

# Prompting formalisation through labour market regulation: a ‘framed flexibility’ model for domestic work

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**Abstract** - There is an urgent need to conceptualise the potential for legal regulation of informal labour markets. This article responds by centring on one facet of the informal economy, namely domestic work. Efforts to regulate domestic work have intensified in the wake of the International Labour Organization’s Domestic Workers Convention, 2011 (No 198). Yet this regulatory project has encountered particular complexities in devising frameworks to regulate the working hours of domestic workers. The article argues that domestic work is both crucial to the evolution of working time regulation and a fruitful site of experimentation on the ‘formalisation’ of unregulated and casualised markets. It investigates the legal construction of working time in domestic work, proposes a conceptual framework for regulation, and outlines a regulatory model (the ‘Framed Flexibility Model’) that is intended to be serviceable across a range of informal and profoundly casualised work-forms (e.g. ‘zero hours contracts’). The article concludes by explaining the relevance of this Model, including by suggesting a novel ‘reconstructive’ role for labour law.

## 1. Introduction

Among the pressures that shape the unsettled terrain of contemporary labour law scholarship is an urgent need to respond to the precarious and informal working relations that are expanding across the advanced industrialised world and have long been characteristic of the South. Labour law scholarship is striving to theorise the regulation of this segment of the global labour force. This article is a contribution to this dilemma. Its entry point is precise: the intersection of a genre of informal work (domestic work) and a regulatory sub-field (working time). Its purpose is more expansive: to build on labour law’s tenets, institutions and regulatory models to propose some tangible strategies for the ‘formalisation’ of informal and precarious work.

The article highlights the deep-rooted affinities of two regulatory sub-fields that are generally assumed to pursue distinct, if occasionally intersecting, trajectories: working time and non-standard work (NSW).<sup>3</sup> Both have a heightened presence in

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<sup>3</sup> See further D McCann ‘New Frontiers of Regulation: Domestic Work, Working Conditions and the Holistic Assessment of Non-Standard Work Norms’ (2012) 34(1) *Comparative Labor Law and Policy Journal* 167.

recent labour law discourses. Working time has returned to legal policy agendas, most visibly at the transnational level. An October 2011 International Labour Organization (ILO) Meeting of Experts on Working Time called for renewed emphasis on the topic and further debate.<sup>4</sup> The EU offers a halting review of the European-level standard, the Working Time Directive (WTD),<sup>5</sup> and the enduring loyalty of the Court of Justice (CJEU) to conventional tenets of working time law.<sup>6</sup> The World Bank continues to use its recently assumed labour law advisory role to caution against any substantial regulation of working hours.<sup>7</sup>

Specific regulation of domestic work represents the latest phase in the evolution of regulatory responses to NSW. Regulatory regimes devoted to domestic work have been constructed in a small number of countries.<sup>8</sup> Domestic work regulation is unusual, however, in being driven primarily from the international level. Centrally, the adoption of international standards in July 2011, the ILO Convention (No. 198)<sup>9</sup> and Recommendation (No. 201) on Domestic Workers,<sup>10</sup> proved to be a regulatory shock, spurring a bout of soul-searching on the scope of disparate legal regimes. These include the EU, in which the exclusion of domestic workers from the coverage of flagship norms, including the WTD, has triggered unease.<sup>11</sup>

These twin legal policy themes have emerged as intimately related in the domestic work debates. Working time features as a thorny challenge for regulatory design. It surfaced in the ILO standard-setting process to elicit particular conceptual and strategic confusion, ultimately prompting the International Labour Office<sup>12</sup> to express a need for ‘particular guidance’<sup>13</sup> on working time regulation.<sup>14</sup>

The article is grounded in two central contentions about the regulation of domestic work. First, it argues that this evolving project is crucial to properly conceptualising the evolution and potential futures of working time regulation. From this insight, two

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<sup>4</sup> ILO *Follow-up to the Meeting of Experts on Working Time Arrangements* (GB.313/POL/1) (ILO: Geneva, 2012).

<sup>5</sup> Council Directive (EC) 93/104 concerning certain aspects of the organization of working time [1993] OJ L307/18.

<sup>6</sup> *KHS AG v Schulte* [2012] IRLR 156 (CJEU); *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA)* (C-78/11) [2012] IRLR 779 (CJEU).

<sup>7</sup> Most recently, World Bank *Doing Business 2014* (World Bank: Washington DC, 2013), although see World Bank *World Development Report 2013: Jobs* (World Bank: Washington DC, 2013). See further S Lee and D McCann, ‘Measuring Labour Market Institutions: Conceptual and Methodological Questions on “Working Hours Rigidity”’ in J Berg and D Kucera (eds), *In Defence of Labour Market Institutions: Cultivating Justice in the Developing World* (Palgrave Macmillan/ILO: London/Geneva, 2008).

<sup>8</sup> For a list of national provisions, see ILO, *Effective Protection for Domestic Workers: A Guide to Designing Labour Laws* (ILO: Geneva, 2012), Appendix 1.

<sup>9</sup> Domestic Workers Convention, 2011 (No 198).

<sup>10</sup> Domestic Workers Recommendation, 2011 (No 201).

<sup>11</sup> McCann (n 3 above).

<sup>12</sup> Convention No 198 (n 9 above).

<sup>13</sup> ILO, *Decent Work for Domestic Workers*, Report IV(2), International Labour Conference, 99<sup>th</sup> Session, 2009 (ILO: Geneva, 2009).

<sup>14</sup> This article draws in part on a study prepared in response to this request: D McCann and J Murray, *The Legal Regulation of Working Time in Domestic Work* (ILO: Geneva, 2010), available at [http://www.ilo.org/wcmsp5/groups/public/--ed\\_protect/--protrav/--travail/documents/publication/wcms\\_150650.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_protect/--protrav/--travail/documents/publication/wcms_150650.pdf).

conclusions are reached. The problem of how to regulate domestic workers' hours, it is argued, should be addressed with reference to the conceptual advances found in the recent working time literature. At the same time, working time scholars across the range of engaged disciplines should recognise the significance of the domestic work project to the future of working time regulation. The core features of domestic work exemplify working time trends that are at the frontier of the challenge to standard work, including long hours, fragmented working time, loss of autonomy over work schedules and so on.

The analysis pursued herein, however, is of a more far-reaching import for labour law scholarship. The fragmentation, or even 'death,' of the field of labour law has been associated with a shift away from standard forms of work, and with ever-evolving demands for flexibility and freedom from regulation. Our project deals with a significant exemplar of NSW, namely domestic work. Further, we use the core norms, techniques, and modalities of traditional labour law, rather than devising 'light touch' rules that re-inscribe the informality of this form of labour. Our framework for the regulation of domestic work, proposed below, offers a tangible example of the way in which the discipline of labour law may evolve towards an authentically global conception of its subject.<sup>15</sup> The second central claim of this article is that the reform of domestic work should be understood as providing guidance more generally for the 'formalisation' of segments of the global labour force that are (*de jure* or *de facto*) excluded from the reach of labour law regimes.<sup>16</sup> If labour regulation is to be integrated into formalisation strategies, that is to say, it is essential to understand, track and absorb the advances of this most significant regulatory incursion into unregulated settings.

We argue that working time laws are fundamental to the governance of casualised work-forms (alongside the more obvious candidate, employment status regulation<sup>17</sup>). This insight underpins the article, but emerges with particular force in our argument for the articulation of certain novel functions for working time regulation. In particular, it is suggested that working time norms should be fashioned to play a 'binding' role, fusing into coherent and protective working relationships the series of dispersed engagements characteristic of casualised work. It is also recognised that working time laws should respect and accommodate the existing temporalities of informal labour force engagement. Crucially, it must be recognised that informal work may be sustained by the need to combine waged work with the worker's own unwaged domestic labour.

The article is structured as follows. Section 2 examines the exclusion of domestic work from the formal scope of labour law frameworks. Section 3 proposes a conceptual framework for the legal regulation of working time in domestic work,

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<sup>15</sup> See T Teklè *Labour Law and Worker Protection in Developing Countries* (Hart/ILO: Oxford/Geneva, 2010); J Fudge, S McCrystal and K Sankaran, *Challenging the Legal Boundaries of Work Regulation* (Hart: Oxford, 2012).

<sup>16</sup> This article adopts the more expansive employment-based conception of the 'informal economy'; see M Carr and MA Chen *Globalization and the Informal Economy: How Global Trade and Investment Impact on the Working Poor* (ILO: Geneva, 2001) and MA Chen 'Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement, and Regulatory Challenges' (2011) 23 *Canadian Journal of Women and the Law* 167-184.

