employer. The case is one of the few cases in which the origins of the new employer (referred to loosely as one of the former employer’s Lebanese friends) is invoked. In Decision No. 32/CS4 of 10 January 2013, however, although the plaintiff was a guardian working in the defendant’s home, both parties appeared to concede that there was no employment contract; consequently the Tribunal found that it had no jurisdiction to decide on the termination. No reasons are given to explain why this relationship was not an employment relationship.

<sup>71</sup> Supreme Court, Judicial Chamber, Social Formation, Decision No. 529 of 20 June 2002.

<sup>72</sup> Decision of 19 October 1971, Abidjan Labour Court, *Travail et profession d’outre-mer* no 327 of 2 June 1972.

labourer on the employer's plantation.<sup>73</sup> The Bouaké Court of Appeal considered the dismissal to be abusive, and took into account the severe economic crisis that Côte d'Ivoire was facing in assessing the reduced likelihood that the worker, 57 years old, with over 6 years of seniority, would find new employment. The Court awarded damages for the abusive dismissal in the amount of 500,000 FCFA. It is important to note that the Court of Appeal awarded the employee the difference between the salary paid (20,000 FCFA) and the operative minimum wage (33,279 FCFA) for a 15 month period.<sup>74</sup> In another decision, a night guard was hired at 20,000 FCFA per month, and sought after working for almost 3 years with the same employer to have his salary readjusted by his employer to respect the SMIG. Instead, he was fired. The Bouaké Labour Court decided that the termination was abusive, and calculated the statutory entitlements, including the difference between the wages paid for a twelve month period.<sup>75</sup> The Abidjan Court of Appeal also resisted characterizing a domestic worker's refusal to perform gardening work that she considered to fall outside of her job description as "insubordination", although it did find that the work should have been performed by the domestic worker.<sup>76</sup> Further, in a 2011 decision, the Abidjan Court of Appeal confirmed a Labour Court decision in which a domestic worker whose working hours ended at 6pm each evening to enable her to go to school and pursue a professional degree, was considered to have faced a significant modification to her terms of employment yielding an abusive dismissal when the employer sought to change her hours to end at 7pm after he married, and the domestic worker refused the change. The employer was forced to pay damages, and the salary differential with the minimum wage was recalculated.<sup>77</sup>

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<sup>73</sup> Decision No. 93 of 12 July 1995, Bouaké Court of Appeal, Social Chamber.

<sup>74</sup> *Ibid.*

<sup>75</sup> Decision No. 58 of 9 March 2000, Bouaké Labour Court. The reasoning in some other cases may seem laconic, with the Labour Courts finding an abusive dismissal by simply affirming that there is no proof to corroborate affirmations, particularly in cases in which an employer alleges that an employee abandoned a post. See e.g. Abidjan-Plateau Labour Court, Decision No. 528/CS4 of 18 April 2013 (a guardian who used to be one of two guards until his fellow employee passed away, and then appeared to be required to work nights consistently, and who took left one evening to attend a religious ceremony).

<sup>76</sup> Decision No. 687 of 21 September 2006, *Juris Social* January 2007, Abidjan Court of Appeal, 4th Social Chamber. In this case, the domestic workers' employers left Abidjan for Mali after the 19 September 2002 crisis. However, they kept her on in the house but under the supervision of the person charged with managing their home. That person was also assuming responsibility for the gardening. When he broke a garden pot, and asked the domestic worker to break it into small pieces so that it could be taken up by the garbage collectors, she refused on the ground that it was not part of her job description. She was fired for insubordination, but the Abidjan Court of Appeal found instead that although the work was indeed part of basic maintenance of the house rather than gardening, she was not insubordinate, much less "irreverent" as the employer claimed, in affirming that she did not consider the task to be part of her job requirement. Practically, this means that the dismissal was justified, but on the basis of a simple fault, rather than serious reason justifying dismissal without notice. The domestic worker was therefore not entitled to damages for an abusive dismissal, but the domestic worker was awarded damages for salary adjustments, payment of CNPS contributions, and for the failure to deliver a work certificate to the employee.

<sup>77</sup> Abidjan Court of Appeal, 4th Social Chamber, Decision No. 68 of 18 March 2011, *Juris Social* April 2012.

Some decisions, like the non payment of wages by an employer that precipitated the employee's no longer coming to work, are dealt with straightforwardly. This is important in a context in which the practice of non-payment of wages is prevalent even for civil servants,<sup>78</sup> as a non-execution of contractual obligations by the employer for which damages for an abusive termination are calculated.<sup>79</sup> The Courts are also attentive to the need for employers to provide proof when they allege that an employee has abandoned a post, and in the absence of proof, find that the employer has proceeded to dismiss the employee abusively.<sup>80</sup> Similarly, in a case in which a domestic worker was notified that she had been dismissed as soon as she returned from medical leave, the employer responded by alleging a litany of reasons why the employment relationship had deteriorated – from frequent theft, to incompetence in the execution of tasks, to absenteeism without justified reason, to the employee often being in a bad mood. The Bouaké Court of First Instance noted the existence of an incompatibility between the parties, and mentioned that the employment relationship of indeterminate duration may be terminated if there is a legitimate reason so long as there is reasonable notice provided. Since in this case no notice was given, and indeed that the employee was replaced, there was a termination without notice. The employee was not reinstated, but was granted her request: 458,400 FCFA.<sup>81</sup> In yet another case, the Court of Appeal of Bouaké considered a termination to be abusive even when it was the night guard who refused to sign a written warning letter, putting him on notice of repeated absences and sleeping on the job. Since the employer had told the employee to leave when the employee refused to sign the warning, the Court found that pay in lieu of notice, as well as other statutory rights on termination, were due to the employee.<sup>82</sup> Repeatedly, the courts seem to seek to challenge a vestige of the traditional, “law of the home workplace” in the domestic work relationship: that is, the employer perception that a domestic worker can be fired at will.<sup>83</sup>

As would be expected, in other cases the bases under which it is possible to terminate without notice due to serious reason have been articulated. For example, the Supreme Court of Côte d'Ivoire confirmed that a guard who failed to notice that the house was robbed by breaking and entry one

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<sup>78</sup> See Carlos Maldonado et al. (1999) *Le secteur informel en Afrique face aux contraintes légales et institutionnelles* (Geneva: International Labour Office, 1999). See also Blackett, *supra* note 8 at 265.

<sup>79</sup> Tribunal du travail d'Abidjan, no 1648/CS4, 13 décembre 2012.

