EXPLOITED, UNDERVALUED - AND ESSENTIAL:
DOMESTIC WORKERS AND THE
REALISATION OF THEIR RIGHTS

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Exploited, undervalued – and essential: Domestic workers and the realisation of their rights

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INTRODUCTION

This book contains the findings of the Domestic Workers Research Project (DWRP), based on research conducted under the auspices of the Social Law Project (SLP) at the University of the Western Cape from 2009 to 2012.¹

The idea of the project arose in 2008 from a suggestion by Advocate Roseline Nyman of the Cape Bar, subsequently a member of DWRP’s Reference Group, that domestic work was an area in need of in-depth research from the perspective of the implementation of workers’ rights. This was certainly an exciting if somewhat daunting proposition. The sector called out for attention not only because of its size, its de facto lack of regulation and the fact that domestic workers are mainly black women bearing the brunt of historical disadvantage; it also presents a unique set of challenges in terms of the conceptual and institutional framework of labour law. The mismatch between conventional labour law and non-standard forms of employment in the context of globalised markets (discussed more fully in the chapters that follow) has long been an area of debate, research and legislative responses which, by and large, have not surmounted the problem. In the domestic work sector these questions present themselves in particularly intractable forms. Any progress towards developing effective forms of regulation in this sector, it seemed, would not only improve the lives of domestic workers; it might also provide some ideas for the development of labour law more generally in responding to the challenges of informalisation and deregulation across a range of sectors.

And, at approximately the same time, the Governing Body of the International Labour Organisation (ILO) was approving a proposal to set standards on decent work for domestic workers, starting a process that would lead to the adoption of the ILO’s Domestic Workers Convention² and its accompanying Recommendation in June 2011.³ DWRP sought to contribute to this process, inter alia by providing research support to the South African workers’ and government delegations to the International Labour Conference in 2010 and 2011, and has joined others in hailing the Convention as a landmark. But, in itself, the Convention does not answer the question that motivated this research: how can equal treatment and decent work for domestic workers be turned into a practical reality? It is for readers to judge how far DWRP has succeeded in taking the inquiry forward, not only at the level of knowledge production but in terms of applied research aimed at finding better ways of dealing with the problems that have thus far obstructed the implementation of domestic workers’ rights. We ourselves, certainly, are the first to recognise that a great deal still remains to be done in the area of research as well as advocacy; and, for

¹ More information about DWRP can be found on its website at www.dwrp.org.za.
² Convention 189 concerning decent work for domestic workers, which entered into force on 5 September 2013.
this reason, implementation of workers’ existing rights rather than the
formulation of new rights is being considered as the focus of SLP’s
research in the years ahead.

It remains only to express sincere appreciation to everyone in the
research team and others who contributed so much to the study reflected
in this book. First and foremost these include the authors, whose
particulars are given below, and colleagues who formed part of the
research team at different times. Special mention must be made of Ray
Mungoshi and Jim Mayua, who took part in producing the project’s first
research papers in 2009-2010, Verne Kleinmidt who contributed to the
chapter on migration, Ernest Booy who assisted with technical editing,
Annalize Swartz who looked after the administration of the project so well
and, above all, Fairuz Mullagee, who not only contributed to the research
but managed the project as a whole with unfailing determination and
without whose input it would not have got as far as it did.

We are grateful also to FNV Mondiaal not only for providing the
funding that made the research possible but also for their collegial advice
and support that helped us to negotiate some of the difficulties that were
encountered along the way. Similarly, we appreciate the support
experienced at all times from the Faculty of Law at UWC and the Dean,
Professor Julia Sloth-Nielsen, whose expectation of high-quality research
was one of the driving forces that helped us to stay focused. In terms of
intellectual stimulation and guidance we were fortunate in engaging with
a great many colleagues, collaborators and partners at an academic as well
as a practical level. Although it is impossible for all to be named, I cannot
omit mentioning Margareet Visser, Jan Theron and Shane Godfrey of the
Institute for Development and Labour Law at the University of Cape
Town and, internationally, Celia Mather, Karin Pape of WIEGO, Barbro
Budin of the IUF, Claire Hobden of the ILO, Professor Helen Schwenken
of the University of Kassel, Professor Rolf Birk, Director Emeritus of the
Institute of Labour Law and Industrial Relations in the European Union
in Trier, Professor Sarah van Walsum of the University of Amsterdam,
Jenny Moss of Kalayaan, Professor Bridget Anderson, Director of the
Centre on Migration, Policy and Society in Oxford, and Emeritus
Professor Manfred Weiss of Goethe University in Frankfurt. The insights
they and others shared with us added much to our understanding, though
any shortcomings are for our own account.

But also at a practical level the knowledge we gained from others was
critical in guiding our research. We are deeply appreciative of the
cooperation offered by the Department of Labour in the Western Cape and
nationally as well as the willingness of the Commission for Conciliation,
Mediation and Arbitration (CCMA) to share information with us. Most
important of all was the relationship that DWRP developed with the South
African Domestic Service and Allied Workers Union (SADSAWU)
during the course of the research and, through SADSAWU, with growing
numbers of domestic workers in Cape Town, Johannesburg and Durban.
Capacity-building was one of the objectives of the project, but what started

4 Women in Informal Employment: Globalizing and Organizing.
5 The International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco
and Allied Workers’ Associations.
6 Kalayaan is a London-based organisation that supports migrant domestic workers.
as training workshops soon evolved into a two-way dialogue where we shared our findings with workers and, in turn, took on board the comments, questions and further information which they had to offer. Without their input our findings would have been much poorer.

Darcy du Toit
Editor
CONTRIBUTORS

In order of appearance

Darcy du Toit is an Emeritus Professor at the Faculty of Law, University of the Western Cape. He obtained his BA LLB at the University of Cape Town and an LLD at the University of Leiden in 1979. He has taught, researched and published in most areas of labour law, focusing in recent years on collective bargaining, discrimination and the regulation of non-standard work. He is currently the research coordinator of the Social Law Project at UWC and serves on the Advisory Board of the Institute for Development and Labour Law at the University of Cape Town, the Board of Advisors of the European Labour Law Network and the Local Organising Committee for the 21st World Congress of the International Society for Labour and Social Security Law, to be held in Cape Town in 2015.

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Jennifer N. Fish is chair of the Department of Women’s Studies at Old Dominion University in Virginia, USA. Her research focuses on women’s labour and migration in the informal economy, social policy protections and women’s collective mobilisation through civil society organisations. Over the past 12 years she has worked with the South African Domestic Service and Allied Workers Union (SADSAWU) to promote workers’ rights. Her book publications include Domestic Democracy: At Home in South Africa (2006) and the co-edited collection Women’s Activism in South Africa: Working Across Divides (2009). More recently, Dr. Fish has worked with the International Domestic Workers Network during the establishment of the first global policy on domestic workers rights through the International Labour Organisation. She is a member of the Women in Informal Employment: Globalizing and Organization (WIEGO) research policy institute at Harvard University and the Social Law Project at the University of the Western Cape.

Nandi Vanqa-Mgijima is a gender activist currently working as a researcher-educator officer for the International Labour Research and Information Group (ILRIG) in Cape Town, a support service organisation that works with social and labour movements. Her focus areas are new empirical material on the working and living conditions of working-class women, the gendered nature of the labour market, feminisation of labour and how women are organising differently. Her research interests are around the areas of women, employment, access to service and organising. She has registered for an MPhil on organising and empowering domestic workers.

Yvette Wiid holds an LLB as well as an LLM (cum laude) from the University of the Western Cape. She is currently a lecturer in the Mercantile and Labour Law Department at UWC and is in the process of completing her LLD, which deals with the right of persons with disabilities to social protection and an adequate standard of living.
You see here in South Africa, most of the people they underrate us, mostly they isolate us; in our workplace most of the people they want to pay us low money. Maybe they will say R50 a day, because they know us Zimbabweans we are stranded and desperate people, and we don't have money. In our country we are suffering and because I have nowhere to go and nothing to do in South Africa, we end up agreeing [accepting] that money. And that's the problem that we're facing here in South Africa: we want sometimes to send food back to our children back home but we can't afford to do that because of the money they are giving us.1

1 I n t r o d u c t i o n

Domestic work assures the regeneration of society through care labour extended to families, children, elderly and households. As the global economy expands, this sector has grown, with a distinct increase in migrant informal worker populations fulfilling the needs of household reproduction. Because it takes place in the private sphere, and is often considered an extension of ‘women’s work’, domestic labour largely remains informal. International labour, policy and gender debates on domestic work have confronted a prevailing tension between the sector’s growth worldwide and the pervasive gaps in social, economic and legal protection. Over the past decade domestic work policies have emerged in

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* I am thankful to colleagues at the Social Law Project, UWC, who contributed substantially to the content, conceptualisation and analytic emphases of this chapter. In particular, I thank Verne Kleinsmidt for her foundational efforts on this chapter and Ray Mungoshi for his research on several of its topics. Ernest Booys provided substantive research to assure the most contemporary data on the rapidly shifting topic of migration in South Africa. Fairuz Mullagee and Darcy du Toit have informed pivotal conversations through analytic insights over the course of the past four years of shared scholarship and research in Cape Town, Geneva and Amsterdam. This chapter was made possible through their visionary and sustained work to assure both academic and applied measures of social protections for domestic workers in South Africa.

1 Statement by a migrant domestic worker at DWRP focus group, Cape Town, 11 July 2009.
certain countries to begin to build systems of protection for this highly marginalised group of workers. Yet the persistent feminised and devalued nature of domestic work, coupled with its largely informal nature, pose serious challenges to regulation and policy implementation. This leaves most domestic workers in precarious working conditions, with limited opportunities to access the social and legal protections established at state and international levels. When we consider the impact of migration on domestic work, both the vulnerable nature of employment in this sector and its effect on those who cross national borders to seek economic livelihood intensifies substantially.

The face of domestic work worldwide is characterised increasingly by migrant workers, the majority of whom are women. According to the International Labour Organisation’s most recent and comprehensive report, the global sector contains approximately 53 million documented domestic workers, 83 per cent of whom are female. In the context of globalisation and the growing interconnected flows of labour resources, domestic work has become one of the largest sectors of employment in the informal sphere. In 2011, after two years of tripartite discussions, the International Labour Organisation (ILO) established the first set of global standards for domestic work as a means towards formalising this sector and promoting labour rights, particularly for migrants who fall outside the reach of most employment protections. This global policy represented the most comprehensive attempt to respond to the transnational labour realities of globalisation by proposing protections also for migrant workers in the informal part of the domestic worker sector.

In the course of this process South Africa came to be seen as a model country in terms of the establishment of labour policies for domestic workers. Given the particular history of household service labour under apartheid, domestic work remains a deeply embedded social institution and also remains one of the top sources of employment for black women. The legal framework that emerged in the post-1994 democratic

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2 S Ally problematises the notion of ‘vulnerability’ in relation to the reification of domestic workers’ dependency on the state in South Africa’s post-1994 construction of social rights and labour protections. For her sophisticated analysis of this distinct dialectic relationship between ‘statecraft’ and ‘vulnerability’, see S Ally From servants to workers: South African domestic workers and the democratic state (2009).
4 Convention 189 on Decent Work for Domestic Workers (‘Convention 189’), accompanied by Recommendation 201 concerning Decent Work for Domestic Workers (Recommendation 201), discussed in part 2.1 below.
5 Author’s ethnographic observations, International Labour Conferences, Geneva, June 2010 and June 2011.
6 According to Statistics South Africa, the number of domestic workers stood at 840,000 in the last quarter of 2012, the vast majority of whom were African. This exceeded the total number of women in the manufacturing industry (557,000) and was second only to the number of women doing informal work in the non-agricultural sectors (874,000): Quarterly Labour Force Survey 4th quarter 2012 Table 3.1.
dispensation, which placed South Africa amongst the most advanced countries in the world in terms of labour rights, saw virtually the full range of legal protections extended to domestic workers. The expansive national coverage of basic conditions of employment, unemployment insurance, minimum wages contained in a dedicated sectoral determination and the right to organise have since become benchmarks for the integration of domestic labour law within national legislative frameworks.

As we consider South Africa in the context of globalisation, the rapid increase in transnational migration is changing the composition of the domestic work force and complicating the application of established legal rights. These demographic shifts are critical to assessing the impact of labour protection for domestic workers because of the high and escalating rates of political and economic migration to South Africa. The International Red Cross and the UN Refugee and Food Aid Agencies estimate that at least 10 million African refugees are now living in South Africa. According to the most recent UNHCR figures, South Africa was the ‘world’s largest recipient of individual applications’ for asylum in 2011. In 2012, more than 100 000 people sought asylum in South Africa. From a comparative perspective, more new asylum seekers arrive in South Africa each year than in all 27 member states of the European Union (EU).