<sup>17</sup> See further ACL Davies, 'The Contract for Intermittent Employment' (2007) 36 *Industrial Law Journal* 102; D McCann, *Regulating Flexible Work* (Oxford University Press: Oxford, 2008).

enunciating a set of principles to underpin regulatory frameworks. Section 4 outlines a regulatory framework - the Framed Flexibility Model – that translates these principles into concrete regulatory strategies. Section 5 concludes by identifying the innovations of this Model, and its relevance to the broader regulation of informal working relations, and by proposing a new ‘reconstructive’ role for labour law.

## 2 *The Legal Construction of Working Time in Domestic Work*

The social fact of domestic work – the performance of those tasks undertaken within the home that create and sustain the household - is age-old. For much of human history, households have harnessed the labour of others to perform or assist with those demands.<sup>18</sup> This domestic working relation has been reflected in such archetypes as the ‘clever servant’, which has existed from Plautus to Jeeves and beyond, while the ‘upstairs/downstairs’ motif is undergoing a curious twenty-first century revival in film and television.<sup>19</sup> By the end of the nineteenth century, domestic service was one of the single biggest categories of employment in countries like Britain.<sup>20</sup> Despite the changes in social and technological features of family life in the twentieth century, predictions that this ‘archaic’ form of labour would become redundant have proved to be misplaced.<sup>21</sup> Instead, in the twenty-first century, paid domestic work has undergone a resurgence in many developed countries and it remains a significant form of employment in less developed nations. In 2011, the ILO estimated that at least 52.6 million people worked in paid domestic work, 83% of them women. Indeed, domestic work is the main job of 7.5% of all women workers in the world.<sup>22</sup> Among the complex reasons for this expansion is the increasing emphasis in government policy on the marketised, private provision of care for the aged, disabled, ill and children, much of it to be provided in the client’s own home rather than in large-scale public institutions.<sup>23</sup>

The current flourishing of academic scholarship on the contemporary ‘problem’ of domestic work has at least some of its roots in the 1980s.<sup>24</sup> Feminist scholarship, including feminist legal scholarship, exposed the gender ordering of the

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<sup>18</sup> For example, T Meldrum, *Domestic Service and Gender 1660 – 1750: Life and Work in the London Household* (Longman: Harlow and London, 2000).

<sup>19</sup> M Romero, ‘Nanny Diaries and other Stories: Imagining Immigrant Women’s Labor in the Social Reproduction of American Families’ (2003) 52 *DePaul Law Review* 809. The popularity of ‘Downton Abbey’ has led to the re-release of the best-selling memoir by kitchen maid Margaret Powell: M Powell, *Below Stairs* (St Martin’s Press: New York, 1968, reissued 2012).

<sup>20</sup> C Steedman, *Labours Law: Domestic Service and the Making of Modern England* (Cambridge University Press: Cambridge, 2009). On the evolution of the legal category of servant in the UK, see E Albin, ‘From “Domestic Servant” to “Domestic Worker”’ in Fudge, McCrystal and Sankaran (n 15 above).

<sup>21</sup> L A Coser, ‘Servants: the Obsolescence of an Occupational Role’ (1973) 52(1) *Forces* 31.

<sup>22</sup> ILO, *Global and Regional Estimates on Domestic Workers* (ILO: Geneva, 2011).

<sup>23</sup> See, for example, J Fudge, ‘Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada’ (2001) 23(1) *Canadian Journal of Women and the Law*, 235; G Mundlak, ‘Recommodifying Time: Working Hours of ‘Live-in’ Domestic Workers’ in J Conaghan and K Rittich (eds) *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press: Oxford, 2005).

<sup>24</sup> See generally A Blackett, ‘Introduction : Regulating for Decent Work for Domestic Workers’ (2011) 23(1) *Canadian Journal of Women and the Law* 1.

domestic realm and the role of work within it.<sup>25</sup> This analysis of the intra-household division of labour then expanded to consider the significance of paid work within the home.<sup>26</sup> Critical commentary noted the centrality of gender,<sup>27</sup> race<sup>28</sup> and class<sup>29</sup> in structuring paid domestic labour and its peculiar vulnerabilities. It has also been noted that the forces underpinning globalisation tended to increase both supply of and demand for paid domestic labour<sup>30</sup> and that existing modes of regulation of this flow of labour is clearly inadequate.<sup>31</sup> Much of the literature on ‘global care chains’ highlights the significant proportion of migrant ‘othered’ women providing domestic service in households in the developed world, and the impact of the labour on family relationships in both the home and host countries.<sup>32</sup>

This rich literature has thus done much to expose the complex dynamics and ideologies that shape domestic work, and to highlight the nature and legal character of the regulatory failures. There is a wealth of data about the general absence of decent working conditions for such workers,<sup>33</sup> and their vulnerability to gross human rights abuses.<sup>34</sup> In relation to the working time of domestic workers, the available evidence reveals central deficiencies in the temporal practices of domestic work.<sup>35</sup> The research confirms the widespread presence of long, even completely open-ended, hours; insufficient rest periods; ‘unsociable,’ undesirable or unsafe hours; long spans of fragmented work; excessively short hours (and the related low income); unpredictable scheduling; limited influence over working time arrangements; low levels of awareness of legal and contractual entitlements; and inadequate documentation and verification of working hours.<sup>36</sup>

Intersecting, complex variables shape these working time arrangements, cumulatively permitting labour processes to dictate working hours in ways that undermine recognised working time standards. As an illustration, where domestic support tasks are analogues of the traditional feminine roles of cooking, cleaning and caring, entrenched and gendered notions of work-value are likely to generate

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<sup>25</sup> See, for example, J Williams, ‘From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition’ (2000-2001) 76 *Chicago-Kent Law Review* 1441.

<sup>26</sup> For recent commentary, see S Bianchi, L Sayer, M Milkie and J Robinson, ‘Housework: Who Did, Does or Will Do It, and How Much Does it Matter?’ (2012) *Social Forces* 91(1) 55.

<sup>27</sup> J Rollins, *Between Women: Domesticity and their Employers* (Temple University Press: Philadelphia, PA, 1985).

<sup>28</sup> D E Roberts, ‘Spiritual and Menial Housework’ (1997) 9 *Yale Journal of Law and Feminism* 51.

<sup>29</sup> R Milkman, E Reese and B Roth, ‘The Macrosociology of Paid Domestic Labor’ (1998) 25(4) *Work and Occupations* 483.

<sup>30</sup> B Ehrenreich and A R Hochschild (eds), *Global Women: Nannies, Maids and Sex Workers in the New Economy* (Granta: London, 2003).

<sup>31</sup> N Ghosheh, ‘Protecting the Housekeeper: Legal Agreements Applicable to International Migrant Domestic Workers’ (2009) 25(3) *International Journal of Comparative Labour Law and Industrial Relations* 301.

<sup>32</sup> V Shiva, ‘Global Care Chains and Surplus Emotional Value’ in W Hutton and A Giddens (eds), *Global Capitalism* (New Press: New York, 2000) 112.

<sup>33</sup> See generally ILO (n 13 above).

<sup>34</sup> V Mantouvalou, ‘Servitude and Forced Labour in the 21<sup>st</sup> Century: the Human Rights of Domestic Workers’ (2006) 35(4) *Industrial Law Journal* 395.

<sup>35</sup> ILO (n 37 above), *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* (ILO: Geneva, 2013).

<sup>36</sup> D McCann and J Murray (n 14 above).

comparatively low rates of pay.<sup>37</sup> Low hourly rates and lack of worker autonomy over working time combine to create pressure on domestic staff to work excessively long and/or unpredictable hours. A related feature of domestic work is that the boundaries between 'work' and 'not-work' may be porous or even non-existent, particularly for 'live-in' staff. Domestic work often gives rise to a requirement to remain available and prepared to work, whether as an unavoidable adjunct to the job or as an inessential, yet routine, requirement. Carers, most obviously, may be prevented from determining the use of their spare hours by the need to be prepared to attend to their charges, whether young, elderly or sick.

It is apparent that a central factor in domestic work's escape from standard working time norms is its treatment by regulatory regimes. This treatment is, in turn, underpinned by an influential account of domestic work as a unique form of labour, inherently unsuited to regulation.<sup>38</sup> The legal construction of domestic work has roots deep in the traditions that shape constellations of meaning around work and the home. Thus in the common law tradition, the foundational distinctions between master and servant recognised the distinct category of the domestic servant.<sup>39</sup> The evolution of statutory labour law sharpened pre-existing distinctions between formal employment and 'other' workers. This model was transplanted to legal frameworks in low-income countries where it mapped to pre-existing working relations. In consequence, paid work performed in the home has been excluded from the scope of legal protection or, where formally protected, has been prone to distinct failures of compliance and enforcement.