<sup>80</sup> See e.g. Abidjan-Plateau Labour Court, Decision No. 844/CS4 of 13 June 2013. In Decision No. 470/CS4 of 11 April 2013, the Abidjan-Plateau Labour Court does not find a legitimate reason for dismissal, even in the face of allegations that the male cook was violent toward the employer's common law partner. The Labour Court stated that a loss of confidence can never on its own constitute a real and serious reason for the dismissal, even if it relies on objective elements. In contrast, a domestic worker who alleges that she was told to take her vacation and then await instructions to return, and returned only three days after her vacation was over, was found to have abandoned her post. Abidjan-Plateau Labour Court, Decision No. 949/CS4 of 4 July 2013.

<sup>81</sup> Bouaké Court of First Instance, Decision No. 132 of 29 July 1999. See also Supreme Court, Judicial Chamber, Social Formation, Decision No. 279 of 22 May 2003 (abusive dismissal based on an accusation of theft without proof provided by the employer).

<sup>82</sup> Bouaké Court of Appeal, Decision No. 84 of 21 June 2000.

<sup>83</sup> See also Abidjan Court of Appeal, 3rd Social Chamber, Decision No. 98 of 31 January 2002, *Juris-Social* June 2005 (standing for the principle that a dismissal is abusive if it is not for valid reasons, and the allegation that a domestic worker who said harmful things to the employers or who took a bath in the back yard in the presence of young children were not considered to be valid reasons for dismissal but rather, abusive (“*empreint d'abus*”).

night while he was on duty was appropriately fired without notice or payment of indemnities for serious reason (*faute lourde*).<sup>84</sup> Similarly, the Abidjan Court of Appeal accepted that there was a loss of confidence when a breaking and entry occurred with a night guard on duty who had failed to follow instructions to keep outdoor lights on. That employee had in fact been criminally charged, but was not convicted. The Court of Appeal accepted that the “reasonable doubt” which led to the criminal acquittal was none the less sufficient to lead to a loss of confidence in the night guard justifying a dismissal, with notice, and thus with (limited) indemnities.<sup>85</sup> Abandonment cases may well be more troublesome, with some appellate decisions suggesting that it constitutes serious reason for dismissal,<sup>86</sup> while another notes an apparently uncontested lower court decision that because the abandonment was not repetitive, it was not constitutive of serious reason but rather a “simple fault” that may deprive the employee of notice of termination but keeps in place the rights to a range of other rights to payment on termination.<sup>87</sup>

There are also outlier decisions, such as the case in which domestic employers, who were employees of the African Development Bank that relocated from Abidjan to Tunis during the political crisis, were informed that to terminate the employee on the grounds that there was a *force majeure* was a false pretext, as the employment relationship with the domestic worker was for work to be done in and for the employer’s household, irrespective of whether that household was situated on national or foreign territory.<sup>88</sup> Despite that stark claim, it might be explained by the employers’ attempt to invoke *force majeure*, without paying the employees the appropriate indemnities. That the employee who had worked for 7 years for the employers was awarded 10 months of salary suggests as much. The case is consonant with an Abidjan Court of Appeal decision rendered on the same day, recognizing that an employer who lost his job, downgraded his house and changed his mode of life, while also retrenching his male cook’s job acted legitimately. That employer paid the employee the appropriate indemnities as calculated by the labour inspector. It is none the less particularly noteworthy in that same case that the Court of Appeal did not consider the employer’s subsequent decision to hire a female domestic worker to be in contradiction with the suppression of the male cook’s job. Indeed, the Court refers to

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<sup>84</sup> Supreme Court, Decision No. 347 of 18 December 1997, *Juris-Social* September 2001. See also Abidjan Court of Appeal.

<sup>85</sup> Abidjan Court of Appeal, Decision No. 21 of 6 January 2000, *Juris-Social* December 2001. It is not clear on what basis the CNPS was not awarded.

<sup>86</sup> Abidjan Court of Appeal, Decision No. 57 of 20 January 2000. The employee, a male clothes washer, left without informing the employers after the employer criticized the way in which he was serving. It should be noted that given the insufficiency of details, this case leaves open the possibility that the employee was working in a commercial establishment (e.g. a drycleaner), rather than a private household. The case is framed as one between two private individuals but the context in which the work is undertaken is not specified.

<sup>87</sup> Abidjan Court of Appeal, 1st Social Chamber, Decision No. 30 of 13 January 2000. The employee in question left for a “few” days on the death of his brother’s wife. See also Abidjan Court of Appeal, 2<sup>nd</sup> Social Chamber B, Decision No. 171 of 23 April 2010, *Juris Social* April 2011 (chauffeur who sought to obtain a raise, was refused, and did not carry out his work assignment was said to have been fired for legitimate reasons).

<sup>88</sup> Abidjan Court of Appeal, 5th Social Chamber, Decision No. 552 of 22 June 2006, *Juris Social* August 2007.

the newly hired worker as a “girl” who the employer brought in to help his wife with domestic tasks<sup>89</sup> ... Implicit in the decision is the customary practice to pay young female “servants” significantly less than higher status, sometimes formally trained male cooks, even though the former are expected to perform a multiplicity of often poorly delineated tasks and live in their employer’s household. It is fair to conclude from this case that when the court inserts itself into a logic that acknowledges some work as domestic work as work like any other, there coexists comparably less well valued domestic work, performed by a “girl”, that remains invisible.

The “work like any other” framework under the generalist code seems to be applied, when employee misconduct is alleged as the basis for termination. Consider an early Abidjan Labour Court decision from 1975, which found that in the absence of proof that the domestic worker had in fact stolen from the employer, the employer had terminated the employee without legitimate reason. Moreover, the Labour Court recognized the hostile work environment that had ensued, noting that the atmosphere had become “unbreathable” so the employee could appropriately consider himself to have been fired. The employer was required to pay the requisite indemnities.<sup>90</sup> In a 1997 decision, the Supreme Court refused to conclude that serious grounds for dismissal occurred simply because a domestic worker was arrested and then released the same day without charge by the police for a theft that occurred in the employer’s household; it is unclear whether the Court would simply have preferred to have the employee placed on suspension pending the outcome of any court proceedings. There was certainly no discussion of the specificity of the employer’s home as a workplace. Rather, relying on the presumption of innocence, the employer was considered to have acted abusively.<sup>91</sup> In a 2013 decision, the Labour Court refused to accept the notion that a loss of confidence could stand alone as a justification for the dismissal, when the dismissal was not based on objective factors personally attributable to the employee himself.<sup>92</sup> In a 2013 case in which an employer claimed that an employee hired as a cook and “cleaning lady” was verbally, and possibly physically, rough with his child, the Abidjan Labour Court considered there to be a lack of evidence provided to substantiate the allegations, and underscored that the employer’s testimony was contradicted by the domestic worker. The dismissal was found to be abusive.<sup>93</sup>

Other cases reveal, however, that the specificity of domestic work does force decision-makers to grapple with how to apply generalist employment law principles. This is palpable in a 2002 Abidjan Court of Appeal decision, in which a live-in domestic worker becomes pregnant. The social science literature in many parts of the world would suggest that the employee would run the risk simply of

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<sup>89</sup> Abidjan Court of Appeal, 5th Social Chamber, Decision No. 555 of 22 June 2006, *Juris Social*, August 2007.

