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Comparative Legal Analysis of Domestic Worker's Legal Status under International and Russian Law

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Abstract:

Purpose: The article aims to identify the international legal mechanisms for protecting the labour rights of domestic workers and determine the extent of their conformity with the Russian legislation.

Structure / Methodology / Approach: To determine the mechanisms for protecting the labour rights of domestic workers, it seems necessary: first, to estimate the efficiency of the international legal mechanisms; second, to analyze the labour standards of the Russian legislation aimed at the legal registration of such labour relations; third, to study the provisions of the legislation in a number of states; fourth, to formulate recommendations on the implementation of the provisions of the international labour law in part of regulation of domestic workers' labour; fifth, to determine the legal prospects for the Russia's participation in ILO Convention No. 189 concerning Decent Work for Domestic Workers.

Results: The conducted comparative legal analysis showed that the Russian legislation in general complies with the provisions of ILO Convention No. 189 concerning Decent Work. However, in practice labour relations with domestic workers are rarely subject to legal formalization, which results in the violation of rights of such workers without further consequences. The authors propose to enshrine in the legislation the employer's obligation to conclude written employment contracts. Besides, the authors have developed proposals for improving the existing labour legislation in accordance with the international standards.

Practical Implications: The results can be used to improve international legal regulations, as well as in the formulation of policies aimed to protect and promote the labour rights.

Originality / Value. The main contribution of this study is the elaboration of ways aimed at progressive development of international and national legal regulation of relations associated with the legal status and labour of domestic workers.

Keywords: ILO, labour rights of domestic workers.

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Paper Type: Research article in Special issue dedicated to Russian Economy.

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1. Introduction

The issue of the legal regulation of domestic workers' activity is of immediate interest today. They are a vulnerable group, who usually gets involved in work without any documentation of the existence of the employment. According to ILO, the use of such workforce is especially predominant in Latin America, Asia, Africa, European and Arab countries where over 50 million people being affected.

It is worth noting that the ILO does not turn a blind eye to the specific features, relevant to domestic workers (Bekyashev, 2015). The demand for legal governance of the matter first arose in 2008, when the ILO Governing Body selected the topic to be discussed at tripartite negotiations. These were the prerequisites for the drafting of a unified document to regulate labour and guarantee workers' rights. The authors of the first study under the auspices of the ILO demonstrated that domestic wage employees put in significantly more work than their colleagues from other areas, which adversely impacts their health and quality of life. Under the ILO's estimates, since mid-90s until 2010 the number of domestic help increased by 19 million people (ILO Statistics, 2018).

According to the most recent global and regional estimates produced by the ILO, at least 52.6 million women and men above the age of 15 were domestic workers in their main job. This figure represents some 3.6 per cent of global wage employment. Women comprise the overwhelming majority of domestic workers: 43.6 million workers or some 83 per cent of the total. Domestic work is an important source of wage employment for women, accounting for 7.5 per cent of female employees worldwide (ILO, 2011). A large number of such women are migrant workers (Bekyashev & Ivanov, 2015). These figures estimates that the aspects of the legal regulation of female protection at work has gained an international character whereby the world community forms special approach for solving discrimination in this sphere (Bekyashev & Mikrina, 2016). Available data show, that domestic work is a growing economic sector. As stated by the International Labour Conference, "the challenge of reducing decent work deficits is greatest where work is performed outside the scope or application of the legal and institutional frameworks" (ILO, 2002). Legislation and regulatory policy are hence essential tools for eliminating the negative aspects of informality in the domestic work sector while at the same time ensuring that opportunities for decent work and employment offered by domestic work are not compromised. Extending the reach of labour law to domestic workers is an important means of bringing them within the formal economy (ILO, 2009).