Yet nor does the presence of formal norms and institutional frameworks that embrace domestic work guarantee decent conditions.<sup>40</sup> The monitoring and enforcement of labour standards in the private home is even more fraught than in public workplaces, and traditional enforcement mechanisms are prone to failure. In settings, further, in which domestic labour is performed by immigrants unfamiliar with the language and legal culture of their workplaces, individual-complaint mechanisms are likely to be wholly ineffective in the absence of complementary supports (institution-building, education, state-sponsored financial supports etc.) Finally, the conceptualisation of domestic work as beyond the standard legislative field is often coupled with deficient trade union organisation. While alternative forms of social organisation are playing a promising role in some national<sup>41</sup> and international<sup>42</sup> settings, collective labour systems have yet effectively to be mobilised to attain decent working conditions for domestic workers.<sup>43</sup>

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<sup>37</sup> See, for example, D N Barron and E West, 'The Financial Costs of Caring in the British Labour Market: Is There A Wage Penalty in Caring Occupations?' (2011) 50(3) *British Journal of Industrial Relations* 1.

<sup>38</sup> G Mundlak and H Shamir, 'Bringing Together or Drifting Apart? Targeting Care Work as "Work Like No Other"' (2011) 23(1) *Canadian Journal of Women and the Law* 289; ILO (n 13 above).

<sup>39</sup> W Blackstone, *Commentaries on the Laws of England* (London, 1765-1769), 411-15, 417; see generally E Albin (n 20 above) 234ff.

<sup>40</sup> Blackett (n 24 above); Mundlak (n 23 above).

<sup>41</sup> See, for example, J N Fish, 'Engendering Democracy: Domestic Labour and Coalition-Building in South Africa' (2006) 32(1) *Journal of Southern African Studies* 107.

<sup>42</sup> H Schwenken, E Prugl, R Pabon, C Hobden and S Ally, 'Conversations,' (2011) 13(3) *International Feminist Journal of Politics* 437.

<sup>43</sup> European Trade Union Confederation (ETUC), *Out of the Shadows. Organising and Protecting Domestic Workers in Europe: the Role of Trade Unions* (ETUC: Brussels, 2005).

### 3. *The Legal Regulation of Working Time in Domestic Work: a Conceptual Framework*

In part, these outcomes are the product of a political struggle to conceptualise domestic work as apt for regulation, which is premised on an acceptance of the incursion of the regulatory mechanisms of the state or social partners into this dimension of working (and domestic) life. As the political will to intervene has been increasingly secured, however, it has exposed an urgent need for regulatory models suited to this genre of working relations. This observation holds for all facets of domestic work; yet working time is a particularly intractable element of this complex site of regulation, on which institutional knowledge is inevitably scant.

A central contention of this article is that the problem of how to regulate the temporal dimension of domestic work should be situated within the preoccupations and theoretical constructs of contemporary working time scholarship. This literature, it is argued, provides a frame through which properly to conceptualise the temporal practices of domestic work, and to discern the most effective modes of regulation. The article aims to signal to working time researchers the relevance, even centrality, of the domestic work debates for the broader regulation of working time in casualised labour markets. Further, it is contended that legal regimes on working time must creatively respond to the broader challenge of ushering domestic work within both the formal and *de facto* reach of labour law frameworks.

These insights, it is suggested in this Section, can elicit a conceptual framework for regulatory intervention. To this end, the following outlines a set of principles to underpin regulatory interventions in the temporalities of domestic work. These principles are complementary. Three embody broader regulatory objectives that have particular resonance for working time law (A-C); three map to the themes of the contemporary working time literature (D-F). The final two are directed at regulatory strategy (G-H). Purposely open-textured, this set of principles is proposed as the necessary foundation for regulatory regimes across a range of settings, both bargained and statutory.

#### *A. Legal Recognition of the Value of Care Work*

That domestic labour should be accorded greater value is an overarching insight applicable across modern labour law frameworks. Yet this principle has a special resonance for domestic work regulation, in which it can be taken to suggest, most fundamentally, a ‘formalisation’ of this form of labour. In its most basic sense, this formalisation implies that domestic work should be subject to regulation, rather than assigned to a realm beyond the reach of formal norms.<sup>44</sup> The exclusionary model, that is to say, is precluded. The principle of legal recognition of the value of care work, however, also has ramifications for the form and content of regulatory instruments on domestic work. Less obvious among its demands is that domestic work should be recognised as comparable, in a range of dimensions, to other of the caring professions.

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<sup>44</sup> On the formalization of domestic work, see Chen (n 16 above), pp 178-182.

This insight underscores the indispensable contribution of domestic workers to the care economy. More tangibly, it can be brought to bear on the quest for regulatory models. Cognate occupations are regulated to address the dimensions of temporal flexibility encountered in domestic work: the need for emergency care and impossibility of uniform adherence to working hours schedules. The medical and nursing professions, in particular, are governed by regulatory frameworks that accommodate such temporal flexibilities. These can be mined for techniques to regulate household services, as they are below.

### *B. Universality*

The principle of universality is grounded in an assumption that all workers are entitled to labour law's protections. This principle is of extensive heritage, having implicitly shaped the evolution of labour law systems by fuelling the expansion of protective standards. This observation can be illustrated by considering the historical preoccupations of the international standard-setting process. As the constituency of ILO Member States expanded during the last century, the application of the international norms to countries at all levels of development was assumed.<sup>45</sup> This vision of the expansive scope of the international labour code was subsequently reinforced by the adoption of devoted standards for certain of the non-standard forms of work (part-time work;<sup>46</sup> temporary agency work;<sup>47</sup> homework;<sup>48</sup> semi-dependent, disguised and triangular employment relationships,<sup>49</sup> and domestic work<sup>50</sup>).

In the contemporary debates, the principle of universality can readily be associated with the recently intensified grip of human rights discourses on labour law scholarship.<sup>51</sup> This incursion has embraced the twin regulatory fields that are the subject of this article. The human rights tradition has been called on to evaluate the legal treatment of domestic work,<sup>52</sup> and has a particular hold on the discourses that generated and sustain the ILO standards.<sup>53</sup> In the field of working time, it underpins a claim that if working time laws embody rights that are fundamental in nature, these instruments should also be universal in reach.<sup>54</sup>

Applying the universality principle to the intersection of these fields inevitably rules out the exclusionary model. Further implications can be suggested, however, for the scope and content of domestic work laws. Three examples can be highlighted.

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<sup>45</sup> See, for example, ILO *Hours of Work. Extract from the Report of the 37th (1967) Session of the Committee of Experts on the Application of Conventions and Recommendations, Geneva, 1967* (ILO: Geneva, 1967).

<sup>46</sup> Part-Time Work Convention, 1994 (No 175).

<sup>47</sup> Private Employment Agencies Convention, 1997 (No 181).

<sup>48</sup> Home Work Convention, 1996 (No 177).

<sup>49</sup> Employment Relationship Recommendation, 2006 (No 198).

<sup>50</sup> Convention No 198 (n 9 above); Recommendation No 201 (n 10 above).

<sup>51</sup> See, for example, P Alston (ed) *Labour Rights as Human Rights* (Oxford University Press: Oxford, 2005); C Fenwick and T Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart: Oxford, 2010).

<sup>52</sup> For example, Mantouvalou (n 34 above).

<sup>53</sup> Convention No. 198 (n 9 above), Article 3.

<sup>54</sup> ILO, *Hours of Work: From Fixed to Flexible* (ILO 2005). See further D McCann, 'Decent Working Hours as a Human Right: Intersections with Working Time' in Fenwick and Novitz (n 51 above), 509; J Murray, 'Taking Social Rights Seriously: Is There a Case for Institutional Reform of the ILO?' in Fenwick and Novitz (n 51 above).



First, dependent workers should be entitled to protection irrespective of their contractual arrangements or the configuration of their working relationships. This observation is of particular relevance to domestic workers supplied to private households by third parties, a substantial segment of the domestic workforce in many countries.<sup>55</sup> Second, since domestic work is fuelled by the mobility of workers through temporary and permanent migration - both internal and international - the universality principle urges focused regulatory attention on the needs of migrant workers.<sup>56</sup> Third, novel incentives for implementation are crucial in working relations that are informal, in the sense of existing beyond the *de facto* reach of labour regulation.

