

**ECONOMIC EXPLOITATION AND CHILD LABOUR: TOWARDS A
STRUCTURAL APPROACH TO INTERNATIONAL LABOUR LAW AND
HUMAN RIGHTS**

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Abstract:

The elimination of child labour in all its forms is an identified political priority for the international community. This has endured historically and has moved up the agenda since the 1990s, including through its inclusion most recently in the UN Sustainable Development Goals. However, international legal and policy approaches to date have only provided a limited challenge to some of the enduring structural processes that underpin the problem. These include the growing and highly dispersed informal economy, poverty and structural inequality for children and their families, the role and burden of gendered care and social reproduction work, and deprivations in the right to education. This thesis problematizes the limitations of the conceptual framing of childhood economic exploitation under international labour law and international human rights law. Analyzing what it terms the ‘prohibition and penalty’ approach that has dominated the labour law model of intervention, this thesis argues that this approach fails to effectively challenge a number of these structural processes, in particular the prevalence of child labour in the informal economy. Raising further critical questions in relation to the distinct international human rights law model, this thesis argues that while promising a more holistic approach to children’s rights, the human rights law framework relegates the relevance and implications of social reproduction and care to the private sphere of the family, and provides limited protection for crucial socio-economic rights for families.

The second part of the thesis examines the ways in which we can address two critical structural dimensions of the problem – the informal economy and social protection mechanisms for families. Emerging policy developments in these fields are reviewed, including the potential of the ILO’s recent Decent Work for All Agenda as a response to the informal economy, and the scope and application of social protection mechanisms in this field. Noting some positive trends, this thesis argues that these developments retain some of the limitations identified in the labour law and human rights law models. In particular, they fail to fully grapple with the relevance and implications of social reproduction and care labour as an enduring and less visible element that underpins childhood economic exploitation. Moreover, there remains a disjuncture between progressive policy developments and international legal standards. Drawing on feminist relational theory throughout the analysis, this thesis argues for an approach to childhood economic exploitation that would embed the child within the range of personal and institutional relationships that determine her socio-economic rights over time, and that would centralize rather than marginalise the significance of care and interdependence, in ways that capture the distinct ‘situatedness’ of children as legal subjects. By engaging in this analysis, this thesis attempts to contribute towards emerging legal and policy approaches in this specific field, and to an enhanced understanding of the distinctive position of the child as a subject of law and development, that is alive to the core significance of varied personal and institutional relationships for the advancement of children’s human rights.

Résumé:

L'élimination du travail des enfants sous toutes ses formes est une priorité politique identifiée pour la communauté internationale. Il s'agit d'une réalité historique, qui a progressé dans l'agenda politique depuis les années 1990, en partie grâce à son incorporation récente aux Objectifs de développement durable des Nations Unies. Cependant, les approches légales et politiques internationales n'ont à ce jour posé qu'un défi limité à plusieurs des processus structureaux sous-jacents qui font durer le problème. On pense à l'économie souterraine, très dispersée et en pleine expansion, à la pauvreté et à l'inégalité structurelle concernant les enfants et leur famille, au rôle et au fardeau des soins sexospécifiques et du travail de reproduction sociale, et au dénuement en matière de droit à l'éducation. Cette thèse pose le problème des limitations du cadre conceptuel de l'exploitation économique de l'enfance selon le droit international du travail et le droit international en matière humanitaire. Avec l'analyse de ce que l'on appellera l'approche « interdiction et punition », qui a dominé le modèle d'intervention du droit du travail, on en discutera l'échec, car cette approche ne confronte pas efficacement plusieurs de ces processus structureaux, en particulier la prédominance du travail des enfants dans l'économie souterraine. On soulèvera d'autres questions critiques concernant le modèle particulier du droit international en matière humanitaire, posant l'idée que, tout en promettant une approche plus globale des droits de l'enfant, le cadre du droit international en matière humanitaire renvoie l'importance et les implications de la reproduction sociale et des soins à la sphère privée de la famille, et offre une protection limitée des droits socio-économiques cruciaux pour les familles.