The increased participation of women in the workforce, the intensification of work, and the absence of strong social policies permitting the balancing of work and family life, ensure the on-going importance of, and increased demand for, domestic workers in most developed and developing economies. Yet domestic work tends to be undervalued and poorly regulated, manifesting the lack of decent working conditions

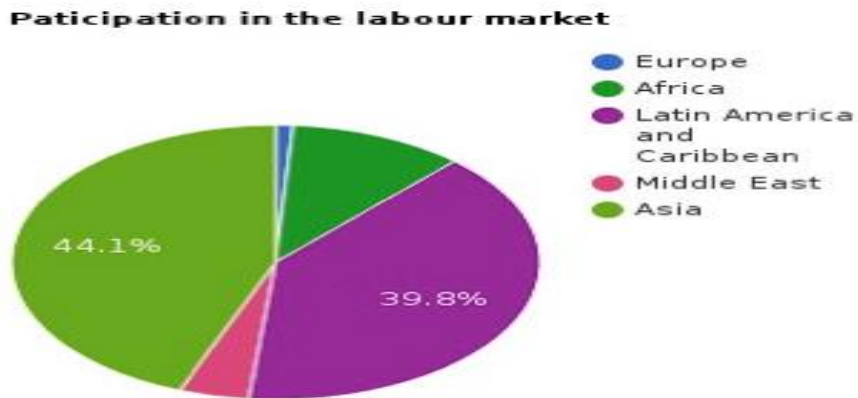
that is particularly characteristic of the informal economy. Thus, domestic workers have enabled many other workers, particularly women with families, to participate and advance in the productive, formal economy, thereby achieving greater influence; however, they themselves often do not have the rights and protections necessary to ensure that they enjoy conditions of decent work.

Children as domestic workers are involved in hazardous work and become victims of forced labour covered with the irresponsibility of the society itself and particularly their parents. Consequences of children involvement to work may affect not only generic moral level of minors, but also an educational grounding in the state that impede the ensuring of progressive development in many spheres of life (Mikrina, 2017). Legislative provision may require employers to safeguard young domestic workers from certain potentially hazardous aspects of domestic work and contribute to the realization of their right to education and personal development. In order to encourage monitoring in this area, many countries have also required employers to keep records of young persons they employ and to cooperate with public authorities. Such record keeping may ensure that employers, State institutions and other interested parties have access to information necessary to monitor and protect young domestic workers from employment that could jeopardize their health, safety or morals and interfere with opportunities to participate in further education and training (ILO's Guide, 2012).

Domestic workers are no different than any other type of employees, but in practice they represent a vulnerable group, since besides lacking any basic rights, they also fall outside the scope of any pension and social programs. The difficulty in legalizing this kind of employment lies with the fact that to act as an employer, a person has to register as an official insurer for the purposes of providing social, pension and medical coverage. Thus, to conclude an employment agreement, the Employer must transfer payments for the protection of such Employees. This long-standing situation is also satisfying to some domestic workers, since their wages are thereby excluded from taxation. At the same time, the labour of such workers is undervalued and deprived of any protection, and when a domestic worker reaches the age of retirement or breaks his leg, he gets sacked without the right to pension or any material support (Federal Law, 2002).

The employment in the area of domestic services can also be well-illustrated by its extensive working hours. Southeast Asians follow the longest working week (e.g., Malaysia – 66 hours, Thailand – 58 hours, Indonesia and Philippines – 52 hours) and for Middle Easterners' the working week is 64 hours. The domestic staff in the majority of developed states however enjoy a part-time working week: 15 hours in Austria and Norway and 26-27 hours in Spain and Italy (ILO's Guide, 2013). (Figure 1).

Figure 1. Review of domestic workers' participation in the world labour market 2018 (prepared by the authors).