### *C. The Unity of Labour Law Regimes*

The third principle is articulated to address the complex interrelationship of particular and universal regulatory frameworks that has been generated by two decades of specific regulation of non-standard work. Its concern is the coherence of regulatory frameworks, and its prescription a recognition of the unity of labour law regimes. The unity principle holds that systems of regulation are most convincingly conceptualised as an integrated whole.<sup>57</sup> In this article the principle, and attendant holistic analysis of regulatory schema, are applied to working time law. Regulatory reform on domestic work, the unity principle is taken to suggest, must be pursued in an awareness of its repercussions for the evolution of the corpus of working time laws, and in particular with a concern that domestic work laws do not undermine the level of protection available under 'mainstream' working time frameworks. This demand has profound implications for regulatory frameworks on domestic work, which are returned to in Section 4.

### *D. Work/Family Reconciliation for Domestic Workers*

Crucial research efforts have exposed the gendered complexion of conventional models of labour regulation. This work has addressed the role of legal regulation in shaping family life including, centrally, by tracing the repercussions of the male breadwinner/female caregiver model that conventional regulatory frameworks embody.<sup>58</sup> The insights of this work/family analysis advance the understanding of the temporal dimensions of domestic work. At the conceptual level, this analysis reveals the working hours characteristic of domestic work, outlined in Section 2, to be of the kind likely to inhibit family life. Long daily and weekly hours hinder domestic workers in sustaining meaningful family and private lives. Across more extensive time-frames, migrant domestic workers are for substantial periods prevented from directing their caring labour towards their own families. The family lives of domestic workers are also threatened by the unpredictability of their hours; as in other occupations, where it is impossible for domestic workers to predict when they will be relieved of paid work, the quality of their "free time" is inevitably undermined.

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<sup>55</sup> See *Model Law*, Section 1. *A Cancedda Employment in Household Services* (European Foundation for the Improvement of Living and Working Conditions: Dublin, 2001); Chen (n 16 above).

<sup>56</sup> See e.g. *Model Law*, Section 23.2.

<sup>57</sup> See further McCann (n 3 above).

<sup>58</sup> See in particular Conaghan and Rittich (n 23 above); J Murray (ed) *Work, Family and the Law* (Federation Press: Sydney, 2005).

The growth in domestic work, further, can be attributed in part to a failure on the part of policy actors to ensure, including through the legal regulation of working time, that parents have adequate time to devote to their family lives. A key challenge for the regulation of domestic work is that it disrupts outsourcing-based care policies by requiring a third party to be accommodated within the care equation. In particular, a pervasive assumption that the employer is the sole subject of work/family policies has prevented domestic workers from being fully integrated into these models as autonomous actors equally entitled to working time protections. This work/family analysis offers a crucial rationale for legal intervention in the working hours of domestic workers: to ensure that the private and family lives of domestic workers are not jeopardised by the drive to sustain the family life of the dominant party to the wage-work bargain.

This principle of work/family reconciliation for domestic workers also points to recent advances in working time law that can be integrated into the project of domestic work regulation. Efforts to shape working time regulation to work/family objectives have co-opted conventional regulatory mechanisms (hours limits, minimum rest periods, unsocial hours designations etc.).<sup>59</sup> They have also prompted innovative techniques, in the shape of a range of forms of family leave, emergency time-off rights and entitlements for individual workers to influence the duration and scheduling of their working hours.<sup>60</sup> The potential of these techniques for domestic work regulation is illustrated in the Framed Flexibility Model outlined in Section 4 below.

### *E. Standardisation*

The burgeoning literature on precarious work can also be employed to illuminate the contours of working time in domestic work.<sup>61</sup> Much domestic service can be characterised as precarious in the sense that this concept has been elaborated in the literature, as “work involving limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health.”<sup>62</sup> Most pertinently, elaborations of the working time elements of precariousness hone in on features that characterise domestic work: hours that are excessively short or long, irregular in number or timing, or scheduled during unsocial periods.<sup>63</sup> Within such an analysis, it is crucial to isolate, as a driver of precariousness, domestic work’s divergence from the “Standard Employment Relationship” (SER).<sup>64</sup> Domestic work deviates from the SER along

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<sup>59</sup> See for example C Fagan, ‘Gender and Working Time in Industrialized Countries’ in J Messenger (ed), *Working Time and Workers’ Preferences in Industrialized Countries: Finding the Balance* (Routledge: London and New York, 2004), 108.

<sup>60</sup> Fagan *ibid.*

<sup>61</sup> See, for example, J Fudge and R Owens (eds), *Precarious Work, Women and the New Economy: the Challenge to Legal Norms* (Hart: Oxford, 2006); L F Vosko (ed), *Precarious Employment: Understanding Labour Market Insecurity in Canada* (McGill-Queen’s University Press: Montreal, 2006).

<sup>62</sup> L F Vosko, ‘Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity’ in Vosko (*ibid.*) 4.

<sup>63</sup> L F Vosko, M Macdonald and I Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge: London, 2009).

<sup>64</sup> See, for example, G Bosch, ‘Towards a New Standard Employment Relationship in Western Europe’ (2004) 42(4) *British Journal of Industrial Relations* 617.

multiple axes, most obviously in its location, but also in its temporalities, in an often striking contrast with the 9-5/Monday-Friday work-week.

The extent to which domestic work deviates from this paradigm has shaped its legal treatment under the exclusionary model. Yet the working time dimension of the SER also holds promise for the regulation of domestic work. Reformulated, it can sketch the standardisation that is required to regulate this un-regulated arena, offering a vision of the standard work-week that, in a refashioned form, is central to the regulation of domestic work. The principle of standardisation, then, demands that the cardinal benefits of the standard model (certainty, regularity, the preservation of social and community time) should be preserved in the regulatory frameworks devised for domestic work.

#### *F. Regulated Flexibility and 'Working Time Capability'*

Certain forms of domestic work, in particular those that involve elements of personal care, must inevitably escape the strictures of standardised working time, at least periodically. Yet the temporal practices of domestic work can be recast as uninhibited employer-oriented flexibility, while the principle of work/family reconciliation for domestic workers suggests temporal flexibility in aid of the subordinate party. The challenge for the regulation of domestic work, then, is to ensure compatible flexibilities: the employer's need for the presence of domestic workers in urgent circumstances and the worker's capacity to address unexpected elements of her family life and other responsibilities. This article suggests that a solution can be derived from two intersecting strands of the working time literature. First, Bosch's 'flexible SER' model, in its call to flexibilize the standard form, where necessary, while retaining its protective elements.<sup>65</sup> Secondly, Sen's notion of capabilities, as it has been developed in the field of working time, to support the capacity of individual workers to influence their working hours.<sup>66</sup> These theoretical models animate the 'Framed Flexibility' approach outlined in Section 4.

#### *G. The Optimal Interaction of Regulatory Techniques*

The regulation of working time is subsumed within broader debates about the modes of regulation best suited to contemporary labour markets.<sup>67</sup> Most relevant for present purposes, this literature implies a careful calibration of regulatory techniques to embrace an optimum balance between labour law's core regulatory methodologies, of

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<sup>65</sup> Bosch (n 64 above).

<sup>66</sup> S Lee and D McCann, 'Working Time Capability: Towards Realizing Individual Choice' in J-Y Boulon, M Lallement, JC Messenger and F Michon (eds) *Decent Working Time: New Trends, New Issues* (ILO: Geneva, 2006); C Fagan and P Walthery, 'Individual Working-time Adjustments between Full-time and Part-time Working in European Firms' (2011) 18(2) *Social Politics: International Studies in Gender, State and Society* 269.

<sup>67</sup> See, for example, Murray (n 54 above), 364-5; G Davidov and B Langille (eds), *New Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart 2006); C Arup, P Gahan, J Howe, R Johnstone, R Mitchell, and A O'Donnell (eds), *Labour Law and Labour Market Regulation*, (Federation Press: Sydney, 2006); S Lee and D McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation* (Palgrave Macmillan/ILO: London/Geneva, 2011); D McCann, S Lee, P Belser, C Fenwick, J Howe and M Luebker *Creative Labour Regulation: Indeterminacy and Protection in an Uncertain World* (Palgrave Macmillan/ILO: London/Geneva, 2014).

legislated and collectively-bargained norms.<sup>68</sup> In this Section, it drives a pair of related propositions: that the regulation of domestic work should be pursued primarily through statutory mechanisms, and that these mechanisms should embody a considerable degree of detailed regulatory guidance.