While this data offers overviews of political migration to South Africa, economic migrants are not documented in these figures. Like their housing, education and transient status, employment placement is most often informal and therefore very difficult to capture. As in the global context, access to employment in private households provides a means to circumvent residency and labour requirements. This reality presents a further challenge to the relevancy of the existing labour legislation in that, despite rapid increases in migrant populations, the national labour laws have not yet aligned to include non-residents. As a result, domestic labour law in South Africa is weakened in terms of relevancy and enforceability because its coverage does not extend to migrants.

7 See Chapters 3 and 4 (above). At the time of writing the right to compensation for occupational injuries and diseases is the sole protection that is not available to domestic workers, but the Department of Labour has expressed its intention to correct the anomaly: see part 2.1.1 of Chapter 4 above.
8 Sectoral Determination 7: Domestic Work Sector (South Africa), discussed in part 5.1.2 of Chapter 3 (above).
12 NL-Aid (n 10 above).
This chapter explores how South Africa’s legislative framework of domestic work intersects with its immigration laws, as well as the realities of substantial increases in flows of migrant workers who enter the country and gain employment in private households. After setting the global context for the increase in feminised labour migration, I explore the fissures between law and practice within South Africa’s existing context. The discussion then moves to a larger analysis of national, regional and international legal frameworks that set standards for domestic work in South Africa. Gaps in policy and implementation form a central analytic framework for this chapter, illustrated through a case study of the application of social security protections for migrant domestic workers. The chapter closes with a series of ideological and policy change proposals that emerge from a recognition of the vital interplay between migration and domestic work in the South African context.

2 Migration, domestic work and globalisation

South Africa’s influx of migrant workers reflects global patterns of increased movements of people, capital, and culture across borders. While domestic work holds a particular meaning in South Africa’s history, contemporary trends link the growth in the global economy with an expansion of service labour. The intersection of shifting economic, political and social forces has manifested in both unprecedented numbers of migrant labourers and increasing demands to evaluate the relevancy of global work standards, human rights and legal protections for populations who lack access to formal citizenship. To situate South Africa within this larger global context, let us turn to an overview of the patterns that shape migration and domestic work trends in Sub-Saharan Africa.

2.1 Global migration patterns

The unprecedented numbers of people who are leaving their home countries to settle in other countries for various reasons has prioritised questions of migration and citizenship rights within the international community. According to the United Nations Population Division (UNPD) estimates from 2010, the number of people living outside their country of birth rose to at least 214 million, more than double the 1980

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figure of 102 million. In contrast to popular belief, the number of migrants moving from developing countries to developed countries is estimated to be a little more than a third of the global total. Migration between developing countries represents almost the same figure, while migration between developed countries is slightly lower, at less than a third. The United Nations estimates that some 75 per cent of all international migrants are located in 30 countries in the world, which identifies them as the preferred destinations. This small sample of key data trends parallels scholarship and applied research worldwide, which consistently reflect sharp increases in populations ‘on the move’.

This increase in international migration comprises a key dimension of globalisation, with free transnational flows of capital being accompanied by rapid increases in the movement of people across national borders. Contemporary globalisation literature repeatedly illustrates how the nature of work has shifted towards informal, outsourced and transnational forms, creating both new economic opportunities and increased vulnerabilities for workers. The economic policies, political and social developments that have accompanied these processes have strengthened the interconnectedness of different levels of globalisation’s impact. Neo-

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16 According to the ILO’s International labour migration: A rights-based approach (2010) http://www.ilo.org/public/english/protection/migrant/download/rights_based_approach.pdf (accessed 29 April 2013), international migrants represent between 7% and 20% of the population in most Organisation for Economic Co-operation and Development (OECD) countries. Most South–North migration is headed for Europe and the United States, while North–North migration mainly takes place within Europe and across the Atlantic. The ILO estimates that in 2010 there were about 105.4 million economically active migrants (including refugees) across the world, representing 44% of the total migrant population. These economically active migrants and their families comprise 90% of the migrant population. Around 39.1 million are in Africa and Asia, somewhat more (around 60.2 million) are in Europe and North America.

17 In 1998 migrants represented no more than 4.2% of the industrialised countries’ total workforce. The United States absorbed the bulk of the increase (more than 81% of new migrants from developing countries), while Canada and Australia accounted for another 11%. In the European Union migrants were heavily concentrated in France, Germany, Italy and the United Kingdom. Throughout the 1990s the number of those coming from developing countries grew significantly faster than those originating from other OECD countries, so that by 1998 they had become the bigger group, representing some 57.8% of all migrant workers in the organisation’s member countries: see The World’s Women 2010 (n 16 above).

18 Globalisation refers to an inter-related series of processes that have emerged around the world since the 1970s – a period which, following the internationalisation of world trade and investment during past centuries, saw the increasing global connections among production, labour, migration, money markets and finance capital, fuelled by a revolution in information technology that made it all possible. See discussion in part 5 Chapter 1 (above).

19 For key overarching texts on these patterns of globalisation, see Marchand & Runyan (n 13 above); J Roseneau Distant proximities: Dynamics beyond globalization (2003); A Giddens Runaway world: How globalization is reshaping our lives (2002); D Held et al Global transformations: Politics, economics and culture (1999); G Ritzer Globalisation: The essentials (2011); Sassen (n 13 above).
liberalism – that is, liberalising trade, investment and markets by reducing regulation – has given employers more flexibility in competing in global markets. At the same time, the growth in outsourced modes of labour has resulted in less accountability for protections within employment relationships. The macro context of global restructuring also decreased the relevance of the nation-state and increased the porousness of borders, allowing easier access to an international labour market through formal and informal networks. Dicken outlines how these macro changes have impacted the labour economy:

Until recently, the production process itself took place primarily within national boundaries. Today the picture is very different: national boundaries no longer act as ‘watertight’ containers of the production process.

Shifting relations from non-industrialised countries’ supply of raw material for industrialised countries’ development processes has signified the emergence of a new global division of labour. Within this restructuring of the global economy, means of production have expanded beyond raw materials to the intimate labour dimensions of household and family reproduction, where domestic workers fulfil a vital role in this transnational labour supply and production process.

The impact of these economic shifts, as well as the accompanying neo-liberal policies, has fallen disproportionately on the developing world. In national contexts with very limited resource bases, migration becomes one of the few options for populations left destitute by economic change. Although global migration provides increased economic and social capital opportunities, we must not overlook the personal struggles and human impacts of vast relocation and family/community separation. Migration is beset with difficulties ranging from the costs of travel to the risks associated with arriving in unfamiliar societies, often without legal authorisation or a dependable support network and with little financial resources. These challenges are especially defining for poorly educated sectors of the population, whose position in the labour market is tenuous. Social and

This global shift was also referred to as the ‘Washington Consensus’, with reference to the policies considered necessary for market-driven economic growth by key financial institutions based in Washington DC, such as the World Bank and the International Monetary Fund. The political contestation surrounding these policies, which has dominated much of the last two decades, will not be discussed here; suffice it to note that organised labour has resisted many of the measures associated with neo-liberalism, especially those resulting in loss of jobs, and has sought to promote alternative policies. For a leading critique of neo-liberalism, see JE Stiglitz Globalisation and its discontents (2002). See also the discussion in part 5 of Chapter 1 (above).

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22 See E Boris & RS Parreñas Intimate labors: Cultures, technologies and the politics of care (2010).

23 In 2005, eg, the unauthorised population of the USA was estimated at 10.3 million people, including 5.9 million unauthorised Mexican immigrants: GH Hanson ‘Illegal migration from Mexico to the United States’ NBER Working Paper 12141 (March 2006) 1 http://www.nber.org/papers/w12141 (accessed 26 April 2010).
psychological costs, such as the prospect of leaving families behind, are also central influential factors. Associated risks, including the possibility of failing to obtain the expected employment or to earn the anticipated wage, or having to live under deplorable conditions, also deter prospective migrants from leaving home.24

Furthermore, given these realities, families of migrants throughout the world carry an immeasurable psychological burden as a result of separation, emotional trauma and increased day-to-day risk factors. These realities are easily overlooked in mainstream analyses of global migration. When we consider the increase in the domestic labour sector, coupled with the intimate nature of the work, its isolation and vulnerability within a private household work context magnifies the human costs of migration.

Migrant numbers are swollen further by the unprecedented number of refugees globally, which peaked at around 18.2 million in 1993 and thereafter declined somewhat.25 The growth in the number of asylum claimants nevertheless has raised anxieties among the signatories to the 1951 Geneva Convention and the 1967 Protocol relating to the Status of Refugees about their capacity to host more political migrants. South Africa has assented to but has not ratified the Convention Relating to the Status of Refugees, which defines a refugee as any person who26

\[\text{as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.}\]

Article 3 of the Convention requires states parties to apply the provisions of the Convention to all refugees. Accordingly, states may not discriminate on the basis of ‘race, religion or country of origin’. In the case of refugees who are employed, the Convention requires contracting states to give them the same treatment as their own nationals. As will be discussed below, these distinctions between refugees, asylum-seekers and economic


26 Convention relating to the Status of Refugees, 189 UNTS 150; entered into force 22 April 1954.
Chapter 6

migrants become central to access to legal policies and practices in South Africa.

2.2 Theories of migration

Predominant economic analyses of migration have focused on how economic differences within and between countries influence population movements. This foundational body of literature on migration repeatedly explains the phenomenon through economic ‘push-and-pull factors’. Todaro, for example, draws from this body of work to illustrate that the decision to emigrate is the logical product of the expected income differential between the home and the destination countries. The application of this framework suggests that labour migration occurs when the aggregated effects of push and pull factors outweigh the costs and risks of migration. This predominantly quantitative analysis of migration has framed the field over the past three decades. Yet we must also distinguish between the two sets of factors by recognising that ‘pull factors differ from push factors in that they are based on expectations rather than on actual experience’.

Other theoretical bodies have challenged the western and overly simplistic notion of the predominant economic focus within migration theories, calling for a wider scope of analysis and greater regional specificity. Sinclair, for example, has questioned the relevance of the push-pull factor frameworks in Southern Africa, stating that such a model ‘leans towards a contextual simplicity and a particular economic rationality that are not unquestionably universal’. A range of applied analyses of migration have examined disproportionate impacts on already marginalised populations, such as women, ethnic, religious and sexual minorities. Diverse perspectives such as these frame complex and expansive theoretical, political and applied debates surrounding explanations for and responses to the escalating rates of migration worldwide. The scope of these debates extends far beyond the goal of this chapter and is well documented. My intention is to contextualise the most relevant factors that set the larger context for the migration of domestic workers, particularly in the Southern African region. Therefore, rather

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27 For a classic historical perspective on the migration factors, see EJ Ravenstein ‘The Laws of Migration’ (1885) 48 Journal of the Statistical Society of London 167. For a much more contemporary study of migration in South Africa, see H Solomon Of myths and migration: Illegal immigration into South Africa (2003).
28 Solomon (n 27 above) 7.
30 Solomon (n 27 above).
than focusing on the uni-dimensional push-pull explanations, I highlight aspects of migration most relevant to domestic work as part of a complex and multidirectional interaction amongst a range of economic, political and social trends.

Migrants are driven across national borders by numerous forces, including even environmental crises. The ILO has argued that contemporary migration is caused mainly by growing economic disparities amongst countries, a shortage of jobs, and tenuous human security conditions. In addition to economic factors, political stability (conflict and wars), social circumstances (including oppression stemming from race, class, gender, religion and sexuality), cultural ties, ease of access, environmental factors (food security and famine) and social networks form central motivations in migrants’ decision to relocate. In addition, people are forced to leave because of overcrowding which exerts pressures on limited natural resources. Related factors include ‘inequality between poor and rich countries; growing urbanisation; reduction in the cost of transport and communications, resulting in increasing interactions among societies; the absence of respect for human rights in some countries; and establishment of migration networks by earlier migrants’. These interrelated socio-economic, political, environmental and demographic circumstances reinforce one another, making the isolation of particular explanatory push/pull dynamics extremely difficult to unscramble.

Central to these processes, the migration of populations pronounces race, class and gender divides within an overarching global context that adds citizenship and national origin to the intersections of inequality as they play out in the transnational ‘trade’ of domestic workers. The global economy has reinforced a racialised division of labour that reifies aspects of slavery and colonial eras, where dark-skinned populations provide labour for wealthier, and often lighter-skinned privileged groups. Native populations in richer countries, for example, tend to shun certain jobs that are associated with lower socio-economic status, people of colour and immigrant labour pools. As the ILO has noted, this creates a bifurcation in the market, whereby perceptions of ‘low-skilled jobs in secondary labour markets in informal and small enterprise sectors become dependent on low-skilled migrants, often those in irregular status’. These immigrant-dependent jobs are located mainly in agriculture, construction, cleaning, catering, hospitality services, tourism, care work, domestic service and entertainment.35

34 ILO (n 16 above) 24.
35 ILO (n 16 above) 23.
Feminist analyses question the characterisation of domestic work as 'low skilled', given the expanse of responsibilities and the central role of social reproduction of the household societal unit. Campaigns for the rights of domestic workers in the United States, for example, have focused on the immeasurable value of love labour and 'Caring Across Generations'. Analyses of efforts to formalise domestic work through the establishment of legal protections emphasise that domestic work is 'real work', worthy of legal and social protections and realistic remuneration. Yet the devalued and underpaid nature of this labour can be attributed to the racialised, gendered and migrant-based division of the international labour pool, with women of colour for the most part supplying care needs for households throughout the global economy.