2. Research of Regulation of Domestic Work

2.1 Back to the past and the reason for fair regulation of domestic work

Domestic labour is intertwined with the global history of slavery, colonialism and other forms of compulsory labour (Fauve-Chamoux, 2004). In its modern manifestation, domestic labour presents a global phenomenon, crystallizing a hierarchical relationship based on race, ethnicity, indigenesness, caste and nationality (Andall, 2004). Any work related to household assistance continues to be undervalued. Of course, it is still paid, but the legal regime for such employment relationships is absent in many states. Moreover, a large share of domestic workers are foreigners (in essence, labour migrants) who are among some of the most vulnerable workers across the world, because of their position as invisible workers and their precarious status as migrants (Bamu, 2018). Due to the lack of effective enforcement of labour legislation, domestic workers are still dependent on their Employers' perceptions of justice, as opposed to a universally accepted legal rule, recognizing their human dignity (ILO's Report, 2010). The International Labour Conference turned its attention to paid domestic work in labour standard as early as 1936, in discussions on holidays with pay (Blackett, 2018). In 1948 the International Labour Conference adopted a resolution on the conditions of employment of domestic workers, which recognized the "urgent need" to establish minimum living standards "compatible with the self-respect and human dignity which are essential to social justice" for domestic workers in both developed and developing countries (Lagutina, 2016).

2.2 Effective mechanisms of labour regulation with the adoption and ratification of the Convention No 189

The adoption in 2011 of the Convention Concerning Decent Work for Domestic Workers 189 and Recommendation 201 thereto were the first stimuli for future reform. The Convention entered into force on the 5th of September 2013 and has been the source of hope for the improvement of domestic workers' status and Employers' attitudes ever since. Convention № 189 establishes the minimal standards vis-a-vis the rights and protection mechanisms to be enjoyed by domestic workers, acknowledging the economic and social value of their jobs and confirming their equal entitlement to decent labour.

At the moment 25 States have ratified Convention № 189, having reformed and continuing to reform their state policies regarding domestic workers. Some of them, including Argentina, Chile and Paraguay, made sweeping amendments to their legislation after the Convention was adopted (Poblete, 2018). For example, German labour law already applies to domestic workers on an equal footing with other workers, but the Government still needs to take a number of steps to apply the Convention in full (Trebilcock, 2018).

3. Analysis of the Russian Labour Legislation

3.1 Legal analysis of the rules of the Russian labour law compliance with the provisions of the Convention No 189

The Russian Federation is not a Party to Convention 189, although the Labour Code of Russia contains Chapter 48, which deals with the legal framework regulating domestic work. This has sparked up many disagreements. Because of this, we considered it appropriate to conduct a comparative study of Convention 189 and the Russian labor legislation.

The adoption of the Convention seeks to place the protection domestic workers within the domain of international treaty and incorporate it into the field of labour law. The Convention defines domestic work as "work performed in or for a household or households". The term domestic worker is described as "any person engaged in domestic work within an employment relationship". In Russia, natural persons not possessing the status of sole proprietors may enter into employment relationships with workers for the purposes of personal service and household help. Thus, it can be concluded that the term "domestic worker" is in fact enshrined in the labour legislation of the Russian Federation.

Each worker's labour function is typically contingent upon the needs of their Employer. However, according to Russian Law, the Employer who is not a sole proprietor must register their Employment Agreements with the local government, meanwhile the Employee agrees not to perform any work contrary to the Labour Code. It follows from the foregoing that the Russian Labour Code Rules, defining the term "domestic worker" are consistent with the Convention. It is also worth

stressing that private individuals can enter into employment relations with foreigners legally present in the territory of Russia, both under employment agreements and contracts for the provision of services for personal and domestic needs and the like, when unrelated to entrepreneurial activity (Federal Law, 2002).

Working in such conditions presents a difficulty: since private individuals are reluctant to register their agreements and controlling unregistered Employers is almost impossible, violations of labour law are common. In cases where a domestic worker's rights were infringed or where their legal status was restricted, the ILO Convention's Article 3 provides for freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

Importantly, in Russia, unionizing is impossible for those, who perform their functions under an agreement with natural persons unregistered as sole entrepreneurs. Collective bargaining and entering into collective agreements, the right to strike, to compensation for workplace injury as well as emotional distress are not envisaged in the Russian legislation. Thus, any relations with domestic workers will be subject to only to general restrictions, such as the prohibition of compulsory labour, the discrimination in respect of employment and the prohibition to enter into employment with people who are not of age.