Statutory standards are favoured because collective bargaining is strikingly ill-developed in domestic work. It is implausible that collective mechanisms harbour the capacity effectively to regulate the domestic workforce, even in the most highly regulated regimes. Given the limited capacity of the collective partners to negotiate effective norms, then, the role of statute must inevitably become more pronounced.

The preference for detailed statutory standards is derived from kindred labour market phenomena: the growth of precarious work and the renewed aspiration to protect workers in the informal economies of developing countries. These phenomena render the identity of the legal subject more compelling than during the reign of the SER. Destandardised, fragmented and impoverished workforces, that is to suggest, require that a precisely elaborated image of the protected worker be envisaged to underpin regulatory frameworks. Further, this archetypal legal subject should approximate the most vulnerable workers in a given regulatory sphere.<sup>69</sup> It is less frequently suggested, however, that the effective regulation of these neglected facets of the global labour market implies an upward trajectory in the articulation of norms across regulatory strata. The contention of this article is that statutory standards should incorporate a substantial level of detail, at least as a default. Legislation, in this scenario, becomes a blueprint for workplace practice, serving both workers and hirers who cannot be expected to be familiar with the intricacies of constrained working time schedules. This model, then, conspicuously diverges from the modern history of European working time laws, which has been characterised by the devolution of regulatory frameworks towards the sectoral-, industry- and enterprise-levels.<sup>70</sup>

These assertions about the pre-eminence and elaboration of statutory norms, however, do not neglect the merits of collective bargaining as a form of regulation. Statutory norms are most effective in the embrace of collectively regulated regimes, and the forms of individualisation that can support work/family reconciliation are best articulated through this highly responsive mode of regulation.<sup>71</sup> It is therefore suggested that the - possibly finite - political will to regulate domestic work should be seized as an opportunity to promote collective negotiation in the casualised labour force. Standardised working time patterns, in themselves, can help to sustain collective organisation, by limiting working hours and preserving collective time.<sup>72</sup> Yet a more proactive role for statute would be to build mechanisms of collective voice. These objectives are reflected in the Framed Flexibility Model.

#### *H. Innovative Regulation: Dynamic and Responsive Regimes*

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<sup>68</sup> D McCann, 'Regulating Working Time Needs and Preferences' in Messenger (n 59 above), 10.

<sup>69</sup> This approach is reflected in the objectives of ILO Convention No. 198 (n 9 above). The Convention excludes, however, those 'who [perform] domestic work only occasionally or sporadically and not on an occupational basis' (Article 1(c)).

<sup>70</sup> See in particular P Marginson and K Sisson, 'European Integration and Industrial Relations: a Case of Convergence and Divergence' (2002) 40(4) *Journal of Common Market Studies* 671.

<sup>71</sup> Lee and McCann (n 66 above).

<sup>72</sup> A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press: Oxford, 1999), 58.

The responses to the manifold challenges highlighted throughout this Section are only beginning to be mapped, rendering the design of legal frameworks on domestic work necessarily complex and uncertain. The principle of innovative regulation responds to this uncertainty, by suggesting that a degree of experimentation is inevitable in designing legal frameworks on domestic work, including those on working time. The complexity of governing domestic work suggests that any regulatory settlement should be dynamic, in the sense of integrating processes of empirical testing and incremental reform. The ideal can be speculated to be an iterative process, in which the influence of regulatory regimes is periodically evaluated and tailored reforms introduced.<sup>73</sup> This strategy would entail the recurrent investigation of processes of implementation, with the object of determining regulatory good practice in a systematic manner. Such an approach would be in line with insights from the legal literature on the effectiveness of regulatory models in the informal economies of developing countries, which offers experimentation coupled with empirical evaluation as a response to regulatory uncertainties.<sup>74</sup>

#### 4. The 'Framed Flexibility' Model

It is apparent that devising models for the regulation of working time in domestic work is a task as urgent as it is complex. Further, this demand is not satisfactorily served by the existing legal frameworks on either working time or domestic work. As an illustration, the recent ILO Domestic Workers standards treat working time scantily, despite the anxiety about domestic workers' hours that pervaded the preceding debates among the ILO constituents.<sup>75</sup> Even the traditional vehicle for conveying regulatory technique to domestic policy-makers, the non-binding Recommendation, foregoes the detail of regulatory design.<sup>76</sup> There is therefore an urgent need to conjecture on the structure and detail of regulatory models on working time in domestic work. The research project that underpins this article has responded to this challenge.<sup>77</sup>

This Section proposes a basis upon which working time in domestic work can be regulated consistently with the principles outlined in Section 3. To this end, instructive transnational and national standards were identified and consulted. These include the transnational working time instrument of the industrialised economies, the EU Working Time Directive<sup>78</sup>; the most advanced developing world standards on domestic work, the South African Sectoral Determination<sup>79</sup> and Uruguayan Act No 18.065 on domestic work;<sup>80</sup> the international instruments on working time;<sup>81</sup> and the central modern statement on international working time law by the ILO's Committee

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<sup>73</sup> For initial reflections on such an approach, see D F Frey, 'A Diagnostic Methodology for Regulating Decent Work' in Lee and McCann (n 64 above), 339.

<sup>74</sup> C Fenwick, J Howe, S Marshall and I Landau *Labour and Labour-Related Laws in Micro and Small Enterprises: Innovative Regulatory Approaches* (ILO: Geneva, 2007).

<sup>75</sup> N 14 above.

<sup>76</sup> Recommendation No 201 (n 10 above), 41-54.

<sup>77</sup> McCann and Murray (n 13 above).

<sup>78</sup> N 5 above.

<sup>79</sup> Issued under the South African Basic Conditions of Employment Act.

<sup>80</sup> Uruguay Act No 18.065 of 15 November 2006, Decree No 224/007 of 25 June 2007.

<sup>81</sup> For a complete list, see McCann and Murray (n 14 above), 42.

of Experts on the Application of Conventions and Recommendations (CEACR), the 2005 *General Survey*.<sup>82</sup> Finally, in line with the contention advanced throughout this article that domestic work should be situated on the continuum of care work, regulatory regimes from the caring professions were consulted.<sup>83</sup>

Elements of these models have been selected, and adapted as needed, to build a cohesive regulatory framework on working time in domestic work, characterised as a 'Framed Flexibility Model.' The Framed Flexibility Model is not proposed as a universal model, to be applied without modification. Instead, it is tendered as a resource for the design of measures at a range of regulatory levels, and in diverse national settings. To illustrate how these principles might be translated into a concrete regulatory framework, a *Model Law on Working Time in Domestic Work* has been designed.<sup>84</sup>

The Framed Flexibility Model rests on two intertwined assumptions about the objectives of working time regulation in domestic work. First, the task of legal regulation is to ensure that the normative aspects of standard working time – maximum daily and weekly hours, minimum rest periods, paid annual leave, and so on – are protected. Second, the role of working time regimes is properly to conceive of, and regulate, flexibility in working hours. Based on these twin tenets, the Framed Flexibility Model permits the calibration of standardised working time norms with a degree of flexibility in favour of both employers and workers. To this end, the Model is composed of three parallel sets of standards: a framework of hours limits and rest periods (the 'Framing Standards'); a set of 'flexibility' norms (the 'Temporal Flexibility Standards'); and a set of procedural requirements that are tailored towards ensuring that the substantive standards exercise a decisive influence on the actual practices of working life (the 'Effective Regulation Standards').

The Framed Flexibility Model is tailored to the properties of domestic work. It is intended, however, to be serviceable across a broader range of casualised work-forms that exist beyond the (*de jure* or *de facto*) reach of formal regulation. It is the first model of working time regulation that has been fashioned to prompt and sustain the embrace of labour forces unregulated by formal norms.<sup>85</sup> The Model is designed to formalize the temporal dimension of domestic work through a regulatory framework that is both attuned to the existing practices of informal labour and embodies incentives towards regulation. It therefore offers a working time dimension to integrate into those facets of formalization strategies that recognise and protect domestic workers and that extend to these workers the rights and benefits of formal employment.<sup>86</sup> In particular, the Model is expected to be relevant to a broad range of

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<sup>82</sup> ILO (n 54 above).

<sup>83</sup> Most notably, the Nursing Personnel Recommendation, 1977 (No 157).

<sup>84</sup> The *Model Law* can be accessed at

<https://www.dur.ac.uk/resources/law/ModelLawonWorkingTimeinDomesticWork.pdf>. See also McCann and Murray (n 14 above).