Parallel to the wider global landscape that relies upon women of colour to perform household service labour, migrants' ability to move – especially in the case of workers without formal skills – is powerfully constrained by legal, economic, and social barriers. As they relocate, migrants are constantly reminded of their vulnerability to state practices of inclusion and exclusion. Such macro political, economic and social structures create increased power differentials where the insecurity of migrant domestic workers' positions is heightened in the context of their 'outsider' status.

2.3 The gender face of migration

The changes in the macro context of globalisation discussed above carry a distinct gender dimension as the rate of women's migration is increasing throughout the world. Estimates suggest that 49 per cent of the migrants globally are women. For many migrant women, seeking domestic work even under the worst conditions is often the only available option. In order to pursue a migrant work path many women, including highly qualified professionals, downsize their professions to seek employment as domestic workers, carers, commercial sex workers and cleaners, performing roles that locals may be reluctant to fulfil.

Migrant domestic workers face increased vulnerability because their frequently undocumented citizenship status places them in positions of

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36 See also the discussion in part 4 of Chapter 1 and parts 5.2.8 and 7.6 of Chapter 3 (above).
38 Peberdy (n 15 above) 1.
39 The participation of women in international migration was lowest in Western Asia, at around 39%, followed by Southern and Northern Africa (both 43%) and Southern Asia (45%). At the other extreme is Eastern Europe, where the share of women international migrants was around 57%, followed by Central and Eastern Asia (both 55%) and Northern Europe (53%). United Nations 'Population and families' http://unstats.un.org/unsd/demographic/products/Worldwomen/WW2010Report_by%20chapterBW/Population_BW.pdf (accessed 27 June 2013).
greater dependency on private employers and the informal economy for subsistence. Their ability to move within the labour market is severely limited by state policies of inclusion and exclusion according to citizenship qualifications. It has been noted that the unrecognised role played by domestic workers liberates others – mainly women with greater access to economic resources – from the duties of caring for the family and home. Migrant workers who ‘do the mothering and caretaking work of the global economy’ have thus become vital to release women to leave their homes, while ensuring that men remain freed from domestic labour responsibilities. As a result, paid domestic work is essential to the continued growth of the local and international economy.

Yet, in the wider global context, studies across developed and developing contexts have shown that migrant domestic workers’ wages are generally poor and their terms of employment are often extremely exploitative. Even in countries that have legislative requirements, such as South Africa, exploitation is pervasive because of the larger power dynamics at play. As we see throughout the world, marginalised race, class and gender become even more pronounced when domestic workers are also undocumented immigrants, without access to established national labour protections. These realities exist as a result of the tensions between the demand for care labour in the global economy and the increase in migrant flows into this sector. Given the large gap between care needs and protections for the pools of migrant workers who fulfil this sector, effective policies and their associated enforcement mechanisms must adapt to meet the realities of this gender dimension of globalisation.

In the existing global economic and labour context, domestic workers ‘nurture’ globalisation by providing a ‘regime of labour intimacy’ within the context of increased care needs. An added factor in recent years has been the ageing population in the industrialised countries as the ‘baby boom’ generation approached retirement age. In the United States, for example, people aged 65 or older numbered 34.8 million in 2000, representing 12.7 per cent of the country’s population, and was expected

40 Peberdy (n 14 above) 1.
41 See discussion in part 4 of Chapter 1 (above).
42 Parreñas (n 13 above).
43 The ILO Report (n 24 above) para aptly describes it as ‘a form of global care chain between workers with family responsibilities in the North, who require household service, and temporary migrants from the South, who can provide them – albeit at the cost of leaving their own families behind’. Migration to South Africa and other migrant-receiving countries in the South, however, demonstrates that inequality can no longer be defined in purely geographical terms; globalisation has brought about an increasing inter-penetration of the first and third worlds.
45 The extent of compliance with domestic workers’ legal protections in South Africa is discussed in Chapter 5 (above).
46 Marchand & Runyon (n 13 above).
to increase to 16.5 per cent by 2020. At the same time, the number of people over 85 years of age, who will require the most care, will treble from about 4 million to about 14 million. This demographic shift substantially increases the demand for skilled migrant workers. Furthermore, as baby boomers retire, the presence of domestic workers allows more privileged sectors to assume these roles, thereby reinforcing a serious divide in terms of economic opportunities. These patterns illustrate the importance of recognising and responding to the gendered dimensions of globalisation, as seen in the particular role women’s and migrants’ care labour plays within the shifting global economy.

2.4 Migration in Southern Africa

The global migration patterns play out in particular ways throughout Africa. The continent’s vast riches remain largely untapped within the poorest regions in the world. Per capita food production dropped in Sub-Saharan Africa in the period 1990-1995, a trend that has not yet been reversed. The effects of poverty in the region have been exacerbated by low commodity prices and unstable and low-paid jobs, coupled with unequal trade regulations, especially subsidies on cotton rich countries. As a result, the region is most disadvantaged in the present trend towards globalisation and economic restructuring. Whereas the rest of the world is competing to make headway in achieving economic progress, Sub-Saharan Africa is still contending with the pressing matters of overcoming extreme poverty, addressing conflicts and responding to the HIV/AIDS pandemic, all of which severely impact on migration flows throughout the continent.

Increases in migration caused by poverty in the Southern African Development Community (SADC) region have been intensified by economic liberalisation programmes as well as by the ravages of wars and political instability since the 1970s. Many governments abandoned their earlier interventionist approach to socio-economic development in favour of more market-oriented policies. In particular, international financial

48 By the late 1980s, there were already some 10 million environmental refugees in Africa with another 135 million people living on soils deemed vulnerable to desertification while 80% of all pasture and range lands are threatened by soil erosion. In the last quarter of the twentieth century land productivity was said to have declined by 25%: DS Massey & JE Taylor International Migration: Prospects and policies in a global market (2004) 64.
Policies, protections and practices for migrant domestic workers in South Africa

Institutions required governments to implement labour market reforms aimed at facilitating enterprise efficiency both in terms of flexibility and productivity. While different countries adopted varying reforms, the standard elements of such programmes included a reduction in public sector employment, decentralised wage determination, cost containment by marginalisation of trade unions, less regulation, easier avenues for employers to terminate employees’ contracts and the establishment of export processing zones (EPZs). In practice, countries that implemented these programmes experienced massive increases in poverty levels as unemployment soared. This larger economic landscape continues to create an impetus for migration to more prosperous countries within Africa.

Political and military destabilisation played an even more visible role in the continent as a central factor leading to increased migration. The politically-driven implosion of Zimbabwe and protracted civil war in the Democratic Republic of the Congo (DRC) and the Great Lakes region, have been amongst the most catastrophic experiences in recent years. Less developed rural areas in many SADC countries have suffered further devastation owing to sharp slumps in agricultural output. Many of those left destitute as a result of these incidents have sought a means of subsistence in informal work or in informal cross-border trade; others have resorted to migration.

Concomitant hardships and structural adjustment programmes have restricted government spending on public expenditure programmes that could cushion unemployment. This places a heavier reliance on salary remittances supplied by migrant workers. Lesotho, for example, was earning 27.4 per cent of GDP from remittances in 2007, while in 2003 such returned income accounted for 90 per cent of recipient household income in Senegal. Sander and Mambo describe the connection between migration decisions and larger national economic contexts by noting that remittances help

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52 Adepoju (n 49 above) 30-31.


54 ILO Report (n 24 above) 43.
to stabilize irregular incomes and to build human and social capital. Remittance receivers are typically better off than their peers who lack this source of income. At the national level, remittances have a substantial effect on the balance of payments and on foreign exchange.\(^{55}\)

Salary remittances therefore reinforce the active interconnection between micro-level households and national economies. Within the African continent, this relationship becomes even more pronounced because of the lack of state investments in public support programmes, limited resources and compromised employment opportunities, all of which leave migration to better-resourced African countries as an attractive option.

### 2.5 South Africa as a destination country

This chapter is concerned with the way in which the larger migration processes, discussed above, play themselves out in relation to the domestic work sector in South Africa. Political, social and economic conditions in Southern Africa, and certain countries further to the north, influence a stream of migrants to continue to enter South Africa at a rate that is practically unstoppable. The perception of a better quality of life to be attained by working (and staying) in South Africa\(^{56}\) makes this relatively new democracy the main host country for migrant workers in the Southern African region.\(^{57}\) Crush distinguishes key features that explain the increased rates of migration to South Africa.\(^{58}\)

First, the end of apartheid, a system designed to control movement and exclude outsiders, produced new opportunities for internal and cross-border mobility and new incentives for moving. The ensuing integration of South Africa with the SADC region brought a major increase in legal and undocumented cross-border flows and new forms of mobility.

SADC’s reconnection with the global economy, growing rates of rural poverty and unemployment, HIV/AIDS and a ‘legacy of mass displacement and forced migration’ following the Mozambican and Angolan civil wars, also comprise central components of the particular draw to South Africa.

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\(^{57}\) M Olivier ‘Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (part 1)’ (2011) 1 SADC Law Journal 123.

At the same time, South Africa has by far the largest economy in the region and a vast preponderance in its balance of trade vis-à-vis its neighbours. It is also the largest source of direct foreign investment in the remainder of SADC59 and, to a lesser extent, in various other parts of the continent. From the viewpoint of many African countries, South Africa embodies the domination of foreign and international capital. By caring for the homes and children of those driving the South African economy, migrant workers from the north are contributing to the development of that economy and its dominance within the region – thus ‘nurturing’ the growth of globalisation in a very literal sense while, in their own lives, suffering some of its worst consequences.

The extent of labour migration to South Africa more generally and of the migration of domestic workers particularly, given the sector’s largely undocumented nature, is a matter of speculation. An interesting glimpse is provided by statistics compiled by a welfare centre for refugees and migrants in Cape Town of those who sought its services in July 2012.60 Of 1,021 respondents, 52.7 per cent were aged between 18 and 35 and 36 per cent were women.61 Significantly, 97.3 per cent of respondents were documented, with the vast majority of those, or 74.3 per cent of all respondents, being in the process of applying for refugee status. Only 48 respondents (4.7 per cent) possessed work permits.62

While this profile suggests the undocumented migrants are hesitant to approach even agencies that might be considered sympathetic to their plight, it sheds no further light on the composition or size of the migrant population as a whole. It did, however, show that no fewer than 501 respondents from outside South Africa – that is, 49 per cent of all respondents – were employed in domestic services.63 This reinforces the finding that domestic work provides a major source of employment for migrants and, judging by the terminology adopted by respondents, women migrants in particular.

60 S Carciotto ‘Scalabrini Centre – 2012 Annual Census’ Scalabrini Centre of Cape Town (15 August 2012, unpublished). The assistance of the Scalabrini Centre in providing this information is gratefully acknowledged.
61 Carciotto (n 60 above) 3.
62 Carciotto (n 60 above) Figure 3.
63 Eg, describing themselves (in order of incidence) as housekeepers, cleaners, nannies, domestic workers, housemaids, child minders, baby-sitters and au pairs: breakdown of job categories provided by the Scalabrini Centre (n 60 above).
2.6 Gender and migration in South Africa

One feature of large-scale redundancies and forced displacement across the African continent has been an increase in the number of African women who are dispensing with traditional restrictions to take over as their families' main breadwinners. SADC migration is also characterised by 'an increased feminization of cross-border migration'.

Although some women move to other countries within the African diaspora, South Africa remains the major destination for women from neighbouring countries.

For many, domestic work offers the only escape route out of poverty as the majority are from poor households and are often further disadvantaged by low levels of education and few marketable skills. Other factors are the ease of access to informal domestic employment, the normalcy of the sector within South Africa and its association to what continues to be perceived as 'women's work'. For example, the 2001 census revealed that 42 per cent of black women from SADC countries who lived in Johannesburg were working in private households. This pattern distinctly changes the nature of the sector from one defined by apartheid labour laws and practices of employing South African women to one that reflects the impact of the wider regional economy on household labour as a destination occupation for women.