<sup>90</sup> Tribunal du travail d’Abidjan, du 1e avril 1974, *Travail et professions d’outre-mer*, no 421 du 2 juillet 1976.

<sup>91</sup> Supreme Court, Judicial Chamber (Social Formation), Decision No. 340 of 18 December 1997, *Le Juris-Social* December 2003.

<sup>92</sup> Decision no 535 (No 470/CS4 of 11 April 2013), It is telling that the employer invoked the employee’s physical abuse of his spouse – to the point at which the police were called - as a reason for the loss of confidence. There is little detail in the decision about the broader context. See also Decision no

<sup>93</sup> Abidjan Labour Court, Decision No. 1290/CS4 of 14 November 2013. Damages for non registration under the CNPS were also awarded, alongside damages for a failure to issue a work certificate.

losing her employment at that stage.<sup>94</sup> In this case, instead, the employer - who was paying a wage well above the statutory minimum at the time, 70 000 FCFA - instead provided an option to the employee. Once the baby was born, the employee was asked either to find childcare for the baby during the hours of work – those hours are not specified in the decision – or to take housing elsewhere while retaining her job. We read in the decision that the domestic worker “chose simply to abandon” her position, although no information is given about how realistic either option would have been for her, how soon after the delivery this option was expected to take place, whether the caregiver could have her child’s caregiver stay at the home where she worked, whether even with the relatively high salary accommodation sufficiently close to the employer could be found, and what the broader context of the political and economic crisis would mean for this option. For the Court of Appeal, the domestic worker simply decided not to accept the workplace arrangements that affected “neither her work nor her pay”. The option given to the domestic worker to find someone to care for her child would seem to have been a determinative dimension to the decision, preventing a claim that there was a substantial modification to her terms and conditions of employment. This dimension – and the substantial reasoning invoked in other cases but not raised here to suggest it was the employer who precipitated the constructive or “disguised” dismissal - was not even raised by the Court of Appeal. Instead, the Court of Appeal found the conditions were not changed, but rather there were accommodations made to enable the employee to reconcile her new status as a mother, and her job. Consequently, the termination was not abusive.<sup>95</sup> The live in relationship and the challenge of placing boundaries around the time of subordination – so much a part of the specificity of the domestic work relationship - were at once at the heart of the case, yet rendered invisible in the reasoning.

Another aspect of the specificity of the domestic work relationship, referred to in the Draft Decree on Domestic Workers as the right to a family life,<sup>96</sup> has also emerged in some of the case law. An early decision from 1976 addresses a circumstance in which a domestic worker decided, because of family obligations, no longer to live in the employer’s household. The employer subsequently informed the worker that he would receive a written warning because he was not arriving at work in time to enable the children for whom he cared to have breakfast and go to school for 7am. The employee asked his employer to pay his transportation costs, which is provided for by the interprofessional collective agreement. The employer refused. The Labour Court in Abidjan decided that the employer’s refusal to pay the obligatory transport costs made the employer liable for the rupture of the employment contract, even though the employee left the workplace; in other terminology as understood in both civilian and common law jurisdictions, the employer had constructively dismissed the employee.<sup>97</sup>

The court creatively addressed the specificity of domestic work in a case in which a domestic worker was bitten by the employer’s dog. The Abidjan Court of Appeal had little difficulty finding that the worker had suffered a workplace accident, which should have fallen under the collective compensation scheme of the Caisse Nationale de Prévoyance Sociale (CNPS). However, as in most cases reviewed, the domestic worker was not enrolled in the public scheme by her employer. Consequently, while the Abidjan Court of Appeal seemed to accept that the employee left the job of her own will and as a result was not subject to damages for abusive dismissal rather than invoking constructive dismissal, the

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<sup>94</sup> See generally ILO Law and Practice Report, *supra* note 13.

<sup>95</sup> Abidjan Court of Appeal, 1st Social Chamber, Decision No. 83 of 31 January 2002.

<sup>96</sup> See discussion *infra*, note 132ff, and accompanying text.

<sup>97</sup> Decision of 4 May 1976, “Travail et professions d’outre-mer” no 447 of 2 September 1977. Other decisions by the Labour Court invoke the language of “disguised” dismissal.

Court did accept that the plaintiff should receive damages from the employer in the order of 700,000 FCFA because she was not enrolled in the CNPS and was therefore deprived of any state-provided compensation.<sup>98</sup>

More generally, when the CNPS is claimed by employees within the proper procedural delays,<sup>99</sup> it would appear that it is usually,<sup>100</sup> but not always,<sup>101</sup> applied. The Abidjan Court of Appeal explained that failure to respect the legal obligation to declare workers under the CNPS deprives the worker of all social security coverage, which is prejudicial to the worker.<sup>102</sup> The Supreme Court insisted that the responsibility for declaring a worker rests exclusively with the employer, pursuant to Article 4 of Decree No.96-209 of 7 March 1996.<sup>103</sup> In one exceptional case, however, a domestic worker appears to have been enrolled by her employer after her employment relationship ended (it is not clear whether the enrolment happened after she brought suit before the court). When the worker sought to claim an indemnity, the Abidjan Labour Court found that since she had suffered no prejudice in the interim, her claim for compensation was rejected.<sup>104</sup>

Even cases suggesting that the employer might have had a plausible economic reason for the termination are subjected to a high degree of scrutiny. Consider that the Supreme Court, in 2000, refused to conclude that economic reasons had been established to provide a legitimate reason for termination of a male cook with five years of service with the employer, despite the fact that the employer had been able to establish with precise data that his forestry exploitation had suffered significant losses both in 1995-96 and 1996-97. The Supreme Court repeated that the employer had not established the link between the worker and the enterprise in question. Instead, the Supreme Court underscored the fact that the dismissal occurred three days after the employee had taken sick

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<sup>98</sup> Abidjan Court of Appeal, 4th Social Chamber, Decision No. 209 of 7 April 2005.