Establishing the minimum employment age for children applying for domestic work is an important task of all State Parties to this Convention. According to Article 4 of the document, the minimum age should not be not lower than established by national laws, and where the child engages in domestic work before the age of 18, such work must not serve as a hindrance in their the education, whatever the stage. The Russian legislation provides measures for protection of light and uninjurious labour of children aged 15 and over. It also lays down the minimal age for the entry into employment contacts and safeguards the child's right to receive basic education.

Many of the domestic workers serving behind closed doors are exposed to abuse. Such cases testify to the fact that Employers often enjoy impunity and that there is a lack of public awareness about serious breaches of rights and Unions' occasional failure to act of Unions further impairing any options for protection mechanisms. This is why Article 5 of Convention 189 mandates the State to provide domestic workers with effective protection against all forms of abuse, harassment and violence. This can be enforced where such workers are employed through private employment agencies, which enables them to avoid fraudulent and bad faith practices: something, to which the ILO Convention's Article 15 also appeals.

Since 2016 Russian private employment agencies have been acting in lieu of actual employers. The Employment is conducted by temporarily transferring workers (the

Staff) with their consent to a natural or legal person, without the latter (the Receiving Party) acting as their Employer for the fulfillment by the workers of certain functions under their Agreements under the Receiving Party's interests, instructions and control (supervision). Thus, State supervisory and assessment bodies are responsible for conducting any inspections of Private Employment Agencies. It should also be noted here that Russia never ratified the ILO's Convention 181 concerning Private Employment Agencies.

Normally domestic workers are employed in the conditions provided by their employers and have no ability to choose their place of work, influence their schedule, holidays, with the Employer proposing his own schedule and household as a solution in most cases. In this regard, Article 6 of Convention 189 mandates that measures be taken to provide workers with decent working conditions and, if they reside in the household, decent living conditions that respect their privacy. In many states all over the world, including Russia, there is no supervision of domestic Employers' compliance with labour legislation. In line with article 303 of the Labour Code of Russia, which governs employment relations where the Employer is a natural person, a written employment agreement must include all essential conditions for both Parties. Convention 189 contains an exhaustive list of the most important issues, which must be covered in a written contract, such as: the type of work to be performed; the remuneration and periodicity of payments; paid annual leave, and daily and weekly rest periods; the provision of food and accommodation, where necessary; and, of course, the terms and conditions relating to the termination of employment, including any period of notice.

Regrettably, in practice Employers are rarely ready to enter into written agreements with domestic workers. A number of States have introduced standard or template employment contracts. Undoubtedly, these employment contracts may bring clarity to the conditions of employment and Employer-Employee relationships. However, a template employment agreement only reflects the rights that already exist under domestic labour law. The Russian law also states that the Employer must register an agreement, following which the local government, upon reviewing the agreement for provisions in violation of domestic workers' rights, can oblige the Employer to remedy the violations. However, the failure to register such an agreement does not entail any legal responsibility, and should a dispute arise, proving the existence of employment would be quite difficult. Statistically speaking, Russian employers barely ever conclude and register such agreements, and such relationships are taken outside the scope of law.

As opposed to other workers, domestic workers are particularly vulnerable, when it comes to the regulation of holidays and working hours. This problem is solved by Convention 189, which obliges the governments to take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and

paid annual leave in accordance with national laws. Some States stipulate legal working hours, but in practice domestic workers are often expected to be available around the clock, especially when they work and reside in their Employer's household.

On this subject, the ILO adopted the Recommendation concerning Decent Work for Domestic Workers (2011), which caps the permissible working hours for domestic workers, who reside in their place of work. In the current situation, on top of all essential conditions for the Worker, it is also important to account for all periods of weekly rest, which under Convention 189 must be no less than 24 consecutive hours. In Russian Labour law, the regime for work and rest is determined by the agreement between the Employee and the natural person-Employer. And since national legislation does not provide for any specific norms regarding domestic workers, they are subject to general rules and limitations: the length of the working day amounts to up to 40 hours per week, with holidays capped at 28 days.

In many states the issue of domestic workers' pay remains legally unsettled. Domestic workers are recognized as the lowest paid category of workers, when they are paid at all. According to Convention 189, each State must ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex.