By caring for the homes and children of those driving the South African economy, migrant women workers are contributing to the country’s economic growth and, at the same time, its dominance within the region. This, however, does not make migrant domestic workers complicit in the consequences of globalisation any more than workers employed by multinational corporations. The point is rather to underline the extent to which the economies of Southern African have become integrated through the direct channels of migrant women workers. Accordingly, this chapter posits a need for solutions to this wider migration reality. Rather than seeking to remove migrant workers from the economic growth points to which they have relocated, I argue that bringing the legal framework in line with the economic and human

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64 Olivier (n 57 above) 125.
67 The growing supply of women migrant workers includes large numbers of children, some of whom have been trafficked and are virtually slaves in private households: B Ramamurthy ‘International labour migrants: Unsung heroes of globalisation’ Swedish International Development Cooperation Agency (SIDA) Studies No 8 (2003) 8.
realities on the ground should be the objective as a basis for viable solutions. In doing so, given the particular dynamics of gender migration within Southern Africa, policies and practices must take into consideration the particular needs of the women who serve as the predominant labour force for the household sector.

2.7 An overview of domestic work in South Africa

While Statistics South Africa put the number of domestic workers in South Africa at 861,000 at the end of 2012, other estimates suggest that well over a million workers are employed as domestic workers, gardeners, child-minders (including drivers of children) and those who look after the sick, aged or disabled in private homes. According to the 2013 Annual Survey of the South African Institute of Race Relations, the number of domestic workers in South Africa has declined over the past ten years. Research has revealed ‘that the decline was all the more significant as the number of people in South Africa’s middle classes had increased substantially over the same period’. This suggests that South Africa’s middle classes are less inclined to employ domestic workers than was the case in past decades. To date, however, the explanations for these trends have not yet been investigated thoroughly. It has been suggested that stricter labour law and minimum wage regulations, security concerns, smaller homes and properties, racial and cultural shifts in the social attitudes of the new middle class, increasing administered prices such as electricity, rates, and fuel bills, and increased household debt levels may all have contributed to the phenomenon.

While these figures offer a macro view of the sector, they fail to capture migrant representation, which is likely to be underestimated given the lack of structures to count informal workers. Thus, the sector may actually be on the increase due to migrant workers simply not being included in the data. These questions illustrate the need for more comprehensive investigation of the representation of migrant domestic workers within South Africa.

To this should be added that many South African-born domestic workers are also migrant workers due to the heritage of apartheid economic structures and racial legislation that forced domestic workers to live separately from their families in suburban maids’ quarters or

69 Statistics SA Quarterly Labour Force Survey (Quarter 4, 2012) Table D.
71 Press release (n 70 above); and see the Appendix to this chapter.
72 Press release (n 70 above).
73 G Alexander, SAIRR researcher, quoted in Press Release (n 70 above).
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The apartheid system dictated that many domestic workers’ families remain in ‘homelands’ far from their places of employment, as their presence in the cities was illegal. Thus, whilst the mining sector and its single-sex hostels have been well-documented, migrancy in respect of domestic work requires extensive research to capture the trends within South Africa at this point where the forces of globalisation intersect with twenty years of a democratic governance system.75

3 Migration, domestic work and the law: An overview of existing legal frameworks

Legal policies and protections have not yet fully responded to the increased level of service labour demanded by the global economy. The marginalised position of domestic workers makes the development of legal frameworks of protections that much more urgent in respect of migrant populations in this sector. This part of the chapter reviews the protections for domestic workers at the international, regional and national level in South Africa. From here, I set the foundation for examining applied practices and gaps in accessing the protection offered by existing legislation.

3.1 International law on the protection of migrant workers

The 2003 report by the Special Rapporteur of the UN Commission on Human Rights stressed that the human rights of all migrant workers and members of their families are protected by core international human rights treaties, which do not distinguish between citizens and non-citizens, including those in an irregular situation:76

Based on a review of international human rights law, the Special Rapporteur has concluded that all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.

The existence of a ‘legitimate State objective’ and the adoption of means ‘proportional to the achievement of that objective’ as criteria that may justify distinctions between citizens and non-citizens is crucial.

75 Motala (n 74 above).
Circumstances where the denial of human rights protection to non-citizens could be justified in terms of these criteria are practically excluded. The principles of equal treatment and non-discrimination are embodied in numerous international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC). These treaties promote migrants’ enjoyment of their human rights, regardless of geographic location or citizenship status. From an ideological perspective, the notion of ‘essential humanity’ is central to the consideration of legislative protection for migrant domestic workers. In the case of South Africa, this holds particular resonance within the guiding constitutional commitment to human rights and social equality.\(^{77}\)

Notably, these treaties demonstrate considerably higher ratification records than the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).\(^{78}\) Although it only offers limited protection – particularly of trade union rights, the right to health and the right to adequate housing – the ICRMW seeks to extend to irregular migrant workers and members of their families rights that were previously limited to legal migrants. Article 25 resonates with Article 7 of the ICESCR, which stresses the ‘right of everyone to the enjoyment of just and favourable conditions of work’ and numerous ILO Conventions that disregard the legal status of the workers involved. More crucially, the ICRMW enjoins states to afford equal treatment in respect of remuneration and other terms and conditions of work to all workers in their territories. Both the ICCPR and the ICESCR further protect the right of workers irrespective of nationality and legal status to form or join trade unions, a right which is bolstered by the right to organise in ILO Convention 87 on Freedom of Association and Protection of the Right to Organise.\(^{79}\)

Given the increasing need for people to seek work in other countries, the rapid growth in illegal immigration and the ensuing tensions between internal and external forces that ‘accentuate further the prejudices,

\(^{77}\) As discussed in Chapter 2 (above).

\(^{78}\) See http://www2.ohchr.org/EN/Bodies/CMW/CMW.htm (accessed 3 May 2013). Arts 8-35 of the Convention applies to all migrant workers and their families, while arts 36-63 apply only to documented migrant workers and their families.

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xenophobia and racism of which migrants are often the victims,80 have presented a central consideration for the ILO in terms of balancing standard-setting with the pragmatic dimensions of policy implementation. Through a series of binding and non-binding treaties the ILO has built a collection of international labour standards that undergird protection of all workers regardless of their status. For instance, the Migrant Workers (Supplementary Provisions) Convention of 1975 (No 143), an offshoot of the revised Convention concerning Migration for Employment of 1949 (No 97), collectively map out a framework that enjoins states parties to observe the basic human rights of all migrant workers.81

An inevitable tension exists between the need to protect irregular migrant workers against exploitation and the objective of governments to prevent unauthorised entry into their territories. Indeed, it is to be expected that the latter objective will have been foremost among the state parties that were the framers and signatories of these conventions. This finds expression in various international instruments in provisions for the imposition of sanctions on human smugglers and those who employ irregular migrants.82 However, this is not to suggest an absolute contradiction between the two objectives. Although there is a strongly-held view that protecting the rights of irregular migrants encourages illegal migration, a countervailing view is that the very protection of their rights removes the incentive for unscrupulous employers to employ them.83 To put it differently, both international human rights law and international labour standards strive to safeguard the rights of migrant workers while endorsing the right of states to regulate migration and proscribe irregular migration. This, however, does not address the tension between pressures compelling migration and regulatory regimes that are oblivious to these pressures.

In parts 3.3, 3.4 and 4 below we shall look more closely at the South African situation to see how the dual purposes of establishing protections and limiting irregular migration flows play out within the national legal framework.

82 See, eg, art 68 of ICRMW.
83 See O Dupper (Pt 2) (n 82 above) 57-59.
3.2 International law relating to migrant domestic workers

On 16 June 2011 the International Labour Organisation adopted Convention 189 on Decent Work for Domestic Workers. After two years of deliberations, this instrument marked the first set of legal protections for domestic workers at the international level. Within this standard-setting process the prevalence of migrant domestic workers emerged as a central topic in terms of assuring standards that would apply to populations who work outside their country of origin.

Convention 189 protects migrant domestic workers through a number of direct references to its scope of coverage. Article 7.3 states that ‘[m]embers shall cooperate with each other to ensure the effective application of the provisions of this Convention to migrant domestic workers’. The deliberations surrounding the extension of Convention 189 to undocumented portions of the working population recognised the realities of the global economy and the specific needs presented by this category of domestic workers.

Convention 189 also puts in place protections and formal standards for processes to facilitate the transnational movement of domestic workers. As Article 8 conveys:

National laws and regulations shall require migrant domestic workers, who are recruited in one country to do domestic work in another, to receive a written job offer or contract of employment containing all relevant details (as listed in Article 8), prior to the crossing of national borders.

The Convention and its accompanying set of recommendations further recognise the prevalence of international recruitment and placement services as systematised structures that promote the transnational movement of domestic workers. As these provisions reflect, such networks and agencies have increased the movement of workers from supplying to receiving countries. As a result, international laws are required to monitor these processes and the ways in which such avenues may contain loopholes in the fabric of legal protection. In this regard article 17 requires that migrant domestic workers recruited by an employment agency are assured of legal protections against abuse in their employment context. Furthermore, member states are required to specify the conditions under which migrant domestic workers are entitled to repatriation on the expiry or termination of the employment contract.

84 Art 8(1). This does not apply to workers who enjoy freedom of movement for the purpose of employment under bilateral, regional or multilateral agreements, or within the framework of regional economic integration areas: art 8(2).
85 Ie, Recommendation 201 (n 5 above).
86 Convention 189, art 8(4).
Domestic workers also fall under the protection of related international standards for migrant workers. The ILO Convention on Domestic Work draws attention to standards for migrant workers, including the Migration for Employment Convention (Revised), 1949 (No 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143) as complementary sets of protections specific to this sector. Furthermore, domestic workers are protected by the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990, which seeks to promote the human rights of migrant workers with specific attention to labour practices. On 7 June 2013 South Africa formally ratified the Convention on Domestic Work, becoming the eighth state to do so. However, it has neither signed nor ratified any of the related conventions. This places greater emphasis on an analysis of existing national legislative frameworks to assess the protections available to migrant populations in South Africa.

3.3 Regional policies: African Union and SADC migration framework

In June 1991 51 African states signed the Abuja Treaty to establish the African Economic Community (AEC), which amongst other things urged member states to adopt employment policies that allow the free movement of persons within the region. This included facilitating the deployment of available skilled labour from one member state to others facing shortages of certain skills as a tool for the promotion of regional cooperation and integration. In June 1995 member states of the SADC agreed on a Draft Protocol on the Free Movement of Persons in the SADC which proposed ‘a phased-in approach to eventual free movement of persons between SADC member states, including the right to be employed or seek employment, and to reside in any member state’. Article 2 of the Draft Protocol defined its ‘main objective’ as being

in relation to every citizen of a Member State, to confer, promote and protect

(a) the right to enter freely and without a visa the territory of another Member State for a short visit;
(b) the right to reside in the territory of another Member State; and
(c) the right to establish oneself and work in the territory of another Member State.

The Draft was signed into a Protocol in 2005, but has yet to be ratified by the requisite number of SADC states to give it the force of law. 90

The SADC Treaty 91 and the SADC Charter of Fundamental Social Rights 92 between them espouse the right to adequate social protection to all citizens regardless of their educational qualifications and their location within the region. But, although the SADC has developed rules on migration and facilitation of the movement of people, the reception of foreigners in Botswana, Namibia and South Africa – the major receiving countries – remains indifferent. 93 Given these limitations and gaps in policy and practice, this chapter will consider possible further steps towards the development of a regionally harmonised approach to migration management in Africa and in the SADC region in particular. 94

In doing so, an appealing point of reference is the immigration framework created by the European Union. It is obvious that the differences between European and African realities as well the respective migration policies are stark. The EU permits nationals of member countries to enter freely or live in other member states without the need for visas or residence permits. 95 Under this structure, EU nationals and their families have the right to live anywhere throughout the Union for three months, after which they must be working, studying or financially independent if they wish to stay. EU residents may work in other member countries, provided they are appropriately qualified. After five years this right of residence becomes permanent. But, despite the differences, the EU model for the removal of barriers to movement provides an incentive to develop policies that will address the realities of labour patterns in sub-Saharan Africa and its increasing reliance on migrant labour pools, in forms parallel to trends in the global economy.

90 Following its 1996 Protocol on Trade, the SADC has also agreed on the establishment of a Free Trade Area to create a regional common market by 2015. For discussion see SP Hess ‘The new economic geography of a SADC free trade area’ M Econ thesis, Rhodes University, January 2004 http://eprints.ru.ac.za/65/1/HESS-MASTERS.pdf (accessed 30 April 2013).
3.4 South African immigration law

South Africa’s post-apartheid immigration policy has ‘mostly been exclusionary, based on a strongly protectionist and territorial vision’. The new government’s resolve to keep out immigrants may be traced to the Aliens Control Act of 1991, which was constructed during the transition from apartheid to democracy as a barrier to immigration into the country. Peberdy describes the post-1994 policy as follows:

The ways that the new state used and amended the 1991 Act and its replacement, the Immigration Act of 2002 (as amended in 2004), indicate its commitment to the exclusionary principles on which South African immigration legislation has always rested. However, there was a shift in approach in the early 2000s to make policy more responsive to ‘South Africa’s skills and investment needs’ and to engage with xenophobia. … [But the] thrust of policy remains largely exclusionary. African immigrants and migrants, documented and undocumented, seem to have been the most affected.