<sup>99</sup> See e.g. Decision No. 84 of 21 June 2000 from the Court of Appeal of Bouaké, *Le Juris-Social*, December 2001 (guardian claimed the CNPS after the attempt at conciliation, and consequently was not receivable). In Abidjan Plateau Labour Court Decision No. 313/CS5 of 8 March 2013, CNPS was awarded by the court, even though the domestic worker had entered into a negotiated settlement with the employer before the labour inspector.

<sup>100</sup> See e.g. Abidjan-Plateau Labour Court, Decision No. 823/CS4 24 November 2011 (in which the domestic worker mentioned that as her salary was typically paid in cash, she did not realize that she was not registered at the CNPS until she required CNPS for her maternity leave); Abidjan-Plateau Labour Court, Decision No. 241/CS4 2 February 2012 (employee summarily dismissed while on sick leave; amongst other damages, 700,000 FCFA awarded for non declaration of the employee before the CNPS).

<sup>101</sup> In the Abidjan Court of Appeal, 5th Social Chamber, Decision No. 552 of 22 June 2006, the Court considered that the employee of seven years did not bring proof of the prejudice that she had suffered by the employer's failure to register her with the CNPS. Consequently, it upheld the lower court's rejection of her claim to damages for the failure to declare her under the CNPS.

<sup>102</sup> Abidjan Court of Appeal, 1st Social Chamber, Decision No. 30 of 13 January 2000, *Le Juris-Social*, December 2001.

<sup>103</sup> Supreme Court, Judicial Chamber, Social Formation, Decision No. 123 of 17 February 2011, *Juris Social* August 2012.

<sup>104</sup> Decision No. 949/CS4 of 4 July 2013.

leave to recover from the chicken pocks. The Supreme Court underscored the need to identify the “real cause” of the rupture of the contractual employment relationship.<sup>105</sup>

The decisions are hardly unidirectional, however, and allow one to underscore sites of profound indeterminacy. Working time appears to be an important example of that indeterminacy, in which the courts seem not to draw upon the conceptual tools in the general Labour Code, to engage in an analysis that would enable them to apply working hour and statutory holiday protections to challenge in a manner “work like any other” with exploitative working conditions, notably like domestic workers’ presumed “boundariless” availability. For example, a 1999 decision of the Supreme Court concerns a domestic worker who had worked for her employer since 1980, was asked by her employer on 14 November 1994 to work the following day, on a public holiday. The employee asked whether she would be paid overtime. The Supreme Court reports that this employee was usually paid overtime. The employer, unimpressed, dismissed her summarily, for that reason. While the Abidjan Labour Court accepted that the termination was abusive and ordered damages to be paid, the Court of Appeal ruled that the dismissal was legitimate. On appeal to the Supreme Court, the employee argued that the Court of Appeal’s decision violated the provision against forced labour in Article 3 of the Labour Code, claiming that the employee could not be forced to work on a public holiday. The Supreme Court dismisses this argument summarily, proclaiming rather absolutely that an employer’s request to an employee to undertake overtime hours has never been considered to constitute forced labour.<sup>106</sup>

Similarly, a 2013 Abidjan Labour Court decision involved a night guard, who was hired in 2003 and received a salary of 50,000 FCFA per month. He was required to work on Sundays and on public holidays, as the case puts it, “without financial compensation” by which we understand that the code and decree-based protections on working conditions were not applied.<sup>107</sup> The employee informed his employer in 2011 that he no longer wanted to work on rest days and holidays without compensation, and faced with her surprise, indicated that she would need to find another employee by the end of the month. He finished his month, repeated his affirmation in the presence of a witness brought by the employer, and then sought recourse with the labour inspector. The Labour Court found that the employee had terminated the employment, as is permitted under Article 16.3 of the Labour Code. However, the Labour Court added that the terms of the contract of employment were set and accepted from the time that the agreement was entered into. The Labour Court did not consider whether the terms complied with the Labour Code, which is of public order. The approach is contrary to what the courts appear to do in respect of the payment of the statutory minimum wage.

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<sup>105</sup> Supreme Court, Judicial Chamber (Social formation), Decision No. 403 of 22 June 2000, *Le Juris-Social* June 2002. This case is contrasted with Decision No. 552 of 22 June 2006, *supra* note 89, in which the impact of the job loss was demonstrated on the employees home lifestyle. See also Abidjan-Plateau Labour Court, Decision No. 241/CS4 of 2 February 2012.

<sup>106</sup> Supreme Court, Judicial Chamber, Decision No. 59 of 18 February 1999, *Juris-Social* January 2001. The decision

<sup>107</sup> Abidjan-Plateau Labour Court, Decision No. 813/CS6 of 10 June 2013. Notably, Article 21.1 of the Labour Code allows the parties to set hours of work between themselves, but while respecting the codal provisions. Article 24.1 provides that weekly rest is normally to be taken on Sundays. The case does not clarify whether the employee actually received a weekly rest day, but the tenor of the accusations suggests that he did not. Article 24.2 lists national holidays. Both provisions allow for further details to be fixed by regulation or decree.

The working conditions issue, from the surveyed cases, remains underexplored and constitutes a site for remaining divergence between the generalist labour law framework, and the asymmetrical, pluralist norms of availability that prevail in this field.<sup>108</sup>

At their most fundamental level, the decided cases canvassed suggest that the courts play an important role in enabling parties to recognize that the domestic work relationship is indeed an employment relationship,<sup>109</sup> subject to the general rules applicable to employment relationships.<sup>110</sup> Moreover, in the absence of a written employment contract (the norm) or other proof on the duration of the employment relationship, the courts have also shown themselves prepared to require the employer to provide that proof or otherwise accept the statement of the employee.<sup>111</sup> As one informant remarked, the employers often expressed surprise at being brought before the Labour Court. From the employer perspective, they had provided the domestic worker with a place to live and some level of comfort, and might not even have seriously imagined the relationship to be an employment relationship.<sup>112</sup> To be condemned by the justice system to pay damages to a person that the employer might have considered his or her inferior, could be difficult for the employer to accept. To find themselves at the same table, discussing a potentially conciliated settlement with his or her domestic or chauffeur or house guardian might not be appreciated.<sup>113</sup> They were entering what might seem to them to be a distinct regulatory order: that of generalist labour law.