<sup>85</sup> Although pivotal to the experience of informal workers, working time is frequently neglected in the literature on regulatory strategies for the informal economy (see e.g. Chen's classification of the 'rights and benefits of being formally employed,' (n 16 above), Box 3, p 180). An exception is Fenwick et al (n 74 above).

<sup>86</sup> On these two dimensions of the formalization of domestic work, see Chen (n 16 above), Box 3, p 180. Chen identifies a third dimension as 'regulation and taxation,' *ibid*. See also Tomei's observation that existing formalisation strategies are ineffective in stabilizing hours of work and earnings, M Tomei

those in the informal economy who are waged workers. This cohort of the informal workforce is frequently overlooked in the informality debates, which tend to centre on the self-employed.<sup>87</sup> Yet waged work accounts for a substantial proportion of informal working relations in many low-income countries and is an obvious entry-point for legal regulation of informal working relations. With modifications, then, the regulatory strategies suggested in this Section are expected to be of relevance beyond household employment to a range of informal and casualised working relations.

#### *A. The Framing Standards: the Refashioned SER*

The function of the Framing Standards is to ensure the flexibility necessary for domestic work while constraining working hours in ways protective of the worker. In line with Bosch's concept of the 'flexible SER,' this dimension of the Framed Flexibility Model retains the elements of standardised working time that are of enduring value. In consequence, certain of the Framing Standards appear in the vast majority of statutory working time regimes. Others, however, are more novel, and intended to refashion the SER to fit profoundly casualised work.

The Framing Standards apply to domestic work the central insight of working time laws: that the span over which a labour process is performed is not an acceptable measure of the working hours of those engaged in that process. Instead, decent work requires limits on the availability of the regulated worker's labour that are sufficient to preserve health, well-being and family life. The central innovation of the Framing Standards, in this regard, is an explicit regulatory recognition of the time/wage nexus. The Standards require domestic workers to be remunerated at a level that can sustain a decent standard of living without recourse to excessive working hours.<sup>88</sup> To effect that overarching principle, the *Model Law on Working Time in Domestic Work* requires, with some exceptions, normal working time of 8 hours a day<sup>89</sup> and 40 hours a week.<sup>90</sup>

The requirements on daily rest periods allow these hours limits to accommodate the idiosyncrasies of work organization in domestic work. Domestic staff, particularly in households that hire only one worker, are often required to be available over an extensive daily span of hours. Many are required to prepare both breakfast and dinner, and can therefore reasonably be assumed to work across the hours from 06:00 to 19:00. The daily rest period in the *Model Law* is calibrated so that it does not unnecessarily constrain this span of hours: a minimum of 11 hours has been selected. A weekly day of rest<sup>91</sup> and three weeks' annual leave<sup>92</sup> are also specified, as are additional entitlements to public holidays<sup>93</sup> and paid sick leave.<sup>94</sup>

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'Decent Work for Domestic Workers: Reflections on Recent Approaches to Tackle Informality' (2011) 23 *Canadian Journal of Women and the Law* 185-211.

<sup>87</sup> Chen (n 16 above), p 175. See further Carr and Chen's classification of informal sector workers into employment categories: (1) Employers (owners of informal enterprises, owner operators of informal enterprise); (2) Self-Employed (own-account workers, heads of family businesses, unpaid family workers) and (3) Wage Workers: employees of informal enterprises, casual workers without a fixed employer, homeworkers, domestic workers, temporary and part-time workers, and unregistered workers (n 16 above).

<sup>88</sup> *Model Law* (n 84 above), section 15.1.

<sup>89</sup> Section 3.1.

<sup>90</sup> Section 4.1(a). The ILO Domestic Workers Convention (n 9 above) requires equal treatment in normal hours, overtime compensation, daily and weekly rest and paid annual leave (Article 10).

<sup>91</sup> Section 7.2. See also Convention 198 (ibid), Article 10(2).

The Framing Standards' treatment of overtime hours diverges from conventional modes of working time regulation. Drawing on a work/family analysis of working time law, it is grounded in a significant assumption: that in domestic work, rules on overtime should ensure there is as little recourse to overtime as possible, rather than merely constraining overtime hours. This stance is justified by the health and work/life implications of regular work beyond normal hours. The technical innovation is that notice periods are configured as a central feature of overtime regulation. The *Model Law* entitles the worker to notice of a requirement to work overtime, and a right to refuse to do so that can be displaced only by an urgent and essential need for his or her services.<sup>95</sup> More orthodoxly, overtime work is constrained by a 48 hour maximum on weekly hours<sup>96</sup> and attracts remuneration at a premium of at least 50%.<sup>97</sup>

Finally, the Framing Standards contain a more detailed treatment of working time schedules than usual in statutory regimes.<sup>98</sup> This dimension is central to the broader purpose of the Framed Flexibility Model, of preventing and allaying casualised working relations. First, unlike conventional regulatory strategies on working time, which centre almost exclusively on long hours, the Framing Standards configure short hours as problematic. The *Model Law* requires excessively short periods of engagement to be avoided where possible.<sup>99</sup> Domestic workers are also entitled to compensation when they report for work to find that they are expected to work for less than two hours.<sup>100</sup>

To allay fragmentation, the Framing Standards target the intersection of hiring strategy and hours scheduling from which casualised labour emerges. To ensure that domestic workers are certain of their schedules in advance, and are not prone to fluctuating incomes, the Standards prohibit the hiring of domestic workers on an 'as and when required' (casual or 'zero hours') basis.<sup>101</sup> Other provisions attempt to construct the SER from the fragmented daily schedules of domestic work. This aim is pursued through a novel regulatory technique: a system of incentives to arrange working hours continuously. The Framing Standards specify outer boundaries on the working day. The *Model Law* identifies a 'span' of nine hours over which daily hours can be scheduled. Workers whose hours are scheduled beyond this nine-hour span are subject to a normal day of seven hours (although they can elect to work eight-hour days and be compensated by additional annual leave).<sup>102</sup> The span is subject to an absolute limit of 13 hours.<sup>103</sup>

### *B. The Temporal Flexibility Standards: Working Time as 'Time Out of Life'*

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<sup>92</sup> Section 13.1.

<sup>93</sup> Section 12.

<sup>94</sup> Section 14.

<sup>95</sup> Section 8.5.

<sup>96</sup> Section 4.1(b).

<sup>97</sup> Section 8.6(a).

<sup>98</sup> *Model Law* (n 84 above), section 10.

<sup>99</sup> Section 15.1.

<sup>100</sup> Section 10.2.

<sup>101</sup> *Model Law* (n 84 above), section 10.3.

<sup>102</sup> Section 10.4.

<sup>103</sup> Section 10.5.



The Temporal Flexibility Standards operate, primarily within the constraints of the Framing Standards, to structure the unpredictable requirements that are inherent in most domestic work occupations. This facet of the Framed Flexibility Model embraces norms that are intended to provide for two exigencies: the employer's need for the emergency presence of the worker, and the worker's need for time to devote to elements of his or her life beyond waged labour. Both dimensions are examined in the following sections.

(i) *On-call work: countering 'productivity regulation'*

As observed in Section 2, it is in the nature of domestic work that employees may be called upon at short-notice to perform tasks for which it is difficult, or even impossible, to plan in advance. It was also noted that 'on-call' periods are frequently relied on to secure this work. On-call periods, then, ensure the flexibility necessary to respond to unpredictable demands. Yet, they risk exposing workers to long periods of labour, or availability for labour.

How to govern such on-call periods is among the pressing questions for domestic work regulation. The legal conceptualisation of these periods is ill-developed. More than a decade ago, Supiot singled out on-call time as a 'third kind of time' - neither self-evidently working hours nor rest - and observed that the regimes to govern them had yet to be designed.<sup>104</sup> Attempts have since been made to conceptualise on-call work, whether through the interpretive mandate of the courts<sup>105</sup> or novel legislative drafting.<sup>106</sup> The most influential approach can be characterised as the 'productivity regulation' model. This model precludes periods designated as unproductive from legal conceptions of working time, and therefore from the parameters of regulated work. This model has been injected into legal discourses on working time by a regulatory technique that bifurcates working hours into periods characterised as either 'active' or 'inactive.' 'Inactive' hours are devoted solely to remaining available to perform the primary tasks of a job, and are separately classified to permit reduced working time and wage entitlements during these periods.