South Africa thus faces a quandary in dealing with migration. The Preamble to the Immigration Act recognises the need for migrant labour, stating the aim of enabling ‘the South African economy [to] have access to the full measure of needed contributions by foreigners’. Immediately following this statement, however, the Preamble adds that ‘the contribution of foreigners [must] not adversely impact on existing labour standards and the rights and expectations of South African workers’. Section 32 states that ‘illegal foreigner[s]’ must ‘depart’ and enjoins immigration officials to deport ‘any illegal foreigner’ found in the Republic. The Act then proceeds to regulate the conditions under which non-South Africans may enter in the country and avoid deportation.

The essential requirement is to obtain a temporary or permanent residence permit. Migrants, as opposed to immigrants, may apply for one of 13 different kinds of temporary permits, ranging from visitors’ permits to work permits. To obtain any of these permits, applicants must go through a rigorous screening process that systematically disadvantages ‘unskilled’ migrants. In the case of work permits, potential employers of non-South Africans are required to demonstrate that ‘despite diligent search’ they are ‘unable to employ a person in the Republic with qualifications or skills and experience equivalent to those of the applicant’.

Low-skilled migrant workers are thus likely to fail at the first

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97 Peberdy (n 14 above) 148.
99 Immigration Act, secs 11-24.
100 Immigration Act, sec 19(2)(a).
hurdle in the application process. Furthermore, temporary residence permits are issued on condition that the non-citizen is not or does not become a 'prohibited or an undesirable person'\(^{101}\) and has sufficient financial means to survive while in South Africa.\(^{102}\) The economic resource bases of the vast majority of migrants seeking domestic work would preclude their entrance on this basis alone.

At the same time the post-1994 government has placed international law and international human rights standards at the heart of the new democratic order. The Immigration Act was intended to strike a balance between exclusion and compliance with international law as well as the Constitution’s emphasis on human rights.\(^{103}\) State agencies are required to comply with international standards when interpreting domestic law and also, where necessary, as a source of substantive law.\(^{104}\) As discussed below, the state is obliged to grant anyone who appears at its borders the right to apply for asylum in the country.\(^{105}\) Since refugees in South Africa are not sequestered in camps, asylum-seekers are expected to survive without state assistance and are allowed to work or study in South Africa subject to conditions determined by the Standing Committee for Refugee Affairs.\(^{106}\)

Yet it is argued that, taken as a whole, South African laws do not adequately meet international standards as embodied in the ILO’s decent work agenda or the transformative values of the Constitution,\(^{107}\) nor do they protect migrant workers from exploitative employers. Unskilled and semi-skilled workers, for the reasons noted above, face a structural disadvantage if not insuperable barriers to obtaining the protection of the law. In practice, most domestic workers and others without 'scarce skills' must resort to crossing borders and seek employment without a work permit if they hope to escape the conditions that drove them from their countries of origin.

This represents a deep gulf between policy and practice. The widespread migration patterns central to the restructuring of the global

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101 Immigration Act, sec 10(4).
103 See paras (l) to (p) of the Preamble to the Act.
104 Secs 232 and 233 of the Constitution domesticate international customary law and require the judiciary to defer to international legal principles when interpreting local laws.
105 For the forbidding procedure governing applications for refugee status, see Chapter 3 of the Refugees Act 130 of 1998 read with sec 23 of the Immigration Act.
106 In terms of sec 11 of the Refugees Act. For more information see Department of Home Affairs – Refugee Status & Asylum http://www.home-affairs.gov.za/index.php/refugee-status-asylum (accessed 30 April 2013). The website informs asylum-seekers that ‘South Africa does not have any refugee camps so asylum seekers and refugees live mainly in urban regions and survive largely without assistance’, but offers no information as to the right to seek work in order to survive.
107 As discussed in Chapter 2 and part 4 of Chapter 3 (above).
economy increase the traversing of borders within the African continent, compelling millions to do so without legal authorisation. In South Africa, the largely informal nature of domestic work identifies it as a destination employment sector. Yet national migration laws fail to recognise the realities of increased labour flows, thereby creating conditions that leave migrant workers more vulnerable and legal frameworks less meaningful as economic migrants, asylum seekers and refugees flow into the country at increasingly rapid levels.

3.5 Refugee law

The extent of the refugee presence in South Africa and the protection extended to refugees by international law have already been noted. Since 1994, South Africa has acceded to a number of international human rights instruments that censure violation of people's freedoms and protect the rights of refugee immigrants. These mechanisms include the United Nations Refugee Convention of 1951, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. The Refugee Convention imposes an obligation on states to offer asylum to anyone who can show that they have a well-founded fear of persecution on account of their 'race, religion, nationality, membership of a particular social group or political opinion' if sent back home. In addition, South Africa is bound by the international customary law principle of non-refoulement112 of refugees to a state where they are likely to face persecution or inhuman and degrading punishment. This was accepted by the High Court in Kabuuka & Another v Minister of Home Affairs & Others113 and the Constitutional Court in Mohamed & Another v President of the Republic of South Africa & Others.114 The principle is now codified in section 2 of the Refugees Act, which states:

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where –

108 See parts 1 and 2.1 of this chapter (above).
112 The literal meaning is ‘not driving back’.
113 1997 (4) SA 341 (C).
114 2001 (7) BCLR 685 (CC). See also Arse v Minister of Home Affairs & Others 2010 (7) BCLR 640 (SCA).
(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

Section 27(b) of the Refugees Act goes on to state that ‘a refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution’. These provisions draw a distinct line between refugees and economic migrants in terms of legal protections. Because these protections are only applicable to registered refugees, the majority of migrants from African countries who stream across South Africa’s porous borders to escape economic and political hardship but do not apply for or cannot establish refugee status remain outside the scope of legal protections. As such they face an uncertain future as they are prohibited from entering into employment and, if they do, are vulnerable to exploitation. Furthermore, they do not have access to vital social security rights, which often forces undocumented migrants to lead lives of penury and permanent insecurity in unregulated economic activity. But, as we shall see below, the courts have in a number of cases upheld certain basic rights of migrant workers despite their undocumented status.

4 Legal protection of migrant domestic workers: The Immigration Act meets domestic labour laws

The South African government ratified Convention 189 on 7 June 2013. This international instrument specifically extends protections to migrant domestic workers and is the most directly relevant set of standards to recognise the intersecting dimensions of both informal work and migrant status. Specific provisions to give effect to it, however, are not yet in place. As a result, the rules applicable to migrant domestic workers are still found in the Immigration Act, the Refugees Act and the labour legislation discussed above.

4.1 Accessing legal protection for migrant domestic workers

In terms of South Africa’s existing immigration law migrant domestic workers face nearly impossible barriers in terms of accessing a legal right to work. In practice, the only basis on which a non-South African who does not possess the requisite ‘qualifications or skills and experience’ can
obtain the right to work in South Africa is if he or she qualifies for refugee status\textsuperscript{117} and succeeds in obtaining asylum in terms of the Refugees Act.\textsuperscript{118} We have seen that any non-South African who is employed without possessing these qualifications is an ‘illegal foreigner’, as defined,\textsuperscript{119} and section 32(2) succinctly states that ‘[a]ny illegal foreigner shall be deported’. A similar barrier prevents migrant domestic workers from obtaining permanent residence status. Furthermore, employers of domestic workers are not eligible to obtain corporate work permits in terms of section 21 of the Immigration Act.

The effect is that the majority of aspiring immigrants and migrants to South Africa from countries to the north seeking work as domestic workers would fail at the first hurdle should they apply for a work permit. This means that they live under the perpetual threat of deportation or, sometimes more immediately, persecution on the basis of their nationality. The rationale for this state of affairs is the argument that the South Africa labour pool provides a sufficient supply of domestic workers. Therefore, an influx of non-South Africans competing for those same jobs would exert more pressure on an already over-supplied segment of the labour market. These market forces thus form the basis for the exclusionary stance of South Africa’s immigration policies. Against this, I argue that these policies reflect an ultimately unrealistic view of a complex labour and migration exchange system within the broader SADC and continental political economy, which calls for a far more nuanced response based on the values of transformative constitutionalism and decent work, as discussed throughout this book.\textsuperscript{120}

These gaps between policy and the realities of the labour market illustrate a number of challenges bound up with the migration of domestic workers and other workers in Southern Africa. While migrant workers contribute to the South African economy, and while their remittances to their countries of origin are important both to their dependants and to the economies of those countries, they are exposed to conditions that severely infringe their fundamental rights due to their lack of legal status (it will be seen below that the courts are alive to this danger). Migrant domestic workers are especially vulnerable to exploitation and abuse because of their isolation in private homes and the increased power that an employer holds over an employee when legal status is out of reach. Over and above this, lack of legal status prevents undocumented workers from approaching

\textsuperscript{117} Ie, ‘owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group’: Refugees Act, sec 3(a).

\textsuperscript{118} Refugees Act, sec 3, read with secs 21 and 27. Economic need, clearly, does not qualify a person for refugee status.

\textsuperscript{119} Sec 1 defines ‘illegal foreigner’ as ‘a foreigner who is in the Republic in contravention of the Refugees Act 130 of 1998’.

\textsuperscript{120} These concepts are discussed in more detail in Chapter 2 (above).
government institutions for protection when such rights as they do possess are infringed.

At the same time, migrant domestic workers share all the problems experienced by domestic workers in general. The need for organisation and empowerment, therefore, is equally applicable to migrant domestic workers. Yet few support networks exist in South Africa to cater for the needs of migrant domestic workers, who are often separated from their families and wider support networks for long periods. Even joining a trade union can present serious challenges. The relative abundance of household labour skills in the country and the fact that an influx of migrant workers exerts more pressure on an already stretched job market easily translate into generalised perceptions of competition between local and non-local job-seekers. Immigrants thus run the risk of encountering xenophobic resistance both at work and in society at large.121 This anti-immigrant sentiment materialised in physical attacks on ‘foreigners’ during the 2008 wave of xenophobic violence that shocked the country and the world.122 In this larger context, migrant domestic workers frequently suffer in silence for fear of approaching the authorities because of real or perceived anti-migrant tendencies within the police service and government departments. But all these barriers and deterrents, legal and illegal, have failed to stem the tide of migrants, and economic migrants in particular, from crossing South Africa’s borders.

4.2 Labour rights of undocumented migrant workers

Despite the forbidding statutory environment, a number of precedents have been set by the courts from which migrant domestic workers may derive certain protections. In *Discovery Health*123 the Labour Court recognised the validity of an employment relationship between a South African employer and a non-South African employee, a Mr Lanzetta, who did not have a valid work permit. For this reason Lanzetta qualified as an ‘employee’124 and, despite his irregular immigration status, enjoyed

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121 Such perceptions are not new. According to a 1997 survey, 37% of South Africans felt that people from neighbouring countries living in South Africa were a threat to jobs and the economy, 48% believed they were a criminal threat and 29% believed they were bringing diseases. Only 25% felt that they had ‘nothing to fear’ from foreign migrants: R Danso & DA McDonald ‘Writing xenophobia: Immigration and the press in post-apartheid South Africa’ The Southern African Migration Project, Migration Policy Series No 9 (2000) 4.


123 n 80 above.

124 As defined in sec 213 of the LRA.
protection of his right to fair labour practices in terms of section 23(1) of the Constitution.

This case thus established the principle that the protection of employees’ rights must not depend on the existence of a valid contract of employment or, in the case of migrants, possession of a valid work permit. Had this been the case, Judge van Niekerk observed, an unscrupulous employer ‘might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract’. 125 Such an employer may also require the employee to work longer than the statutory maximum hours of work or deny her the required time off or rights to annual leave, sick leave and family responsibility leave, 126 knowing that she would be deprived of a remedy due to the illegal circumstances under which she performs her work. 127 The judgment continued:

This is particularly so when persons without the required authorisation accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorised engagement) to initiate any right of recourse against those who engage them. 128

The protection of section 23 of the Constitution, accordingly, ‘extends potentially to other [than employment] contracts, relationships and arrangements in terms of which a person performs work’. 129

This judgment speaks directly to the situation of undocumented migrant domestic workers. Specific reference was made to the ILO Migrant Workers (Supplementary Provisions) Convention, which emphasises the protection of the basic human rights of all migrant workers. 130 However, the protection of migrant workers has to be interpreted in the context of clandestine immigration and the need for sanctions against illegal immigrants and the people who employ them. 131 As a result, international standards like the above-mentioned Convention ‘attempt to resolve a tension between the right of states to protect their labour markets and the protection of the fundamental rights of those, who

125 Discovery Health (n 80 above) para 30.
126 The relevant minimum rights are laid down in the Basic Conditions of Employment Act 75 of 1997 (BCEA). For an overview of the most essential rights and compliance therewith, see part 5.2.8 of Chapter 3 (above).
127 See also C Bosch ‘Can unauthorised workers be regarded as employees for the purposes of the Labour Relations Act?’ (2006) 27 Industrial Law Journal 1342.
128 Discovery Health (n 80 above) para 30. Bosch (n 127 above) notes that undocumented migrants’ status has ‘historically been exploited to their detriment as they are reluctant to use protective mechanisms for fear of secondary victimization at the hands of authorities’.
129 Para 41, with reference to the decision of the Constitutional Court in South African National Defence Union v Minister of Defence & Another 1999 (4) SA 469 (CC), where it was held that soldiers, even though not ‘employees’, are ‘workers’ for purposes of sec 23 of the Constitution.
130 Art 3 of the Migrant Workers (Supplementary Provisions) Convention 1975 (No 143).
by choice or necessity, seek work in countries other than their own'.