### Qualitative Assessments

The significance of a process that requires parties to sit across the table and acknowledge each other as actors in the employment relationship is itself a measure of the law injecting some social justice into the domestic work relationship. The existence of the labour administration mechanisms, and the judicial process and decisions, recall the need to assess decent work for domestic workers in context. There is innovation, and even a dynamism in the decision-making that suggests real sensitivity to the

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<sup>108</sup> See Blackett, *supra* note 16 at 784-786.

<sup>109</sup> See e.g. Bouake Court of Appeal, Social Chamber, Decision No. 94 of 24 July 1996, *Le Juris-Social* July 2001. In that case, the employer, referred to as Doctor T, seemed to deny that an employment contract existed, even though he admitted to having engaged the plaintiff as a guardian for 20,000 FCFA but the employee stayed only for 5 months. The Bouake Court of Appeal was therefore able to evacuate the suggestion that there was no employment contract quite summarily.

<sup>110</sup> For example, a probationary period for a domestic worker as for other employees must be stipulated in writing. See Supreme Court, Judicial Chamber, Decision No. 63 of 13 March 1997, *Juris-Social* February 2001 (case of a newly hired chauffeur who died in a car accident).

<sup>111</sup> *Ibid.*

<sup>112</sup> Translation of interview with labour court judges, 18 December 2013. Consider also Bouake Labour Court, Decision No. 109 of 25 May 2000, *Le Juris-Social* September 2002, in which the employer, despite admitting the work that the employee undertook for him, considered the employee (a house guardian) to be a member of the family for whom he cared during an illness but fired him when he refused to wash his car while still on medically prescribed sick leave. By repeating the facts, and Article 2 of the Labour Code, the Labour Court explains why the parties are bound by a contract of employment).

<sup>113</sup> Translation of interview with labour court judges, 18 December 2013.

need to the asymmetry of the employment relationship, and the importance of understanding domestic workers to be workers entitled to the protection of law.

While the conciliated settlements and judicial decisions are important, therefore, they also reveal the limited ability of the administrative and judicial actors to apply the broad panoply of labour code protections, especially on hours of work. There was broad recognition, including by judicial actors, that the Labour Code, although a protective instrument for employees, is only partially adapted to the perceived reality of domestic workers.<sup>114</sup> Bound by the claims as they were filed, and the challenge of crafting remedies in employment relationships that are rarely formalized into a written contracts or even pay stubs, judges acknowledged the difficulty of rendering detailed awards on the basis of claims on matters as basic to domestic work as hours of work. Unlike in the case of abusive dismissal, the onus is understood by informants to rest with the party that alleges that she or he worked excessive overtime or during statutory holidays.<sup>115</sup> Informants expressed concern about how to establish a violation if the facts are contested. Moreover, the few cases that centred the issue of working hours suggested that even with admissions by the parties that the hours were worked, notably in live in circumstances, some judges simply did not seem to appreciate the challenge. Long working hours are so “normalized” and domestic workers own care responsibilities are kept at such a far distance, that that they become invisible. In the absence of specific regulatory texts circumscribing them, they run the risk of remaining invisible.

The interviews also captured the fact that there are situations that are quite simply not anticipated by the Labour Code that prove significant for domestic workers in the Ivoirian context. The issue of a right to a marital life is one that was raised in this study.<sup>116</sup> While some “good” employers celebrated their employee’s marriage and participated in the ceremonies, others considered marriage and a married life to be antithetical to the work relationship, for live in domestic workers.<sup>117</sup> For various reason linked to the specific regulation of decent work for domestic workers, including this example, the Labour Ministry has been actively engaged in elaborating a specific decree on domestic workers, and has involved SYNEMCI, with some support from the ILO.<sup>118</sup>

A further challenge persists. The mechanisms available through the labour administration and through the judiciary are set in motion at the domestic worker’s initiative. Yet knowledge of the mechanisms is extremely limited. Moreover, it is not obvious that there is widespread public knowledge that the mechanisms might yield results, however limited. To the contrary, the SYNEMCI plays a representative role for domestic workers who come to it, and reports receiving a steady stream of workers; even some employers who wish to inform themselves in order to hire and conduct their relationship with their domestic workers in conformity with the law contact them directly.<sup>119</sup>

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<sup>114</sup> Interview with labour court judges, 18 December 2013.

<sup>115</sup> Interview with labour court judges, 18 December 2013 (“C’est celui qui invoque un fait qui doit rapporter la preuve. Si la domestique dit chaque nuit je me réveille pour m’occuper des enfants, si l’employeur ne dit rien, je suppose qu’il ne conteste pas... Mais s’il conteste, il faut qu’elle rapporte la preuve de ce qu’elle dit. Parce que c’est sa parole contre la parole de l’autre.”)

<sup>116</sup> Interview with Mr. Kone Tadjaga, General Secretary, SYNEMCI, Abidjan, 20 December 2013; Interview with members of the Labour Administration, December 2013.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Interview with Mr. Kone Tadjaga, General Secretary, SYNEMCI, 20 December 2013.

SYNEMCI has also stepped out of its formal role as representative of domestic workers, to engage in mediation between domestic workers and their employers, outside of the context of the formal state mechanisms. That the settlements achieved might in fact be on the basis of lesser rights than those afforded under the Labour Code, but invoked speed of settlement as a factor that might lead the parties to accept.<sup>120</sup> Yet its chief challenge is to establish a more systematic contact with domestic workers, during the employment relationship. Domestic workers' isolation in individual households and their limited leisure time prevent them from reaching out.<sup>121</sup> Attendance at union meetings convened to inform domestic workers of their rights is limited. Their main moment of contact with domestic workers, is when the domestic workers face termination of employment.

Civil society organizations and unions have been at the forefront of sensitizing the broader population to the rights of domestic workers. The BICE is a case in point: it has led important public information campaigns underscoring the exploitation faced especially by child domestic workers, and has actively adopted public education campaigns and campaigns to provide training for young domestic workers – in part to break their isolation, in part to provide literacy training, and in part to provide alternative life options for these children.<sup>122</sup> BICE has also created an Association of girls who fight for their rights (*Association des filles battantes*), and has put in place local committees for the protection of child domestic workers' rights. Annex I of this study contains documentation from some of the publicity campaigns that BICE has put in place, including its code of conduct initiative for agencies to adhere to domestic workers' rights. Moreover, BICE intervenes in disputes between child domestic workers and employers, helping the workers to calculate the payments that are due to them under the Labour Code. It also has the assistance of a lawyer, to whom it may refer domestic workers. Finally, BICE has been involved in training of youth court judges and the media sensitization.<sup>123</sup>