La deuxième partie de cette thèse s'intéresse aux différentes façons dont nous pouvons résoudre deux dimensions structurelles critiques du problème : l'économie souterraine et les mécanismes de protection sociale pour les familles. On analysera de récents développements politiques dans ces domaines, dont le potentiel de l'Agenda Un travail décent pour tous de l'OIT, en réponse à l'économie souterraine, et l'échelle et l'application des mécanismes de protection sociale qui s'y rattachent. Soulignant quelques tendances positives, on expliquera que ces développements conservent certaines des limitations identifiées dans les modèles du droit du travail et du droit en matière humanitaire. En particulier, ils ne parviennent pas à cerner entièrement l'importance et les implications de la reproduction sociale et du travail de soins en tant qu'élément persistant et moins visible qui sous-tend l'exploitation économique de l'enfance. De plus, la contradiction demeure entre les développements politiques progressifs et les standards légaux internationaux. En se basant sur la théorie relationnelle féministe tout au long de cette analyse, on appellera à une approche de l'exploitation économique de l'enfance qui intègre l'enfant au sein des relations personnelles et institutionnelles qui déterminent ses droits socio-économiques au fil du temps, et qui centralise plutôt que marginalise l'importance des soins et de l'interdépendance, d'une façon qui prend en compte le contexte (« situatedness ») des enfants en tant que sujets légaux. En s'engageant dans cette analyse, on tentera d'apporter sa contribution aux approches légales et politiques qui émergent dans ce

domaine spécifique, et d'aider à une meilleure compréhension de la position spécifique de l'enfant en tant que sujet de droit et de développement, vivant jusqu'au cœur l'importance des différentes relations personnelles et institutionnelles pour l'avancement des droits de l'homme pour les enfants.

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Chapter One

Defining and Contextualizing Childhood Economic Exploitation – Framing the Analysis

1. Introduction

The economic exploitation of children has been described as “the moral equivalent of slavery in the 21st century.”¹ Where it is hazardous, child labour poses documented immediate harms to the physical and mental health, safety and development of children.² More generally, it is directly linked with constraints in children’s ability to access the right to education and decent work across the life cycle.³ In this sense, it can be considered an inequality-generating phenomenon that reproduces and institutionalizes poverty and exclusion through the intergenerational transfer of disadvantage across time.⁴ Over 180 years since the first legislative attempts to address childhood economic exploitation, while the number of children in economic exploitation globally has reduced overall, it has proven to be a persistent and complex problem that remains resistant to diverse legal and policy interventions.⁵ This is particularly the case in jurisdictions in the Global South where there is a large and growing informal economy, and in the less visible area of unpaid ‘social

¹ See Gordon Brown, *Child Labour & Educational Disadvantage – Breaking the Link, Building Opportunity* (Office of the UN Special Envoy for Education, 2012) [Brown 2012] at 14.

² For the documentation of the negative physical and mental impacts of child labour, see for e.g. ILO, *A Health Approach to Child Labour – A Synthesis Report of Four Country Studies from the Brick Industry* (Geneva: ILO, April 2015) at xi-xiv; ILO, *Children in Hazardous Work: What We Know, What We Need to Know* (Geneva: ILO, IPEC, 2011) [ILO Hazardous Work 2011] at 28.

³ For empirical evidence relating to long-term impacts of child labour on access to decent work as an adult, see ILO, *World Report on Child Labour: Paving the Way to Decent Work for Young People* (Geneva: ILO, 2015) [ILO WR Decent Work Young People 2015] at 15.

⁴ See for e.g. Nicola Philips, Resmi Bhaskaran, Dev Nathan, C. Upendranadh, “Child Labour in Global Production Networks: Poverty, Vulnerability and ‘Adverse Incorporation’ in the Delhi Garments Sector” (2011) Working Paper No. 117 [Philips et al. 2011] at 14. For the cyclical nature of disadvantage that results from child labour across the life cycle, see ILO WR Decent Work Young People 2015, *ibid* at 5-8.