As a rule, national governments will typically establish minimum wages for all types of employees, except for domestic workers. The governments have rarely succeeded in recognizing domestic work as labour in its own right. Many workers continue to fight for the right to minimum wage coverage. In the USA the National Domestic Workers Alliance (NDWA) has succeeded in advocating for a federal law reform. In particular, the adopted Domestic Workers' Bill of Rights provides for a salary no lower than the set minimum and provides for compensation of all hours, worked overtime. The Republic of South Africa adopted the National Minimum Wage Bill according to which the minimal wage for domestic workers was to be raised, starting the 1st of January 2018. If the Employer was undervaluing the cost of Employee's work, the law then obliged them to raise the payments. Under UK employment laws, domestic workers are excluded from a number of labour standards, including maximum weekly working time, restrictions on the duration of night work, occupational health and safety legislation, and, if they reside in their employer's home and are 'treated as a member of the family', the minimum wage (Fudge, 2016). The Russian legislation also guarantees minimal wage, which however falls short of covering the minimal cost of living. The category of "other employers", apparently referring to Employers who resort to domestic workers must pay out of their private funds. Article 133 of the Labour Code of Russia guarantees the minimal monthly wage to Employees, who have worked the prescribed working hours and discharged work quotas (work responsibilities).

What concerns the means of payment, through which a domestic worker can exercise their right to decent remuneration, Article 12 of Convention 189 enumerates all legal means of monetary payment, which is to be made on a monthly basis. The provisions of the Convention also do not exclude the option of receiving payment in kind with the consent of the worker, provided it will be used for personal purposes.

Domestic workers in Russia are not allowed to receive payment in-kind, the circulation of which is legally limited. However, the remuneration does not have to be in cash, where a written consent of the worker was given and if such a payment does not exceed 20% of the calculated amount of monthly salary. Therefore, the percentage ratio of payments (monetary and in-kind) helps to safeguard the workers from unfair payment and arbitrary actions of the Employer.

The specific nature of domestic labour exposes the worker to potentially unsafe working conditions. Article 13 of Convention 189 obliges Employers to provide safe and decent working conditions for domestic workers. In the present time the high latency of domestic employment makes it impossible to say that States have taken adequate measures to supervise the working conditions of domestic workers in Russia and in other countries.

What concerns social care, Article 14 of Convention 189 lays down the framework for maternity protection via national laws, reinforced by the States' obligation to enroll this vulnerable category into social benefits and insurance schemes –*id est*, social welfare systems. Some developed European States include domestic workers under the ambit of their social welfare laws. Austria, Belgium, Italy, Portugal, France, and Switzerland all treat domestic workers as beneficiaries of their compensatory and pension schemes (Social protection, 2016).

Article 219 of the Labour Code of Russia states that all Workers, regardless of their Employer, have the right to safe working conditions. In cases where the Employer is a natural person, they will be fully responsible for providing guarantees to pregnant women and people having family responsibilities, as well as offering them social insurance and coverage.

Apart from guaranteeing the protection mechanisms for the rights of domestic workers, it is also of crucial importance to safeguard their access to justice. A legal recognition of the existing relationship in writing, reflecting the minimal wage, working hours, facilitated payment schemes and social security payments will expedite civil proceedings and lessen the burden of proof *vis-à-vis* the breach of a Workers' rights. Article 16 of Convention 189 empowers domestic workers with the right to access courts, tribunals and alternative means of dispute resolution. Russia presently recognizes a number of means and opportunities for filing claims, where the Employer breached the Agreement. However, the number of such claims is negligible. Since Employers barely ever draft written contracts with their domestic

workers, scarcely any complaints eventually end up under government scrutiny. According to the Labour Code of Russia, unsettled individual employment disputes where the Employer is a natural person are heard by the Court as per the standard procedure.