These guiding principles, it was held, establishes that national legislation such as the LRA must be interpreted in a manner that recognises the purpose of protecting the fundamental rights of migrants, including 'those who are employed illegally'.

Related cases underline the primacy of human rights over citizenship status. In *Larbi-Ordam & Others v Members of the Executive Council for Education & Another (North West Province)*, as noted above, the Constitutional Court upheld the right to equality of non-South African citizens and struck down a Department of Education regulation prohibiting foreign citizens from permanent employment as teachers in state schools. Similarly, in *Kylie v Commission for Conciliation, Mediation and Arbitration & Others* the Labour Appeal Court ruled that the illegality of a sex worker's job does not deprive him or her of all labour rights or the right to dignity. The case pointed out that the word 'everyone' in section 23(1) of the Constitution must be interpreted broadly. According to Bosch, infringing upon undocumented migrants' labour rights constitutes a violation of their right to dignity.

The problem, however, does not end there. Recognition of the rights of migrant workers is essential to the protection of those rights, but does not guarantee that they will in fact be upheld. Since 1994, as seen above, the democratic government has entrenched workers' rights by enacting a series of labour laws that are fully applicable to domestic workers, including documented domestic workers. But it has also been noted that, in practice, those rights are disregarded to a significant extent in the domestic sector. The wider power relations, the overarching context of unemployment and poverty and lingering perceptions about the informal nature of this sector create conditions where domestic workers repeatedly state that such rights are 'only on paper'. Although little empirical data is available, this is likely to be even truer in the case of undocumented migrant domestic workers. Around the world such workers are particularly vulnerable to discrimination and abuse due to 'the individual employment

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132 Discovery Health (n 80 above) para 45.
133 Discovery Health (n 80 above) para 47.
134 1998 (1) SA 745 (CC).
136 Para 17. Sec 23(1) states: 'Everyone has the right to fair labour practices'. In *Khosa & Others v Minister of Social Development & Others; Mahlaule and Another v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 111, Ngcobo J explained that '[t]he word 'everyone' is a term of general import and unrestricted meaning. It means what it conveys'.
137 Bosch (n 127 above) 1342 & 1352. He argues (at 1353) that allowing unauthorised workers access to remedies under labour legislation 'empowers them in the sense that they do not have to put up with oppressive employer conduct, thus bolstering their sense of dignity'.
138 See Chapter 5 (above) for a discussion of the extent to which the rights of domestic workers are enforced in the sector as a whole.
relationship, lack of legislative protection, stereotyped thinking about gender roles and undervaluing of domestic work’. Discrimination based on race, colour and national origin often intersects with discrimination based on sex. There is no reason to believe that matters are significantly different in South Africa. One response is to say that such workers brought their misfortunes on themselves by migrating unlawfully in the first place. This, however, fails to consider the socio-economic realities underlying the phenomenon of (irregular) migration and offers no basis for resolving it.

4.3 Social security rights of migrant workers

Immigration law and labour law are the two sets of laws that operate most directly in defining the legal space in which migrant domestic workers find themselves. Both are informed by the Bill of rights; both seek to bring about positive social and economic development, addressing the country’s serious skills shortage while protecting the rights and economic interests of South African nationals and migrants. The question addressed thus far in this chapter is whether, in combination, these laws serve to protect the constitutional rights of migrant domestic workers.

For reasons discussed in Chapter 4, however, social security law plays a role no less vital than labour law in giving effect to the transformative values of the Constitution and decent work. As Kitty Malherbe explains:

Labour law can at best provide protection to workers while they are still employed (or when unfairly dismissed). It cannot provide protection during major life course transitions, such as between ‘(unpaid) caring and employment; unemployment and employment; retirement and employment; precarious and permanent employment’. Like most workers, domestic workers experience many of these ‘transitions’ and, therefore, a need for ‘second-tier’ protection against loss of income due to social risks such as unemployment, illness and occupational injuries or events such as maternity.

This part of the chapter considers the extent to which these vital ‘second-tier’ or social security needs of migrant domestic workers enjoy legal

140 ILO Decent work for domestic workers (2010) para 62.
141 S Olney & R Cholewinski ‘Migrant workers and the right to non-discrimination and equality’ Paper read at conference on ‘Migrants at work’ Oxford, 22-23 June 2012 23 (cited with the authors’ permission).
142 I am extremely thankful to Kitty Malherbe for her expertise and content knowledge in the development of this analysis of migrant domestic workers’ social security rights.
143 In particular, the Immigration Act 13 of 2002 and the Refugees Act (discussed in parts 2.4 and 2.5 of this chapter).
144 In particular, the LRA, BCEA and Employment Equity Act 55 of 1998 (EEA) (discussed in Chapter 3 above).
145 See Chapter 4 (above).
protection. The starting point is that section 27(1)(c) of the Constitution states that ‘everyone’ has the right of access ‘to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance’. The Constitution, in other words, provides no basis for distinguishing between South African and non-South African workers. As far as domestic workers are concerned, it reflects an ethos that those who contribute their labour to the country’s economic development are equally entitled to social security protection in times of need.

The two components of social security that are most relevant to domestic workers are social assistance and social insurance.147 It has been noted that the Unemployment Insurance Act (UIA)148 was amended in 2003 to extend various forms of social insurance, including maternity benefits, to domestic workers. This recognises the need of domestic workers for access a safety net during periods of transition and unexpected work interruptions as a central component of the social security framework.

Access to such benefits is particularly pivotal in the lives of migrants, who face the serious challenges of transient employment and geographic separation from structures of support. As Fultz and Pieris have stated:149

It has to be recognised that the quality of life of migrant workers is influenced by the social protection measures available to them, eg whether they are protected against retrenchments or whether or not the dependants of a deceased worker would be entitled to death benefits.

With specific reference to the SADC region, Olivier comments that migrant workers:150

Invariably find themselves in a precarious position, also in relation to social security. They face seemingly insurmountable difficulties due to the operation of several legal restrictions, inappropriate and inchoate policies, and the treatment they generally receive in the host country.

Against this background, let us look firstly at the right of access of migrant workers to social assistance and, secondly, at their position in relation to the social insurance scheme created by the UIA.

4.3.1 Access to social assistance

The Constitutional Court has decided that non-South Africans with

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147 See part 2 of Chapter 4 (above).
150 Olivier (n 57 above) 127.
permanent residence status have the right of access to social security. At issue in this case was the question as to whether non-citizens with permanent residence status had the right to claim certain social assistance benefits, given that the applicable legislation limited those benefits to ‘citizens’. The court found the exclusion of permanent residents to be inconsistent with section 27(1)(c) of the Constitution (above) and ruled that the applicants were entitled to claim the benefits in question. The term ‘everyone’ in section 27, in other words, clearly applies to them.

However, Judge Mokgoro on behalf of the majority of the court went on to hold as follows:

I accept that the concern that non-citizens may become a financial burden on the country is a legitimate one and I accept that there are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status. The exclusion of all non-citizens who are destitute, however, irrespective of their immigration status, fails to distinguish between those who have become part of our society and have made their homes in South Africa, and those who have not. It also fails to distinguish between those who are being supported by sponsors who arranged their immigration and those who acquired permanent residence status without having sponsors to whom they could turn in case of need.

Migrant workers without the required documentation, thus, have no right of access to social security.

It is instructive to view the position adopted in South Africa within the framework of international law. It has already been noted that the principle of equal protection of the basic rights of migrant and non-migrant workers is well-established in international migration law. Here we shall look specifically at a number of ILO Conventions dealing with the right of migrant workers to social security. Not surprisingly, the focus is primarily on documented migrants. The Migration for Employment Convention (Revised) 97 of 1949 regulates the manner in which the migration of persons for employment should take place. In terms of the Convention, migrants are entitled to equality of treatment with nationals.

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151 Khosa (n 136 above).
152 Khosa (n 136 above) paras 58-59.
153 See part 2.1 of this chapter (above).
154 The ILO Conventions listed below were selected from the many that mention migrants’ rights, as they are also the Conventions referred to in the preamble of the Domestic Workers’ Convention. South Africa has not signed or ratified any of the international standards mentioned below. The Constitutional Court in Khosa (n 136 above) accordingly made no reference to international law.
in respect of social security. The Equality of Treatment (Social Security) Convention 118 of 1962 likewise provides for equality of treatment under a ratifying country’s social security legislation to workers of other ratifying countries, particularly in relation to schemes for the maintenance of acquired rights and rights in course of acquisition.

The Migrant Workers (Supplementary Provisions) Convention 143 of 1975 goes further, requiring ratifying states to respect the basic human rights of all migrants for employment, independently of their status. In terms of this Convention, irregular migrant workers are entitled to ‘equality of treatment for [themselves and their families] in respect of rights arising out of past employment as regards remuneration, social security and other benefits’. Member states further agree to create national policies designed to promote and guarantee:

by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Finally, the Domestic Workers Convention 189 of 2011 seeks to protect all domestic workers. The Convention and Recommendation 201 don’t distinguish between domestic workers on the basis of nationality or immigration status, and both contain provisions extending specific protection to migrant domestic workers. These provisions, however, relate to the recruitment of documented domestic workers from other countries and, in general to the regulation of the conditions of documented migrants. The situation of undocumented migrant workers is not addressed.

4.3.2 Access to social insurance

In terms of the various international instruments mentioned above it is clearly contemplated that migrant workers should enjoy equality of treatment with nationals in respect of social security and, even if South Africa has not ratified these treaties, the right of migrant workers to
equality which they embody resonates with the right to equality in section 9 of the Constitution. More specifically, article 14 of Convention 189, which South Africa is in the process of ratifying, requires member states to ‘ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection’. It is submitted that the regulation of the two principal forms of social insurance in South Africa, unemployment insurance\(^{164}\) and insurance against occupational injuries and diseases\(^{165}\) is in both cases contrary to this requirement and, arguably, the principle of equal treatment contained in international law and in the Constitution.

Although domestic workers were included in the scope of the UIA in 2003, migrant domestic workers are expressly excluded. Section 3(d) of the Act states that it does not apply to:

persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if upon the termination thereof the employer is required by law or by the contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave the Republic, and their employers.

The effect is that migrant domestic workers, including documented migrants, are placed in a position that is distinctly ‘less favourable than those applicable to workers generally in respect of social security protection’.\(^{166}\) The reasons for this exclusion, it has been suggested, are purely administrative.\(^{167}\) It is difficult to see that such reasons could justify non-compliance with Convention 189 or an infringement of the right of migrant workers in general to equal treatment.

In the case of insurance against occupational injuries and diseases the conflict with international law and the constitutional right to equal treatment is even more patent: all domestic workers, South African and non-South African, are excluded from the scope of COIDA.\(^{168}\) It has been argued above that this exclusion is manifestly unconstitutional and, at the time of writing, it is understood that an amendment to the Act is under way.\(^{169}\)

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164 Regulated by the UIA: see discussion in part 2.1.2 of Chapter 4 (above).
165 Regulated by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA); see discussion in part 2.1.1 of Chapter 4 (above).
166 According to Olivier (n 57 above) 135, this ‘keenly affects’ domestic workers from Mozambique.
167 Olivier (n 57 above) 131, argues that the Unemployment Insurance Fund ‘has no experience to date of paying benefits outside South Africa’s borders, and only accepts South African-issued documentation for purposes of paying benefits to foreigners in South Africa’.
168 The definition of ‘employee’ in sec 1 of COIDA (n 165 above) excludes ‘a domestic employee employed as such in a private household’.
169 See part 2.1.1 of Chapter 4 (above).
A further complication is the fact that, in terms of section 27(b) of the Refugees Act, refugees enjoy the rights in the Bill of Rights, including the right of access to social security. In terms of the Regulations relating to the application for and payment of social assistance and the requirements or conditions in respect to eligibility for social assistance, refugees qualify for the disability grant and the foster child grant.\textsuperscript{170} Asylum seekers generally do not qualify for social assistance until their status as refugees is finalised.