The BICE's advocacy recognizes and seeks to address decent work for child domestic workers. Implicitly, BICE recognizes the omnipresence of child domestic work – formally contrary to the labour laws for children under 14 years old – and decries the deeply exploitative character of the placement system to which child domestic workers are subject. It is highly critical of prevailing practices, while seeking to influence them. Therein lies the ambivalence. BICE's code of good conduct for agencies, which at once calls for agencies to undertake not to hire domestic workers who are under 14 years old, and sets out standards for those between 14 and 18 years old, is a key example of the NGO functioning beyond the state where it sees regulatory gaps, in an attempt to influence and indeed formalize informal commercial actors' behavior in the domestic work sector.<sup>124</sup> Yet BICE calls for the regulation of domestic work, including child domestic work, while seeking alternative life options for them in a challenged economic and regulatory context. In this regard, it is active in one of

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<sup>120</sup> *Ibid.*

<sup>121</sup> Mr. Tadjaga reported that the union had undertaken some limited door-to-door outreach, but underscore the high risk of being turned away by household members. *Ibid.*

<sup>122</sup> Interview with Mr. Désiré Koukouï, President, BICE, 20 December 2013. Some of the training in other professions includes fashion design (sewing) and hair dressing. Part of the strategy is clear: by allowing the domestic worker to leave the home, the isolation that might allow violence against the child within the home to continue is abated if only out of the fear that the domestic worker will be able to denounce the household employer's behaviour.

<sup>123</sup> *Ibid.*

<sup>124</sup> See Annex I.c.

the most challenging regulatory questions, which in practice largely elides the formal labour regulatory structures at the core of the innovation: addressing child domestic labour both as a worst form of child labour, and as a development issue.<sup>125</sup>

Finally, it should be underscored that a sensitivity to the broader economic context was rarely far away from the concerns of interviewees. Even proponents of specific regulatory texts underscored the difficulty of regulating decent work conditions in a context in which informality reigns, and in which the employer's conditions might not be considered – rightly or wrongly - significantly better than the employee's. Indeed, it is notable that labour inspectors underscored that most of the employers brought before it by domestic workers were foreign nationals, or workers from international organizations, whose capacity to pay might be significantly greater than Ivoirian nationals.<sup>126</sup>

## Toward Specific Regulation? The Need for Multi-level Social Dialogue

The close study of the work of labour administrators and courts above stands in contrast with the prevalent perception that domestic work is unregulated, excluded by the general law. This premise is however stated explicitly in the 2014 *Domestic Workers Private Members Bill*, which explains its *raison d'être* in the generalized abuse faced by domestic workers, treated as invisible. As mentioned at the outset of this working paper, the starting premise of the Bill is that the workers benefit from no legal protection.<sup>127</sup>

The Bill frames itself as inspired by the ILO Convention No. 189, and is designed to accompany the “dynamic” domestic work sector.<sup>128</sup> Importantly, it does not appear to subtract domestic workers from the application of the Labour Code and the Interprofessional Collective Agreement, invokes both, and specifically refers back to them notably for matters such as paid holiday and the benefit of maternity and paternity leave and nursing breaks (Article 10), as well as for a range of holidays for family events (Article 20), as well as working hours (Article 8).<sup>129</sup> Some of the protections would seem to confirm interpretations provided by the labour courts of those generalist laws, notably on declaration for social security,<sup>130</sup> affirming domestic work as work like any other. The Bill also

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<sup>125</sup> See Aristide Nononsi, “Child labour and fragile states in Sub-Saharan Africa: Reflections on regional and international responses” in Adelle Blackett & Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015) 536.

<sup>126</sup> See e.g. interviews with labour inspectors, 19 December 2013.

<sup>127</sup> *Supra* note 11 at 5.

<sup>128</sup> *Supra* note 11 at 6. The draft offers broad definition of domestic workers in Article 2, but proposes a potentially broad exemption for spouses, ascendants and descendants and collateral family members (a subject that apparently has led to some modification to the proposed text) in Article 3.

<sup>129</sup> Article 8 on working hours is more ambiguous. While it references the requirement to ensure conformity with the Labour Code and the Interprofessional Collective Agreement, it clarifies that the conditions may be organized in conformity with the needs of the household and the interests of the worker.

<sup>130</sup> Consider that Article 19 provides the important confirmation that domestic workers should be declared by their employer for social security protection, although it does not specifically mention the

recognizes some of the specific problems faced by domestic workers, and takes pains to forbid discrimination and acts of violence, including sexual assault and recall the existence of sanctions in the penal code (Article 24). Similarly, it forbids termination of employment by the employer on the grounds of pregnancy (Article 25). It requires placement agencies for domestic workers to receive prior Ministerial approval although conditions would have to be set by decree (Article 26). The Bill would only prevent them from extracting fees from domestic workers' salaries.<sup>131</sup>

It is apparent, however, that the proposal introduces notions that depart significantly from international standard setting, and protections under the 1995 and 2015 Labour Codes. The drafters would also have benefitted from close attention to the way in which the 1995 Labour Code has in fact been applied to recognize the existence of the domestic work relationship. For example, the proposed requirement in Article 5 for a verbal contract to be concluded in front of witnesses might create problems for domestic workers seeking to establish an employment relationship that have not posed problems in the canvassed cases.<sup>132</sup> Article 12 proposes to apply the minimum wage to qualified workers, and to those who are under a period of training, but treats the worker "without any particular qualifications" and without professional experience as an apprentice. However, as seen by the review of the cases, the SMIG is applied retroactively by the courts and the labour administration to regulate the employment of domestic workers.<sup>133</sup> Article 15 of the Bill would appear to allow an employer to claim damages and terminate the employee for a serious reason, in the event of undeclared and potentially even for declared damage to the employer's property. The provision as worded runs the risk of undoing much of the case law discussed above, in which the courts require employers to substantiate their accusations with sufficient proof.

The Bill was adopted by the Social and Cultural Affairs Commission, and became the basis for important public debates about both the undervaluation of domestic work, but within a context that also recognized the highly compressed wage structure in the broader society, including the low wages of post structural adjustment civil servants. Whether most families should have a full time domestic worker was implicit in those debates.

The Constitutional Council rendered an Opinion on the proposition on 10 June 2014, to assess its conformity with Section 71 of the Constitution of Côte d'Ivoire in which laws establish the fundamental principles of labour law, trade union law and social institutions. The Constitutional Council generally recognized the ameliorative purposes of the legislation, but considered that omitted rights – like trade union freedoms and the right to strike<sup>134</sup> – should be included in the law, even if by reference to the Labour Code and the Interprofessional Collective Agreement.<sup>135</sup> It also considered

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Caisse nationale de prévoyance sociale. It retains that this is the employer's responsibility. It also provides a three-month period from hiring within which to undertake the declaration. It sets an employer contribution as well as a worker contribution at 5% of salary.