3.2 Private employment agencies: overall trend

The private employment agency industry has grown at an incredible pace over the past three decades due to the increasing need to provide workers and services to a growing and flexible labour market. User enterprises hire temporary agency workers to be able to rapidly adjust to the shifting economic realities (WPEAC, 2009). In certain countries, private employment agencies play a role in the recruitment and placement of domestic workers. Some agencies offer services to assist households in identifying candidates for employment, and to help domestic workers find a job. Alternatively, agencies may employ domestic workers themselves, with a view to making them available to households. Where domestic workers are recruited in one country for employment in another, agencies usually play a role both in the country of origin and the country of employment. Legislative efforts in this area can draw on Convention No. 181 and Recommendation No. 188, and the ILO's Guide to private employment agencies: Regulation, monitoring and enforcement (ILO's Guide, 2007)

The regulation of the activities of employment agencies is generally seen as a necessary means of ensuring the protection of domestic workers and the prevention of fraudulent and abusive practices, including labour exploitation and forced labour (ILO Global report, 2009). The Russian Federation is not an exception according to the legal changes adopted in 2016. The rules of labour legislation are to regulate the new launch of the institute of private employment agencies. These certified agencies provide the labour of the employees (personnel) and acts as a guarantee giver of fair regulation of employment relations due to the true contract with the outstaffing subject matter. The essential condition for concluding a contract is the obligation of an employer to act in accordance with the labour legislation in order to provide safe working conditions. Obviously, we can state that this is the first step to legalize the working activity of domestic workers on the territory of the Russian Federation. This rulemaking of Russian public authorities creates legislative protection of domestic workers from abusive or fraudulent practices:

- provide for the establishing for a system of agency licensing or certification;
- require agencies to accurately inform workers of their labour rights;
- provide for the supervision of contracts by a public authority;
- prohibit agencies from charging fees to the worker, or, where permitted, strictly limit such fees;
- prohibit deductions of fees charged by agencies from the worker's remuneration;
- specify respective obligations of the agency and the household vis-à-vis the worker;

- provide for appropriate sanctions or penalties for agencies infringing the law, including the prohibition of agencies engaging in fraudulent practices and abuses;
- require agencies to report on their activities to the labour inspectorate or other competent authority.

To guarantee that all protection mechanisms are effective, we must foster fruitful and favorable conditions for social partnerships. Domestic workers enjoy the right to association, join unions and found such partnerships. The Convention calls upon states to consult representative bodies of Employers and Employees, which will enable the enhanced protection of this category of workers. In accordance with the rules of the Russian law, domestic workers are entitled to join unions, but they cannot create one from scratch, where the Employer only has a few Employees. Consolidated effort of States, exercised through the improvement of national legislation, can help surpass the legal barriers and lower the level of domestic workers' vulnerability.

4. Conclusions, Proposals, Recommendations

1. On the basis of the conducted legal analysis, considering the acuteness of the issue and the vulnerability of domestic workers, we can conclude that the necessity for enhanced protection rises at the same rate as the increasing demand for domestic workers in the present world.
2. The conducted comparative analysis of the Russian labour legislation and Convention 189 enables us to state that, generally speaking, the Russian legislation is consistent with the treaty. In our view, both the Russian legislation and that of states actively using the labour of domestic workers must reflect international standards developed by the ILO. The legislation in force in Russia (Chapter 48 of the Labour Code) protects only those who have concluded an Employment Agreement. However, as regrettable as it may be, employers rarely commit in writing.
3. In the light of this, another issue arises: how to act in the absence of the employment agreement? Apart from that, the binding requirement to conclude a written employment contract must be determined either by the length of the employment (*e.g.*, establish a term of 2 years and over, upon the expiration of which the registration with the appropriate bodies will become compulsory) or in accordance with the received wage of the Employee. This should be conducted in such a way that even in cases when the Employer seeks to evade his tax obligations, the Employee should at least be entitled to receiving a minimal wage.
4. Additionally, we submit that only a wide State Ratification (include that by Russia) of Convention 189 can prevent the use of forced and unsafe labour. The Convention's implementation will promote the requirement to officially list employment agencies, will encourage the elimination of violence and prevent

Employers' impunity. Considering the above, we can conclude that domestic workers in Russia need to attain the highest level of legal protection, which can be conducted through the ratifying the convention and its further incorporation into the Russian legislation.

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