\textbf{4.3.3 The regional dimension}

The extent to which labour migration is a phenomenon spanning all SADC states as countries of origin or destination inevitably raises the need for a regional approach in giving effect to the right to social security of domestic and other workers relocating between states. Recommendation 201 advocates the conclusion of bilateral, regional or multilateral agreements to provide equality of treatment in respect of social security, as well as access to and preservation or portability of social security entitlements, to domestic workers covered by such agreements.\textsuperscript{171}

Regional alliances such as the European Union have developed systems where benefits follow the beneficiaries, wherever they may be in the region.\textsuperscript{172} The European Social Charter leaves undocumented migrants outside its scope.\textsuperscript{173} However, the Council of Europe’s Parliamentary Assembly resolved in 2006 that a minimum core of rights should apply to undocumented migrants, including social protection through social security where it is ‘necessary to alleviate poverty and preserve human dignity’,\textsuperscript{174} compensation for occupational accidents\textsuperscript{175} and protection for vulnerable groups such as children, single mothers and older persons.\textsuperscript{176} In particular, the Assembly took a position that undocumented migrants who have contributed to social insurance schemes should be entitled to benefits in terms of those schemes or, at the very least, reimbursement of their contributions.\textsuperscript{177}

In the SADC context comparable measures, both bilateral and multilateral, to co-ordinate social security systems so that migrant workers

\textsuperscript{170} Reg 3(a) and 7(c) GNR 898 in \textit{GG 31356} of 22 August 2008.
\textsuperscript{171} R201 of 2011, Art 20(2).
\textsuperscript{173} Art 1, Appendix to the European Social Charter (Revised) http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm#ANX.
\textsuperscript{175} Council of Europe (n 174 above) para 13.5.
\textsuperscript{176} Council of Europe (n 174 above) para 13.7.
\textsuperscript{177} Council of Europe (n 174 above) para 13.4.
do not lose benefits when they return to their home country are ‘conspicuous by their almost total absence’. Olivier describes the effect as follows:

Not being linked to the network of bilateral and multilateral conventions on the coordination of social security, may operate to the disadvantage of citizens of African countries, when they take up temporary employment or permanent employment or residence in other African countries, and also when they return home after working as migrants elsewhere in the continent.

This lack of coordination persists despite provisions in the SADC Code on Social Security which envisage a regional approach to the adoption of cross-border social security arrangements. Article 17.2 of the Code requires member states to promote a number of core principles aimed at ensuring that all lawfully employed immigrants are protected. Those most relevant to migrant domestic workers include:

(a) allowing migrant workers to participate in the social security schemes of the host country;
(b) ensuring that migrant workers enjoy equal treatment alongside citizens within the social security system of the host country;
(c) working towards an aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different member states;
(d) facilitating the exportability of benefits; for instance, by ensuring the payment of benefits in the host country;
(e) identifying the applicable law for the purposes of the implementation of the principles.

As Dekker notes, a number of factors present very real challenges to effective implementation of these principles:

Regional instruments could be problematic, especially for South Africa, in the SADC context where the social security playing field is uneven. Not all social security systems are equally well developed or the countries economically and politically stable. Before improved regional social security protection can be realised, all parties concerned need to agree on some core values and minimum standards of social protection.

179 Olivier (n 178 above) 15.
181 Olivier (n 178 above) 16.
But even if these principles were to be applied in South Africa as the central country of destination, it would make no difference to migrant and other domestic workers to the extent that they remain excluded from social insurance schemes. The European model of providing minimum benefits to all migrant workers, including undocumented workers, and equal treatment to documented migrant workers would address current anomalies and avoid a situation where the legal and social protections of local workers and documented migrant workers are undercut by exploitation of undocumented migrant workers by unscrupulous employers.\textsuperscript{183} This comparative model would also put South Africa in a position to ratify human rights instruments such as the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the ILO Migrant Workers (Supplementary Provisions) Convention of 1975.

However, the implementation of socio-economic rights must always be understood in the broader socio-economic context. The emphasis in recent years on the extension of social protection to migrant workers is challenged by the current focus on reduction in public spending\textsuperscript{184} and may not remain a priority for long. Olney and Cholewinski express the following warning:\textsuperscript{185}

\begin{quote}
The application of the principle of non-discrimination and equality to non-nationals and migrant workers in particular, while relatively uncontroversial in the abstract, is being challenged in many parts of the world, especially in the current global economic crisis as the availability of decent work becomes increasingly scarce. Certain categories of migrant workers remain at greater risk of poor working conditions and exploitative treatment, such as those in an irregular situation, low-skilled temporary workers or migrant domestic workers.
\end{quote}

Given these risks in the larger global context, special focus on the amendment of national social security legislation to provide migrant domestic workers with equal access to social security is imperative. The foundations of such a legislative framework are to be found in the relevant sections of the Constitution, international and regional instruments on migration and domestic work, and the supportive case law discussed in this chapter. The current situation where ‘primacy is given to immigration laws and policy – at the expense of social security laws and labour laws’\textsuperscript{186} must be challenged in order to establish a legislative framework that addresses human rights as well as regulation of the right to freedom of movement across national boundaries.

\textsuperscript{184} As discussed in part 5 of Chapter 1 (above).
\textsuperscript{185} Olney & Cholewinski (n 141 above).
\textsuperscript{186} Olivier (n 57 above) 128.
5 Towards an appropriate regulatory framework for migrant (domestic) labour in Southern Africa

Migration to South Africa of workers lacking the formal ‘scarce skills’ that would qualify them to receive work permits, it has been argued, is not likely to diminish or cease. If this is so, the present exclusionary policy will ultimately prove to be unsustainable, if it has not already done so. Given socio-economic realities and the influx of non-citizens into South Africa, regulatory models designed to address the management rather than the prevention of labour migration need to take the place of existing policies. Management of the flow of domestic labour would be a component of such a model. The development and integration of specific policies and practices towards this end, however, need to be situated with a larger context that seeks to utilise legal reform as a mechanism to transform the socio-economic landscape in accordance with the guiding constitutional values of human dignity, substantive equality and freedom. As argued in Chapter 2, this framework of transformative constitutionalism would be based on active citizenship, including worker empowerment in the social arena, to promote access to social resources such as housing, education and social security which are essential aspects of human dignity as well as the ILO’s decent work agenda.

Particular emphasis was placed in Chapter 2 on the inclusion of non-citizens of integrated and pluralistic societies, as South Africa has become, in any vision of social transformation. In criticising the notion of solidarity confined to South Africans as a basis for transformation, Le Roux makes the following point:187

It is, of course, possible to address this potential injustice by reformulating a more inclusive redistributive principle to also include non-citizens as subjects of socio-economic rights in the South African Constitution.188 Seen from a representation perspective, however, this would remain an affirmation of the nation-state as frame of reference. It is also possible to turn the rights claim by a migrant into a more radical question of political exclusion and thus not to take the nation-state as a neutral constitutional framework for granted. In the words of Fraser, this attempt to re-frame the question would be a transformative strategy.

Transformation, in Fraser's paradigm, is based on a concept of social justice involving ‘(cultural) recognition, (socio-economic) redistribution and (political) representation’ of all, created through an inclusive strategy of ‘non-reformist reform’.189 Le Roux further points out the particular significance of migrant domestic work within this paradigm. ‘In the

187 See Chapter 2 above.
188 As was done in Khosa (n 136 above) [footnote in the quoted text].
189 As discussed in part 4.4 of Chapter 2 (above).
domestic work context’, he argues, ‘questions of gender, class and nationality often overlap and reinforce each other, as the economic exploitation of foreign or migrant women shows’. He continues:190

We thus argue that social justice within the sphere of domestic work has to address issues of recognition (dignity, non-discrimination and the social construction of work and gender; the project must assist domestic workers to challenge their misrecognition as workers), issues of redistribution (access to decent work; the project must assist domestic workers to challenge the injustice of poverty) and representation (not framing and addressing the issue as a migrant worker issue from the perspective of the state; the project must assist domestic workers, including undocumented migrants, to challenge the injustice of misrepresentation and denying them a political voice or a means of challenging their illegality).

The argument, in other words, is that Fraser’s emphasis on removing barriers to civic participation should be expanded to migrant workers, including migrant domestic workers, who are protected by the Bill of Rights and whose empowerment is central to ensuring that social and legal rights translate into asserting the freedom, human dignity and equality of all portions of the population.

Given the circumstances of migration in South Africa, it has to be recognised that any moves towards the realisation of such a vision will call for far-reaching adaptation of the present legal framework, including shifts in policies and practices driven by the values of transformative constitutionalism. This is so because the existing model of regulating migration may in some ways be seen as the antithesis of that which the Bill of Rights might have been expected to foreshadow. It could be compared to an attempt to dam a river in flood and, when seepages break through the wall, throwing the contents back into the river in the hope of eventually managing the growing pace of the water. Leaving aside the metaphor, the cost of this model in human terms, as outlined in this chapter, cannot be seen as consistent with the Bill of Rights or its underlying values. Rather, it embodies a ‘command and control’ view of social governance,191 consistent with traditional practice in South Africa and elsewhere but clearly at odds with the human rights focus of democratic nation-building. As this book articulates throughout each chapter, a more responsive regulatory framework is called for to foster the societal shifts envisioned in the Constitution, that should amongst other things adopt a more realistic approach to dealing with questions of citizenship and the increased presence of migrants in South Africa.

Developing such a framework, it is suggested, will depend on the simultaneous development of three closely inter-related policy objectives:

190 Part 4.4 of Chapter 2 (above).
191 See discussion in part 4.5 of Chapter 2 (above).
(1) establishing a common labour market incorporating the SADC states and possibly other states which, together, form the main sources and destinations of migration in Southern Africa;

(2) redistributing resources from ‘border control’ to integration of markets and processes regulating the flow of labour; and

(3) reforming the relevant statutes to develop complementary approaches to domestic labour and immigration laws.

Given the magnitude and complexity of these tasks, the discussion that follows can only be a starting point and a means of identifying questions requiring further investigation. But hopefully it will also serve to contextualise the underlying hypothesis of this chapter: the unsustainable nature of the existing immigration policy affords the possibility of developing a more rational alternative.

5.1 Towards a common labour market

Given the integrated nature of the economies of Southern Africa, the objective of developing a common labour market that will ultimately create freedom of movement for workers is not unrealistic. South Africa is by far the largest economy in the southern half of the continent, with its gross domestic product (GDP) accounting for 64.6 per cent of the total SADC GDP in 2007, and has the largest labour market.192 During the nineteenth century its diamond mining and gold mining industries, in particular, attracted workers from many parts of sub-Saharan Africa and, indeed, the world, who participated in developing the national economy to its dominant place within the region. This trend continued to accelerate during the twentieth century and remains a reality today. As McDonald puts it: 'clearly, cross-border migration to South Africa from the rest of the continent is not going to disappear, no matter how draconian a policy regime is put in place.'193

Migration can only be understood in the context of the geopolitics of sub-Saharan Africa and, bound up with this, contemporary efforts within the AU and SADC at promoting economic, political and social integration.194 Of particular importance as a first step in this direction, it is suggested, are measures that have been contemplated or already taken towards the harmonisation of migration policies, legislation and practices both at a regional level and in the form of bilateral agreements – for

194 See discussion in part 2.3 of this chapter (above).
example, waiving visa requirements between some SADC member states. This shift towards integration deserves greater policy focus as a key element of regional development in the longer term. As one research report has pointed out:

The development of cohesive and complementary migration policies, rules and regulations in the Southern African region could lead to significant advantages in terms of global integration and will have many direct benefits for Southern African states, such as promoting tourism, providing for better and more efficient migration management, enhancing security, developing a common understanding of the rights of migrants and attracting investments.

An alternative way forward based on this perspective is hinted at in the African Union’s objective of ‘[improving] the management of migration flows by finding a balance between effective security for legal immigrants, freedom of the legal movement of persons and the humanitarian obligation towards those who need protection’. The emphasis, however, is still on ‘legal’ migration, thus denying the overwhelming reality of irregular migration that can never comply with existing legal requirements. To grapple with this reality requires a very different approach to existing immigration policy, which Bhagwati has termed a ‘seismic shift’. Although referring primarily to migration from ‘poor countries’ to ‘rich countries’, his analysis is thought-provoking also in relation to the massive migration from the poorer countries in Africa to the relatively affluent south. Bhagwati explains:

If it is not possible to effectively restrict illegal immigration, then governments in the developed countries must turn to policies that will integrate migrants into their new homes in ways that will minimize the social costs and maximize the economic benefits. These policies should include children’s education and grants of limited civic rights such as participation in school-board elections and parent-teacher associations. Governments should also assist immigrants in settling throughout a country, to avoid depressing wages

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195 At present, visa requirements to enter South Africa have been dropped for nationals of all but three SADC states (Angola, Madagascar and the Democratic Republic of the Congo). Nationals from other SADC states may freely enter South Africa for visits of up to 30 days, but may not work: R Downing ‘SA will consider SADC visa waivers if approached’ Business Day 8 May 2012; T Polzer ‘Population movements in and to South Africa’ University of the Witwatersrand Forced Migration Studies Programme (June 2010) http://www.migration.org.za/ites/default/files/reports/2010/FMSP_Fact_Sheet_Migration_in_SA_June_2010_doc.pdf (accessed 5 May 2013).


in any one region. Greater development support should be extended to the illegal migrants’ countries of origin to alleviate the poor economic conditions that propel emigration. And for the less developed countries, there is really no option but to shift toward a diaspora model.