<sup>131</sup> The language is not as tight as that in Article 15 of Convention No. 189.

<sup>132</sup> Similarly, the Labour Courts have tended to require a probation period to be concluded in writing, but Article 6 would enable a probationary period to be concluded by virtue of a witness.

<sup>133</sup> *Supra* note 29; *supra* note 74 and accompanying text.

<sup>134</sup> Article 28 of the Bill recognized only that domestic workers and their employers may form professional unions of their choice and freely join to exercise their rights as defined under the Labour Code and the Interprofessional Collective Agreement.

<sup>135</sup> Constitutional Council, Opinion No. CI-2014-A-137/10-06/CC/SG of 10 June 2014.

that some of the elements of the law would more appropriately be found in regulatory texts. Soon thereafter, the Bill was withdrawn, for “adjustments”.<sup>136</sup>

A text of a more regulatory nature that is of similar tenor is the Draft presidential decree on domestic workers (Draft Decree). It emerges out of the initiatives of those close to the administration of labour law in Côte d’Ivoire, in 2013.<sup>137</sup> It offers a text that specifically embraces the specific regulation framework with a view to ensuring that “domestic workers may fully enjoy their rights”.<sup>138</sup> Reportedly, it was the basis of extensive social dialogue between the leading trade union confederations in Côte d’Ivoire.<sup>139</sup>

Several aspects of the text are (selectively) inspired by the wording of non-ratified Convention No. 189, as well as Recommendation No. 201. For example, in its definition of domestic work in Article 2, the Draft Decree draws direct language from Article 1 of Convention No. 189.<sup>140</sup> Paragraph 13 specifying that time spent by a domestic worker accompanying the household members on holiday should not be counted as part of their paid annual leave is reproduced as part of Article 19 of the Draft Decree, which also foresees that a contract of employment should foresee the conditions of work that would apply if the employer temporarily moves abroad. It does not, however, address the conditions that would apply should the domestic worker not be prepared to go abroad, and whether that would be considered a significant change to the employment relationship. The influence of Article 7 of Convention No. 189 is also seen in relation to Article 6 on information that an employee should have; regrettably, though, the Draft Decree requires the contract to be in writing. This writing runs the risk of undermining the careful interpretations of the Labour Courts, discussed above, which recognizes that contracts of employment may be oral, but interprets them in favour of workers by considering them to be of indefinite duration, and preventing the introduction of a probationary period that is not in writing.<sup>141</sup> Indeed, given the acknowledged asymmetry of power between often young, poorly educated domestic workers and their employers, one might question the likely impact of placing writing requirements on this category of workers, such as the requirement found in the draft to notify the other party of termination of employment (Article 27).

The Draft Decree recognizes features that the courts have tended to apply, like the applicability of the SMIG (Art. 23); in addition it introduces an initial categorization of domestic workers (Art. 26). However, it also expressly permits 20% of the domestic worker’s remuneration to be paid in kind (Art.

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<sup>136</sup> See *Côte d’Ivoire: deux projets de loi retirés à l’Assemblée nationale*, Abidjan.net, vendredi le 25 juillet 2014.

<sup>137</sup> Copy on file with Prof. Blackett and Dr. Koné-Silué.

<sup>138</sup> Draft Decree on Domestic Workers, by the president of the Republic, on the basis of a study by the Minister of State, Minister of Employment, Social Affairs and Solidarity. Article 3 of the Draft Decree would seem to intend to extend the scope beyond the household, but in the process runs the risk of introducing confusion given the otherwise broad scope of Article 2 of the Draft Bill (and Article 1 of Convention No. 189).

<sup>139</sup> Notably the Union générale des travailleurs de Côte d’Ivoire (UGTCI), DIGNITE, the SYNEMCI, as well as the employers’ confederation: Confédération générale des employeurs de Côte d’Ivoire (CGE) and the federation of small businesses, Fédération ivoirienne des petites et moyennes entreprises (FESACI) within the Independent permanent Commission on Concertation and Dialogue (Commission indépendante permanente de concertation et de dialogue – CIPC).

<sup>140</sup> However, it introduces some room for confusion in Article 3 of the Draft Decree, which alludes to work beyond the household for pecuniary benefit.

<sup>141</sup> See e.g. the discussion at *supra* note 71 and accompanying text.

25), in terms of food and accommodation despite higher working hours for live in domestics, discussed below, and without referencing an employee's right to refuse payment in kind found in Article 32.1 of the 1995 Labour Code, and Article 32.1 of the 2015 Labour Code. Article 12(2) of Convention No. 189 is at once more detailed but insufficiently helpful in the face of the provision on payment in kind, as it leaves scope for national regulations to provide for a "limited" proportion of the remuneration in kind, so long as it is not less favourable than those generally applicable to other categories of workers, and that measures are taken to ensure that the payments in kind are agreed to by the worker, are for the worker's personal use and benefit, and are attributed a fair and reasonable monetary value.

Article 7 of the Draft Decree innovates by specifically recognizing domestic workers' marital freedom, that is, by preventing an employer from forbidding a domestic worker to marry or requiring her to remain celibate during the employment relationship. Although not quite stated in these terms, the principle is consonant with the thrust of some of the court decision-making. Article 20 references the domestic workers' right to exercise religious freedoms. Article 11 of the Draft Decree holds the employer or head of the household responsible to declare the domestic worker before the CNPS and to pay the social security contributions.

Several provisions of the Draft Decree address working hours with specificity. The principle of a ten hour day for six days per week is retained. Moreover, the 10 hour work day is divided under Article 17, from 6 – 8pm, 10 – noon, and 2pm – 8pm, for live in domestic workers. Their maximum work day is 56 hours per 6 day week. However, domestic workers who live out have a maximum of 45 hours per week. (Articles 16 & 17). Overtime is addressed in Article 18, which at once requires the employers to normalize hours in the contract of employment, but also allows for a 15 hour overtime maximum per week. There remains a significant risk that the working hours, as established, legitimize rather than limit a persisting boundariless time of subordination.