This activity/inactivity schema has been most prominent in the ongoing efforts to reform the EU Working Time Directive, in which it was proposed to permit extended hours in jobs that involve substantial periods of 'inactivity.'<sup>107</sup> The bifurcation strategy remains in circulation among the regulatory models generated by the formalisation of domestic work. Most significantly, the pioneering 1999 French collective agreement, the *Convention collective nationale des salariés du particulier employeur* adopts this distinction to remunerate 'inactive' hours at a lower rate<sup>108</sup> Most recently, the bifurcation strategy has implicitly been endorsed at the international level in the ILO's Domestic Workers Convention. By mandating that on-

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<sup>104</sup> Supiot (n 72 above), 81.

<sup>105</sup> See, for example, L Rodgers, 'The Notion of Working Time' (2009) 38(1) *Industrial Law Journal* 80.

<sup>106</sup> See CEC, Commission's amended proposal COM (2005) 246 for a Directive amending the Working Time Directive 2003/88/EC (CEC: Brussels, 2005), Article 1(1b).

<sup>107</sup> *Ibid.* The formula was subsequently modified, to similar effect. CEC, Commission Opinion COM (Brussels, 2009) 57 on the amendments of the European Parliament in second reading (CEC: Brussels, 2009), paragraph 3.2.1.

<sup>108</sup> Article 20.

call ('standby') periods are to be regarded as hours of work only 'to the extent determined' at national level,<sup>109</sup> the Convention leaves domestic policy-makers unconstrained in selecting bifurcation as a regulatory strategy.

The activity/inactivity model infringes a number of the principles that were enunciated in Section 3. It implicitly characterises on-call hours as amenable to regulation only when they are viewed as fully productive, and thereby sanctions long and variable hours and reduced wages. It undermines the universality principle, threatening the coherence of working time law through the downgrading effects of fragmentary regulation. It also mitigates against the work/family account of working time regulation, by harbouring an implicit assumption about the role of working hours limits: that they are mandated exclusively to account for the arduousness of labour, rather than to constrain periods that workers spend away from their families or from other dimensions of their lives.<sup>110</sup>

There is a further, more far-reaching, risk of the productivity regulation model, however, which has so far been overlooked in the scholarly and policy literatures: that it has the capacity to stimulate casualised forms of labour. By enshrining and disseminating a fragmented conception of working time, the model can be deployed to prompt what may be termed 'legalised casualisation.' It cannot be assumed, that the regulatory strategy of distinguishing active and inactive time will remain confined to occupations that skirt the binary divide between working time and rest. Instead, the bifurcated notion of working time is now available to deploy in broader contexts; to permit the carving out of 'inactive' periods from the parameters of regulated work across labour markets as a whole.

If more widely adopted as a regulatory classification, the notion of inactive time would be available to integrate into proliferating efforts to drain 'slack time' from the working day.<sup>111</sup> At the conceptual level, it is possible for a range of time-periods to be designated as 'inactive'; there is no convincing reason that this concept be paired exclusively with the structured and distinct episodes of on-call work generated by work organization in the health sector. Workers being required to 'clock off' during what would otherwise be classified as rest breaks, or even standard elements of working time, is already anecdotally reported in rapidly casualising segments of the labour markets of the industrialized world.

The bifurcation of working hours in the productivity regulation model contrasts with the unitary conception of working time that is offered by conventional working time laws. Most prominently, the ILO standards embody a conception of 'hours of work' that embraces both activity and availability: "time during which the persons employed are at the disposal of the employer."<sup>112</sup> Further, this formula has been interpreted by the CEACR to embrace periods during which workers are under a duty

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<sup>109</sup> Article 10(3).

<sup>110</sup> D McCann, 'The Role of Work/Family Discourse in Strengthening Traditional Working Time Laws: Some Lessons from the On-Call Work Debate' (2005) 23(1) *Law in Context*, 127.

<sup>111</sup> On the notion of 'slack time' see Supiot (n 72 above), 82.

<sup>112</sup> Hours of Work (Commerce and Offices) Convention, 1930 (No 30), Article 2.

to “be at the disposal of the employer until work is assigned.”<sup>113</sup> Sophisticated regulatory models have also been designed to govern the caring professions and specifically for domestic work, most prominently in the South African Sectoral Determination No. 7. Such approaches recognise the need for unscheduled work, while simultaneously protecting workers through hours limits, notice periods and pay premia.

Inspired by these instruments, the Framed Flexibility Model rejects the distinction between ‘active’ and ‘inactive’ time. The Temporal Flexibility Standards posit a contrasting duality: between ‘internal’ and ‘external’ on-call periods. This schema picks up on, and elaborates, a distinction predicted by Supiot<sup>114</sup> and enunciated by the CJEU, initially in *SIMAP*.<sup>115</sup> Workers engaged in internal on-call work are those required to remain at a place elected by the employer; in the external form, workers are on-call at a location of their choice.

The *Model Law on Working Time in Domestic Work* extends specific protections to workers during internal on-call periods: they are entitled, for example, to access to a secure, private room.<sup>116</sup> The acute vulnerabilities of ‘live-in’ domestic workers are also separately recognised, by clarifying that all their periods of on-call duty are to be classified as internal.<sup>117</sup> The Temporal Flexibility Standards also aspire to a degree of certainty for domestic workers on the scheduling of on-call work, of both kinds, including by requiring seven days’ notice of each on-call period.<sup>118</sup> Given that on-call periods represent a significant restriction of workers’ autonomy, the Standards also assume that legal regulation should limit the circumstances in which such demands may be made. Call-outs are permitted only where there is an urgent and essential need for the domestic worker’s services.<sup>119</sup> Most fundamentally, and in calculated contrast to the productivity regulation model, internal on-call periods count as working time for all purposes, including pay.<sup>120</sup> ‘External’ on-call work escapes the definition of working time unless the domestic worker is subject to a degree of obligation comparable to internal on-call periods.<sup>121</sup> Instead, external periods are regulated through the imposition of hours limits,<sup>122</sup> minimum rest periods,<sup>123</sup> and a compensation requirement.<sup>124</sup>

#### (ii) *Temporal autonomy for domestic workers*

The second dimension of the Temporal Flexibility Standards deploys the concept of working time capability, referred to in Section 3.F, with the intent of extending to

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<sup>113</sup> ILO (n 54 above), para 46. See also the CJEU in Case C-303/98 *SIMAP v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] IRLR 845 (ECJ). Case C-151/02 *Landeshaupstadt Kiel v. Jaeger* [2003] IRLR 804 (ECJ).

<sup>114</sup> Supiot (n 72 above), 81.

<sup>115</sup> N 113 above.

<sup>116</sup> Section 18.2.

<sup>117</sup> Section 18.4.

<sup>118</sup> *Model Law* (n 84 above), section 16.1(b).

<sup>119</sup> *Model Law* (n 84 above), section 17.1.

<sup>120</sup> *Model Law* (n 84 above), section 18.1. In contrast, remuneration is beyond the EU’s regulatory scope. Case C-437/05 *Vorel* [2007] ECR I-331.

<sup>121</sup> *Model Law* (n 84 above), section 1.

<sup>122</sup> *Model Law* (n 84 above), section 19.

<sup>123</sup> *Model Law* (n 84 above), section 20.

<sup>124</sup> *Model Law* (n 84 above), section 21.

domestic workers the capacity to adjust their working hours. The objective is to recognise that many women engage in domestic work (and in other facets of the informal economy) because the working time arrangements that can accommodate their family responsibilities are unavailable in the formal economy.<sup>125</sup> The Temporal Flexibility Standards are designed to integrate such worker-beneficial temporalities.

In this regard, the Standards are inspired by one of the most compelling recent trends in working time regulation. They echo a regulatory strategy that has its origins in the bargained frameworks of the Netherlands and Germany and was subsequently exported, in legislative form, to regimes that include Australia,<sup>126</sup> New Zealand<sup>127</sup> and the UK.<sup>128</sup> The Standards extend to domestic workers two central entitlements. The first is an obligation on the employer to notify the worker of planned changes to her working time arrangements<sup>129</sup> and to take account of her preferences.<sup>130</sup> Second, domestic workers are entitled to request adjustments to either the duration or arrangement of their hours. In line with the continental European models<sup>131</sup> - rather than the less onerous Anglo-Saxon variants<sup>132</sup> - such requests must be granted unless they conflict with an essential need for the domestic worker's services.<sup>133</sup> Various supports are provided: that the employer provide a written response,<sup>134</sup> for example, and that the worker be protected from discrimination for having made a request.<sup>135</sup> The *Model Law* imposes a more forceful obligation in response to adjustment requests that are based on particularly compelling grounds of caring for a young child or disabled or sick family member.<sup>136</sup> Domestic workers are also aided in responding to more unpredictable or urgent family needs, in this case through mandated leave periods.<sup>137</sup>

### *C. The Effective Regulation Standards: Experimentation as a Response to Regulatory Uncertainty*

The principle of innovative regulation, outlined in Section 3.H, suggested regulatory regimes that embrace experimentation, periodic review and reform. The Effective Regulation Standards seek to impel this approach through mandatory requirements on

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<sup>125</sup> N Cassirer and L Addati *Expanding Women's Employment Opportunities: Informal Economy Workers and the Need for Childcare* (ILO: Geneva, 2007). On the other hand, many 'live-in' carers have to outsource care of their own children in order to undertake domestic work, a particular problem for immigrant domestic workers. See for example B Ehrenreich and A R Hochschild (eds) (n 30 above).