The shift, in other words, is from the perception of migration as an ‘external’ factor that is potentially harmful to ‘national’ society to a concept of migration as a natural and inevitable process that is part of the wider outcome of globalisation. This ideological shift – and its ensuing practices – involves a reconceptualisation of society from a national frame of reference to a wider understanding of states as components of a larger regional, continental or global community. The coming and going of people across national boundaries then takes on a different meaning: global migration is essentially no different from migration within a country. In both cases it represents people repositioning themselves in relation to economic opportunities and resources that are transnational rather than national in character, situated in a unified economic landscape that is only partially fragmented by national boundaries. This economic reality, as the experience of recent decades has shown, is more influential in determining the movement of people than historical lines of compartmentalisation that have become increasingly artificial.

Important research has been carried out in giving more substance to this perspective in the context of Southern Africa. It is necessary to build on these foundations in order to concretise further measures towards labour market integration and the broader policy implications that such measures would have. Until this is done, migrant workers will continue to pay the price for the discordance between economic realities and migration policies.

5.2 Shifting the focus from border control to regional labour market regulation

South Africa’s exclusionary state policies are enforced through administrative processes that create holding patterns for populations seeking residency and asylum at an exorbitant cost in both financial and human terms. At the same time, the state systems that interact with migrant populations seeking residence often reinforce wider anti-migrant attitudes. Substantial resources are thus devoted to the futile effort to
reverse the flow of migration, resulting mainly in visiting hardship on individuals who happen to be caught while encouraging xenophobia.

As labour tends to move from low employment and low-wage areas to higher employment and higher-wage areas, South Africa’s position as a labour destination within the African continent requires policies that acknowledge the underlying economic and social realities and set out to deal with the flows of populations seeking refuge, livelihoods and, in some cases, citizenship rights. The continued emphasis placed on keeping undocumented migrants out focuses efforts on patrolling borders and arresting, detaining and deporting those without documentation. The cost of doing so is considerable. In 1997, for example, South Africa spent approximately R200 million on deporting 173,000 undocumented migrants.200 The numbers and the costs have increased since then.201 However, the then Director-General of Home Affairs went on record as saying that South Africa ‘has no option but to deport illegal immigrants even if that is to the great expense to the state’.202 These statements capture larger policy tensions between controlling the influx of migrants and dealing with the integration of non-citizens throughout society through assuring social and legal protections.

On the other side of the equation there is evidence that unregulated migration may have a detrimental impact on sender countries as they lose some of their most skilled people to countries where incomes are higher.203 In Southern Africa, better employment prospects and higher wage levels in Botswana, Namibia and South Africa attract skilled as well as unskilled workers from other countries. Zimbabwe, in particular, has long been


204 D Tevera Migration from Zimbabwe: Numbers, needs, and policy options Centre for Development and Enterprise (2008) 19.
losing trained health personnel and employees in sectors that are crucial to economic and social development. Tevera, citing a 2003 study, estimates that 'more than 80 per cent of doctors, nurses, pharmacists, radiologists and therapists trained since 1980 had left the country, and that by 2003 Zimbabwe had lost more than 2 100 medical doctors and 1 950 certified nurses, mostly to South Africa, Botswana, Namibia, Britain, and Australia'.204 This wider 'brain drain' resulting from the emigration of skilled populations has a simultaneous impact on migrant labour pools considered 'unskilled', which is not reflected adequately in the applicable legislation.

The fact that domestic workers are mostly drawn from less educated sections of the population does not mean that the demand for migrant domestic workers in South Africa has no relevance to the brain drain. An OECD study sums up both sides of a negative equation:205

The area most affected by high emigration rates of the highly educated population is sub-Saharan Africa. The potential costs can be great: brain drain means loss of skills for the source country, loss of ideas and innovation, loss of the nation's investment in education and loss of tax revenues, but most importantly, perhaps, the loss of critical services in the health and education sectors. 'Brain overflow' in receiving countries can lead to misuse and subsequent downgrading of professional skills of migrants.

The extent of such downgrading, and the extent to which domestic work is performed by persons with professional or technical skills, needs more investigation.206 The legal position, however, is clear. Skilled migrants who are unable to find employment in their fields of expertise will, by the same token, be without work permits. As such they will be deemed 'illegal foreigners' and faced with the choice between returning to their countries of origin, which they left due to a lack of opportunities, or seeking less skilled work in South Africa. In practice it appears that the latter, including domestic work, is often the more preferable option. For educated women, in some cases, domestic work may be the only one.

Further controversy surrounds the policy objective of ensuring that the only migrants permitted to enter South Africa will be those who can produce goods and services that are more highly valued than the goods and services they consume. Some have argued that migrants, including

204 Tevera (n 203 above) 42.
206 A 2009 survey indicated that between 6.8% and 8.5% of domestic worker respondents had completed 12 years of education: African Response ‘Domestic workers survey prepared for the Social Law Project at the University of the Western Cape’ (2009, unpublished). It is not known how many of these workers were of non-South African origin.
undocumented migrants, are often highly qualified and bring valuable entrepreneurial and other skills into the country. Others contend that undocumented migrants are overwhelmingly unskilled, residing in informal settlements and constituting a net drain on health care and other resources.

More research is needed on these and other aspects of the role played by migrant workers in the economy in order to arrive at the necessary understanding of the socio-economic impact of migration and its role within the regional labour market. Within South Africa, a balanced assessment of the contributions migrants and migrant labour make to the national economy would afford a more realistic approach to managing the trans-border population flows. Such an analysis would put the one-sided emphasis on the cost of migration in terms of education, health care and social support facilities into perspective.

The African Common Position on Migration and Development captured the need for a movement beyond border control management by expressing concern ‘that the emphasis on addressing illegal or irregular migration has been only on security considerations rather than on broader development frameworks and on mainstreaming migration in development strategies’. Such strategies, for example, would include policies to regulate the movement of capital, which could raise wages in labour-exporting countries and affect the trend of migration. In this paradigm, rather than managing migration by means of immigration policies and border controls, ideological and applied responses would shift to managing the integration of people from different places into new economic and social combinations, with a view to enabling new synergies to come into existence.

Points of departure for such an approach are to be found in various policy documents. Heads of state and government of the African Union, for example, have adopted a declaration committing themselves to ‘place employment creation as an explicit and central objective of our economic and social policies at national, regional and continental levels’. More specific proposals have been made, including to ‘[e]stablish regional labour exchanges aimed at facilitating the employment of available human resources of one Member State in other Member States where there are shortages of skilled labour’. Economic activities coordinated on a

208 Cf, Solomon (n 200 above).
211 African Union Draft strategic framework for a policy on migration in Africa (undated) 10.
regional rather than a national basis, and labour exchanges facilitating the flow of labour on a regional scale, are implicit in this broader vision.

Confining the focus to ‘skilled’ labour, however, is problematic, suggesting that existing divisions in the labour market are inherent and development is, by definition, a process driven by the ‘skilled’ in which the ‘unskilled’ play no role. The bigger picture of regional development poses the challenge of harnessing the talents of increasing sections of those who are currently excluded by making them part of the overall developmental process, whether in terms of training and development, performing appropriate tasks or providing a range of needed services. Given that the vast majority of migrants are drawn from marginalised and ‘unskilled’ groups, such an approach is integral to any viable policy for the management of migration.

Policy reform of this nature would align South Africa’s vision of human rights protection with the practical need to integrate the flow of migrants with social and economic developmental initiatives. By bringing policy more closely in line with guiding legal principles, South Africa would model the central dimensions of transformative constitutionalism that frame this study. Ultimately, the capacity to align human rights and legal protections with the migrant domestic labour sector will be a measure of the fullest integration of this concept in South Africa’s emergent practice. Migrant domestic workers feature centrally in this perspective.

5.3 Aligning immigration law and labour law

The current mismatch between immigration law and labour law arises from the fact that different criteria are adopted in identifying those who qualify for legal protection. The principal labour statutes\(^{212}\) adopt a pragmatic criterion by defining employee very broadly as including any person ‘who in any manner assists in carrying on or conducting the business of an employer’. As we have seen, it is on this basis that even an undocumented migrant worker is deemed to be an ‘employee’ falling within the scope of labour legislation. The Immigration Act, on the other hand, adopts the criterion of citizenship in defining those who have the legal right to be employed in South Africa and creates only limited exceptions of non-citizens who are entitled to become ‘employees’.\(^{213}\) The anomalous result is that workers who qualify for protection in terms of labour legislation are subject to deportation in terms of immigration law.

The source of this contradiction may be located in the Bill of Rights itself, which extends an unqualified right to fair labour practices to ‘everyone’ but limits the right ‘to enter, to remain in and to reside

\(^{212}\) Ie, the LRA, BCEA and EEA: see discussion in part 5.2.1 of Chapter 3 (above).

\(^{213}\) See the discussion in part 2 of this chapter (above).
anywhere in, the Republic’, as well as the right to freedom of trade, occupation and profession, to citizens only. There is little doubt that, given the prevalence of similar restrictions in countries around the world, the limitation would pass the test established in section 36(1) of the Constitution. It is equally clear that it constrains the transformative impact of the Constitution by defining the right of participation in the economy not with reference to those who in fact participate but with reference to citizenship.

Seeking to resolve this contradiction, which may ultimately call for a constitutional amendment premised on policy changes of the nature proposed in parts 5.1 and 5.2 above, will not be attempted within the scope of this chapter. Even within the present paradigm, however, the restrictions in question should be narrowly interpreted, in line with established constitutional principles, so as to limit their exclusionary impact rather than being mechanically imposed.214 It may also be noted that the restrictions in question do not stand in the way of extending rights of entry and economic participation to non-citizens. The Bill of Rights creates a floor of rights, not a ceiling of rights, and the Constitution nowhere prohibits the extension of these particular rights to non-citizens. It is therefore suggested that the redefinition of the statutory rights to enter and remain in the country should be considered in the context of developing an inclusive legal framework, capable of accommodating the diversity of South Africa’s economically active population.

The nature of such a framework falls beyond the ambit of the present research. What does emerge, however, is that the objective should be to harmonise immigration law with the pragmatic approach of labour by seeking to identify, and extending appropriate rights to those seeking to engage in economic activity within a coordinated regional framework along the lines discussed in part 5.2 above. As other chapters in this text also convey, I suggest that the development of such a legal framework, together with corresponding and harmonising migration and labour market regulatory frameworks, will necessarily be an evolutionary process that would unfold on the basis of material progress towards economic and social objectives. It would, however, be a profoundly transformative process and, for all the reasons noted earlier, those most directly affected – including migrants and prospective migrants themselves – should be involved as closely as possible in the national and regional legislative

214 As was done, eg, in Khosa (n 36 above). In this regard the UN Economic and Social Council offers the following guideline: ‘Art 2 (3) of the International Covenant on Economic, Social and Cultural Rights creates a third specific exception to the general rule of equality for developing countries: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” As an exception to the general rule of equality, it should be noted that art 2 (3) must be narrowly construed, may be relied upon only by developing countries, and only with respect to economic rights’: UN Economic and Social Council The rights of non-citizens (n 76 above) para 19.
processes in order to ensure that the frameworks that emerge are as responsive as possible to the highly complex sets of factors, rights and interests that need to be taken into account. Domestic workers, as a significant category of migrants, should be among those who take part in redefining their right to regional mobility.
APPENDIX

Estimated employment in private households 2001 - 2012

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
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<tbody>
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<td>2001</td>
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<tr>
<td>2002</td>
<td>1 266 000</td>
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<tr>
<td>2003</td>
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<td>2004</td>
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<td>2009</td>
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<tr>
<td>2010</td>
<td>1 157 000</td>
</tr>
<tr>
<td>2011</td>
<td>1 117 000</td>
</tr>
<tr>
<td>2012</td>
<td>1 153 000</td>
</tr>
</tbody>
</table>

2001 - 2012: -2.9%
2011 - 2012: 3.2%

Source: South African Institute of Race Relations