⁵ For the most recent global statistics in relation to the prevalence of child labour globally, see ILO, *Marking Progress against Child Labour, Global Estimates and Trends 2000-2012* (Geneva: ILO, 2013) [ILO Global Estimates 2013] which reveals that 168 million children worldwide are in child labour, accounting for almost 11% of the child population. Children in hazardous work that endangers their health, safety and morals number 85 million. The figures for child labour have reduced by almost one third (78 million) from 2000-2012, while the figures for children in hazardous work, which comprises the largest share of those in the worst forms of child labour, declined by 50%, from 171 to 85 million.

reproduction'⁶ work undertaken by children in the home, which often remains unrecognized and unaccounted for in official statistical analysis.⁷

Legal initiatives in this field originated with the Factory Act 1833, in industrializing Britain, and have evolved significantly to prioritize the prohibition of child labour as one of the core labour standards of the International Labour Organisation (ILO) and as a human rights violation following the almost universal ratification of the United

⁶ For the ILO definition of reproductive work, see ILO, *A Manual for Gender Audit Facilitators: The ILO Participatory Gender Audit Methodology* (Geneva: 2007) which states, the “[r]eproductive role refers to childbearing and the different activities carried out in what is called today the care economy; namely, the many hours spent caring for the household members and the community, for fuel and water collection, food preparation, childcare, education and health care, and care for the elderly, which for the most part remain unpaid” at 133. While the scope and definition of ‘social reproduction’ work is the subject of debate, within feminist political economy literature, generally social reproduction work is defined to include “nurturant care and other social reproduction activities including for example household and domestic labour,” see for e.g. Rianne Mahon & Fiona Robinson, “Introduction” in Rianne Mahon & Fiona Robinson, eds, *Feminist Ethics and Social Policy: Towards a New Global Political Economy of Care* (Vancouver: University of British Columbia Press, 2011). For an overview of these debates, see for e.g. Judy Fudge, “Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction” (2014) 22 Fem Leg Stud 1 at 7-8 [Fudge 2014]. Fudge in particular uses the concept of social reproduction to examine the labour market and the emergence and decline of the male breadwinner and female housewife gender contract from 1940 to the contemporary period of post-industrial globalism. Specifically Fudge, at 7, defines social reproduction as, “the social processes and labour that go into the daily and generational maintenance of the population.”

⁷ While the primary focus of this thesis is on child labour in Global South, it is undoubtedly the case that child labour continues to occur in high-income countries, particularly in agricultural and domestic sectors in North America and in European countries. See for e.g. ILO, *Global Child Labour Trends 2008 to 2012*, (Geneva: International Labour Office, 2013) [ILO Global Trends 2013] at viii which reveals the predominance of child labour in the countries of the Global South. In absolute terms, the Asia-Pacific region has the most child labourers ages 5-17 (77.7 million) as compared with 59 million in Sub-Saharan Africa and 12.5 million in Latin America and the Caribbean. Yet the Sub-Saharan Africa region has the highest incidence of child labour, with one in five children involved. The incidence of child labour in low income countries is 22.5%, against 9% in countries with lower-middle income and 6.2% in countries with upper-middle income. The incidence of child labour is not estimated for high-income countries since no information was gathered to allow any type of estimation, see ILO Global Trends 2013 at ix. For an analysis of child labour in the Global North, see for e.g. Zehra F. Arat, “Analyzing Child Labor as a Human Rights Issue: Its Causes, Aggravating Policies and Alternative Proposals” (2002) 24:1 Hum Rts Q 177 [Arat 2002] at 180, who observes that, “[r]ich countries are not immune to the problem either. The United Kingdom and the United States are estimated to have two million working children each. A more conservative estimate by the Associated Press identifies 230,000 children as working in agriculture and 13,000 in sweatshops in the United States. While their numbers may not be known for sure, the fact remains that a considerable number of six-year-olds in Texas, for example, pick fruit and vegetables and earn as low as \$2.00 per day. The problem, however, has been colossal in developing countries.” In the European context, an important precedent was established by the European Court of Human Rights (‘ECtHR’) in *Siliadin v France* (2006) 43 EHRR 16. France was found in violation of its positive obligations under Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms for its failure to criminally prosecute a couple who engaged in exploitation of the applicant, a minor from Togo, in their home in conditions of domestic servitude for a number of years.