<sup>126</sup> See J Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18(3) *Australian Journal of Labour Law* 306.

<sup>127</sup> See N Donnelly, G Plimmer and S Proctor-Thomson, 'The Role of "Voice" in Matters of "Choice": Flexible Work Outcomes in NZ Public Services (2012) 54(2) *Journal of Industrial Relations* 182.

<sup>128</sup> See L Anderson 'Sound Bite Legislation: The Employment 2002 and New Flexible Working 'Rights' for Parents' (2003) 32(1) *Industrial Law Journal* 37.

<sup>129</sup> *Model Law* (n 84 above), section 22.1.

<sup>130</sup> *Ibid.*

<sup>131</sup> S Burri, H Optiz, and A Veldman, 'Work-Family Policies on Working Time in Practice: A Comparison of Dutch and German Case Law on Working-Time Adjustment' (2003) *International Journal of Comparative Labour Law and Industrial Relations* 19.

<sup>132</sup> Anderson (n 128 above).

<sup>133</sup> *Model Law* (n 84 above), section 22.2.

<sup>134</sup> *Model Law* (n 84 above), section 22.2(a).

<sup>135</sup> *Model Law* (n 84 above), section 22.2(b).

<sup>136</sup> Section 22.2(c).

<sup>137</sup> Section 23.1.

record-keeping, regular evaluation, and a complex calibration of statutory and collective modes of regulation.

Accurate records on working hours are an essential support to the iterative processes of experimentation and assessment demanded by the innovative regulation principle. Their role is particularly acute under the modes of working time flexibility foreseen by the Temporal Flexibility norms. Yet, the merits and feasibility of tracking domestic workers' actual hours have emerged as prominent conceptual and practical obstacles to working time regulation.<sup>138</sup> Aversion to record-keeping is associated with a perception of domestic work as wholly 'private' in nature. Objections to regulation are frequently ancillary to a belief that the private household is an illegitimate object of state oversight.<sup>139</sup> This contention, however, is easily rebutted. Private households are subject to a range of tax-, financial- and property-related obligations that require the household to account to state agencies. The *Model Law* requires a written Working Time Agreement (WTA) be concluded between domestic worker and employer at the outset of their relationship,<sup>140</sup> which sets out the central components of the worker's hours,<sup>141</sup> and identifies a minima of information required in subsequent record-keeping.<sup>142</sup> To underscore the centrality of documentation, the failure to keep records or to provide them when requested are designated as offences.<sup>143</sup>

The second function of the Effective Regulation Standards responds to the imperative of periodic evaluation and reform. The Standards institute a process of regular consultation between governments and representative organisations of domestic workers and employers on methods of monitoring working hours and on implementation and enforcement of the legal framework.<sup>144</sup> In particular, the influence of legislative measures is to be evaluated at least once in each five-year period, and reforms introduced if needed.<sup>145</sup>

Finally, in conjunction with these devoted standards, there is an effective regulation dimension that operates across the Framed Flexibility Model as a whole. The principle of the optimal interaction of regulatory techniques, elaborated in Section 3.G, recognises collective labour organisation as the most reliable means of ensuring widespread compliance with protective legislation.<sup>146</sup> Yet the collective organisation of domestic workers cannot be founded on the Fordist/standard worker organising model. Most significantly, even in settings in which unionisation is otherwise widespread, it may not be possible to identify an employers' association with the capacity to bargain over the terms and conditions of domestic work. Such deficiencies, it was suggested in Section 3.G, imply that the regulation of domestic work should be configured as an opportunity to promote collective regulation of formalising labour forces. To this end, it can be suggested that legislative modes of

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<sup>138</sup> ILO (n 13 above).

<sup>139</sup> See e.g. Peggie R Smith 'The Pitfalls of Home: Protecting the Health and Safety of Paid Domestic Workers' (2011) 23 *Canadian Journal of Women and the Law* 309-339.

<sup>140</sup> Section 2.1.

<sup>141</sup> Section 2.3.

<sup>142</sup> Section 24.4. See also Convention No 198 (n 9 above), Article 7.

<sup>143</sup> Section 24.5.

<sup>144</sup> *Model Law* (n 84 above), section 25.1.

<sup>145</sup> *Model Law* (n 84 above), section 25.2.

<sup>146</sup> See S Lee, 'Working-Hour Gaps' in Messenger (n 59 above).

regulation should be designed to offer an incentive to construct collective bargaining structures.

European instruments, including the Working Time<sup>147</sup> and Information and Consultation<sup>148</sup> Directives, offer a model of statutory prescriptions as a default: governing only when not displaced by bargained (or otherwise agreed) alternatives. This default model is adopted - with adjustments - in the Framed Flexibility Model, to permit standards to be modified by collective agreements. Thus hours-averaging schemes can be negotiated that permit workers to exceed daily or weekly hours limits in certain circumstances. Such schemes allow firms to address unpredictable demands without resort to overtime work.<sup>149</sup> The EU default models have been criticised for their failure adequately to constrain bargained outcomes.<sup>150</sup> The *Model Law* sidesteps this constraint in two ways. First, it requires comparable levels of protection for those subject to bargained norms.<sup>151</sup> Second, it incorporates a degree of individual choice. The agreement of the domestic worker is needed, for instance, to swap overtime premia for compensatory rest.<sup>152</sup>

### 5. Conclusion: Towards Reconstructive Labour Law

This article has responded to the urgent need to conceptualise the role and potential of legal regulation in shaping informal and casualised work. To this end, it has addressed the intersection of a key home of informal labour relations - domestic work - and the problematic regulatory sub-field of working time. The article elaborated a conceptual framework for the regulation of working time in this arena. This Framed Flexibility Model is grounded in a contention that the regulation of domestic work, in its temporal dimension, should be shaped by the insights of modern working time scholarship. The article has configured domestic work regulation as both central to the future of working time law and a site for experimentation with legal strategies for the formalisation of wage-work relations.

To conclude, a number of suggestions can be made of broader relevance to labour law's engagement with informal and precarious work. First, it can be suggested that regulatory frameworks should host devoted mechanisms to allay fragmentation of working relations. This article has conceptualised casualisation as stemming from work schedules, as well as contractual status, and has contended that working time laws are fundamental to the governance of casualised work-forms. In this regard, the article points to a novel - reconstructive - role for labour law, in which a central objective of regulatory intervention is to build coherent and protected working relationships from intermittent episodes of economic exchange. Equally, labour laws should be designed to respect, where appropriate, the existing rhythms and practices

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<sup>147</sup> N 5 above.

<sup>148</sup> Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

<sup>149</sup> *Model Law* (n 84 above), section 9. See also Sections 8.6(b), 19.2, 22.2.

<sup>150</sup> See for example M Hall, 'Assessing the Information and Consultation of Employees Regulations' (2005) 34(2) *Industrial Law Journal* 103.

<sup>151</sup> For example, Section 19.2.

<sup>152</sup> Section 8.6(b).

of informal working relations, in particular by recognising their deeply rooted connections to unwaged domestic labour.

In the Framed Flexibility Model, the reconstructive strategy is centred in the treatment of hours scheduling, on-call work and employer- and worker-oriented flexibility. It can be contended, however, that other dimensions of labour law frameworks should extend incentives for employers to organise secure working relationships, including over the longer term. These frameworks, further, could mirror the Effective Regulation Standards by providing incentives for the construction of collective bargaining structures. In effect, the Framed Flexibility Model calls for a renewal of working time law, in which this regulatory sub-field is reconfigured from its paradigmatic role in advanced industrialised economies - setting the boundaries of otherwise sustained, predictable and reciprocal employment relations - and is tied to regulatory objectives more attuned to the fragmented labour markets of both North and South. More broadly, reconstructive labour law promises to refashion the field to respond to the needs of both low-income countries and of rapidly casualising labour markets in the advanced industrialised economies.