Unlike the *Domestic Workers Private Members' Bill*, Article 12 of the Draft Decree requires any person who hires or recruits or places a domestic worker to make a prior declaration with the labour inspectorate, and ongoing information requirements.<sup>142</sup> The labour inspectorate is granted powers to inspect individual households, although the Draft Decree would limit their inspection to entry in kitchens and living rooms (Art. 32). However, like the private members' Bill, it does not address workplace safety and health, and little attention is paid to the panoply of domestic workers' internationally recognized freedom of association and collective bargaining rights.

The Draft Decree does not quite appear to complement the private members' bills; their genesis and trajectories are distinct yet overlapping in time. Proposals overlap and at times conflict, making it less than obvious which is more regulatory, and which is also legislative in content. Tellingly, adoption in both cases appears to have been stalled. Both texts would benefit from close international exchanges, and from ongoing dialogue with the local labour administrators and scrutiny of the court decisions. This working paper seeks to contribute to that knowledge exchange. Critically, however, the initiatives call into question the extent to which domestic workers themselves – locally and in affiliation with the International Domestic Workers' Federation - are actively involved in framing the

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<sup>142</sup> Certain adaptations are made, notably exempting the employer from the requirement to keep a register.

direction and content of these and other reform proposals that claim decent work for domestic workers as their goal.

## Conclusion

One of the most significant lessons of relevance to the broader community is that regulatory innovation may well take place beyond the scope of specific new laws and regulations. In the Ivoirian context, the “innovation” that we have foregrounded is not so much the new proposed specific law and decree, but rather the dedicated implementation of the generalist law by actors in labour administration and the labour tribunal system. Some generalized labour law principles have been applied to domestic workers (work like any other). Rather than dull the claim for alternative regulatory frameworks, the cases have heightened awareness by the institutional actors of the limited actual application the generalist labour code, particularly when matters arise only on termination. In other words, despite the fact that state structures are significantly operationalized – even during a decade of political crisis - to respond to domestic workers’ termination of employment claims, those same institutional actors have developed a heightened sensitivity to the importance of adopting specific regulatory mechanisms to make domestic work conditions visible and to challenge the asymmetrical law of the home workplace (work like no other). Working time is a pivotal site for this challenge, yet the labour administration, the courts and the specific draft Bill and decree as prepared so far – with limited domestic worker and it would seem international involvement - may all succumb to the challenge of this area on which lessened standards, rather than substantively equal protection, are meted out.

Despite the critique of the specific draft instruments, the fact that the actors in a labour administration and labour court system cannot act alone without this broader dynamic relationship is evident in this case study. This extends beyond the at once limited awareness by domestic workers in Côte d’Ivoire of the available recourses, or even because of the generalized perception amongst concerned members of the general populace that any recourse that might be available is deeply limited. Part of the challenge is that attempts to infuse the domestic work relationship with a labour law framework are crafted upon a social context in which broader economic development remains a challenge, domestic work is ubiquitous, and the conditions themselves are generalized and largely legitimized as the normal law of the home workplace. This is part of the invisibility of domestic work, in which the domestic workers’ needs and rights are simply not seen.

An evolving sensitivity to decent work for domestic workers accompanies the international standard setting. This is reflected in the various initiatives in Côte d’Ivoire. It is necessary to encourage ongoing rigorous dialogue between actors and institutions that have grappled with the generalist codes for decades, and the current legislative, regulatory actors, social partners and broad civil society representatives calling attention to the need to change the law of the home workplace to reflect specific decent work principles.<sup>143</sup> The dialogue, and the relationship between specific and general regulation in the Ivoirian context, is dynamic. The International Labour Organization has provided

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<sup>143</sup> See Supra note 16.

international standards. It might well be time for the ILO also to provide space, or communities of ongoing learning on decent work for domestic workers.<sup>144</sup>

This working paper is one country-specific contribution to a broader inquiry into the decent work for domestic work challenge: decent work for domestic workers forces those concerned with labour law's future to look closely, carefully, and creatively at the adequacy of existing regulatory models, and fosters experimentation with contextualized, rooted, equality-promoting alternatives.

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<sup>144</sup> See Gabriela Medici & Adelle Blackett, "Ratification as International Solidarity: Reflections on Switzerland and Decent Work for Domestic Workers" (2016) 31 Connecticut Journal of International Law, forthcoming Spring 2016.

## ANNEX: BICE public sensitization posters

**CAMPAGNE NATIONALE DE  
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**LES BONNES SONT AUSSI  
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Avec le soutien de la commission EUROPEENNE



LUTTE CONTRE L'EXPLOITATION DES FILLES DOMESTIQUES

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# CHARTRE DE BONNE CONDUITE

de l'Association des Cabinets de Placement des Gens de Maison  
de Côte d'Ivoire (ACPGM-CI)

Le Cabinet de Placement dénommé :

**s'engage à respecter les droits des jeunes filles domestiques  
et à leur fournir des prestations de qualité.**

**il s'engage en particulier :**

1. A ne pas proposer des jeunes filles de moins de 14 ans pour le travail domestique.
2. Pour les jeunes filles de moins de 18 ans, à les mettre en contact avec des employeurs que si elles se présentent avec leurs parents ou tuteurs.
3. A ne pas placer une jeune fille de moins de 21 ans dans un débit de boisson.
4. A se conformer aux lois et règlements régissant le placement payant notamment en se dotant d'un agrément de travail et en tenant les 3 registres relatifs aux demandes d'emplois, aux offres d'emplois et aux placements effectués.
5. A ne pas conclure les contrats de travail et récupérer le salaire, en lieu et place des filles.
6. A traiter les filles avec respect et dignité dans l'exercice de son métier et à proscrire toutes formes d'abus à leur rencontre, en particulier les abus sexuels.
7. A ne faire payer aux jeunes filles pour ses prestations qu'un tarif forfaitaire d'inscription dont le montant ne doit pas dépasser 5000 FCFA.
8. A veiller à ce que le contrat de travail négocié par la jeune fille domestique comporte des termes avantageux notamment en ce qui concerne les tâches à accomplir, le salaire, les horaires de travail, le repos hebdomadaire, l'environnement du travail, etc. En aucun cas, à négocier des conditions en deçà des dispositions prévues par le Droit.
9. A lutter contre le «trafic des enfants» en évitant de faire venir les jeunes filles des villages en vue de leur exploitation.
10. A s'impliquer par la médiation dans la résolution des litiges entre les filles domestiques et leurs employeurs, à les protéger contre toutes formes de maltraitance et à les assister dans toutes les procédures les concernant.

Ont signé:

Pour l'ACPGM-CI, le Président :

Pour le Cabinet, le Responsable :



Réalisée avec l'appui technique du BICE et le soutien financier de la COMMISSION EUROPEENNE