Nations Convention on the Rights of the Child (UNCRC).⁸ Following many decades of low political prioritization being afforded to the issue, childhood economic exploitation emerged in the early 1990s as part of the growing concern with the negative socio-economic implications of an increasingly globalized and integrated international economy, and with a growing prioritization of the specific position of children as subjects of human rights.⁹ Since then, diverse legal, policy and development strategies have framed and re-prioritized initiatives at the domestic level to curb its prevalence and harm.¹⁰ Most recently, the sustainable development goals specifically identified the elimination of the ‘worst forms of child labour’ through immediate and effective measures, and the elimination of child labour in *all* its forms by 2025 as one of its core aims.¹¹ Additionally, the ILO has identified 2016 as its target for the elimination of the prioritized ‘worst forms of child labour,’ and over 25 years have passed since the coming into force of the prohibition against economic exploitation in childhood under the UNCRC. Therefore, it is opportune to revisit the international labour law and human rights law frameworks to assess their

⁸ United Nations *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [UNCRC]. The UNCRC has been ratified by 195 States. The United States has signed but has not ratified the Convention. The core labour standards are identified in the ILO, *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, 37 I.L.M. 1233 [ILO Declaration]. For the historical origins of the emergence of legal standards in this field in industrialising Europe, see for e.g. Colin Creighton, “The Ten Hours Movement and the Rights of Childhood” (2012) 20 *Intl J of Child Rts*, 457-485; Hugh Cunningham and Shelton Stromquist, “Child Labor and the Rights of Children: Historical Patterns of Decline and Persistence” in Burns H. Weston, *Child Labour and Human Rights: Making Children Matter* (Boulder and London: Lynne Rienner Publishers, 2005) [Weston 2005]. For an overview of the emergence of the worldwide movement against child labour historically, its links with the movement to abolish slavery in the 19th century and its evolution to the current legal framework, see Alec Fyfe, *The Worldwide Movement Against Child Labour – Progress and Future Direction*, (ILO: Geneva, 2007) at 5-10 [Fyfe 2007].

⁹ See for e.g. Holly Cullen, *The Role of International Law in the Elimination of Child Labour*, (Leiden; Boston: M. Nijhoff Publishers, 2007) [Cullen 2007] at 2-6; Holly Cullen, “Child Labor Standards: From Treaties to Labels” in Weston 2005, *supra* note 8 [Cullen 2005] at 92-100; Yoshie Noguchi, “20 Years of the Convention on the Rights of the Child and International Action Against Child Labour” (2010) 18 *Intl J of Child Rts* 515 [Noguchi 2010] at 520.

¹⁰ See further, Cullen 2007, *supra* note 9 at 1-9 and 135-158.

¹¹ See UN General Assembly Resolution, *Transforming our World: the 2030 Agenda for Sustainable Development* (21 Oct 2015, A/RES/70/1) goal 8.7.

ongoing relevance and efficacy in achieving the consensus that exists towards advancing decent childhoods free from economic exploitation.¹²

This thesis interrogates the potential and limitations of the conceptual framing of the child and the phenomenon of economic exploitation in childhood under international labour law and international human rights law. Firstly, applying insights from feminist and critical legal theory, this thesis asks to what extent does an approach that prioritizes the ‘worst forms of child labour’ and the prohibition of children working below the minimum age, which is regulated primarily through a ‘prohibition and penalty’ mechanism under international labour law, have the potential to address the structural social processes that underpin the problem?¹³ Specifically, I argue that the extent to which a ‘prohibition and penalty’ approach can challenge the prevalence of child labour within the growing informal economy, the links with and engagement by children in gendered social reproduction work, the role of insecurity of income and livelihood opportunities for families, and the role of

¹² The 2016 target for the elimination of the worst forms of child labour was established by the ILO in 2006. See ILO, *Roadmap for Achieving the Elimination of the Worst Forms of Child Labour by 2016*, The Hague Global Child Labour Conference, 2010 [ILO Roadmap 2010]. See also ILO, *A Future without Child Labour: Global Report under the Follow up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2002) [ILO Director General 2002]; ILO, *The End of Child Labour: Within Reach, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2006) [ILO Director General 2006]; see further ILO, *Accelerating Action against Child Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2010) [ILO Director General 2010].

¹³ Within the field of labour law, the critical and feminist scholars I draw on primarily include the following: Adelle Blackett, “Emancipation in the Idea of Labour Law” [Blackett 2011] in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford; New York: Oxford University Press, 2011) [Davidov and Langille 2011]; Adelle Blackett, “Situated Reflections on International Labour Law, Capabilities and Decent Work: The Case of Centre Maraicher Eugene Guinois” (2007) *Revue Québécois Droit International* 223 [Blackett 2007]; Judy Fudge, “Labour as a ‘Fictive Commodity’: Radically Reconceptualising Labour Law” in Davidov & Langille 2011 [Fudge 2011]; Judy Fudge, “The Legal Boundaries of the Employer, Precarious Workers and Labour Protection” in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford and Portland, OR: Hart Publishers, 2006) [Davidov & Langille 2006] [Fudge 2006]; Leah Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2010) [Vosko 2010]; Joanne Conaghan & Kerry Rittich, eds, *Labour Law, Work and Family, Critical and Comparative Perspectives* (Oxford; New York: Oxford University Press, 2005) [Conaghan & Rittich 2005].

inadequacies in access to the right to education is distinctly limited by the boundaries and regulatory approach of international labour law.

Secondly, this thesis explores the potential and limits of the international human rights law framework in responding to the challenge of ‘childhood economic exploitation,’ focussing in particular on the conceptual framing of the child as a rights holder in the economic and social sphere.¹⁴ Importantly, in contrast to the labour law model, the UNCRC uses the broader concept ‘childhood economic exploitation’ to incorporate “work that deprives the child of their right to education” within its definition of the problem.¹⁵ By centralizing educational deprivation as a core harm of childhood economic exploitation, I argue, the international human rights law model offers a potentially broad and holistic approach that is capable of capturing a fuller spectrum of both productive *and* social reproductive work in which children can be engaged to the detriment of their well-being. A further distinctive feature of the UNCRC is its centralization and elaboration of the significance of relationships, specifically familial relationships, for the advancement of children’s rights, in particular in the socio-economic sphere. This feature goes some way

¹⁴ A note on terminology is required here. The terms ‘child labour’ and ‘childhood economic exploitation’ are used throughout this thesis. While ‘child labour’ has been used extensively by the International Labour Organisation, the term ‘childhood economic exploitation’ has become more prevalent since the widespread ratification of the UNCRC. As the analysis below reveals, the definition of ‘childhood economic exploitation’ within the international human rights law model is broader than a more proscribed definition under the international labour law model. In general, in this work, ‘child labour’ is used to refer to the labour and other activities performed by children that are prohibited within the labour law model specifically under *Convention Concerning Minimum Age for Admission to Employment* (ILO No. 138), 26 June 1973, 1015 UNTS 297 (entered into force 19 June 1976) [Convention No. 138]; the ‘worst forms of child labour’ and ‘hazardous work’ defined in *Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour* (ILO Convention No. 182), 17 June 1999, 2133 UNTS 161 (entered into force 19 Nov 2000) [Convention No. 182]. In contrast, ‘childhood economic exploitation’ is generally used to refer to the broader definition of the phenomenon defined under Article 32 of the UNCRC as “work that is likely to be hazardous, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, or to interfere with the child’s education.” Specifically, ‘childhood economic exploitation’ is used to refer to the phenomenon in its broadest possible sense which includes the involvement of child in social reproduction and care labour that undermines children’s access to education and other forms of survival activities that may not be considered ‘productive’ work or employment within the labour law model, but can be considered harmful within the meaning of Article 32 of the UNCRC.

¹⁵ Article 32 of the UNCRC.

towards meeting feminist critiques of human rights law and rights discourses more generally, which have pointed to the failure of rights frameworks to attend to the relationships of care and interdependence in which the human self is embedded, and the tendency of rights to abstract the individual rights holder from the contextualized realities of their lives.¹⁶ Applying the relational theoretical lens to the UNCRC, I examine some of the limitations of the human rights law approach to childhood economic exploitation when framed through a liberal rights-based framework.¹⁷ Specifically, I query whether in privileging the family as the ‘natural’ and primary duty-holder with the assumed capacity to provide for the socio-economic and care needs of its children in the private sphere, and outlining secondary progressive obligations for the State to support families in the socio-economic sphere and in the realm of care, the UNCRC provides a robust challenge to the continuum of exploitation that surrounds childhood economic exploitation.

¹⁶ For the elaboration of feminist relational critique of rights in the context of children’s rights specifically, see Sarah White, “Being, Becoming and Relationship: Conceptual Challenges of a Child Rights Approach in Development” (2002) 14 J of Intl Development 1095 at 1097 [White 2002]. For an examination of the relevance of feminist critiques of rights based frameworks that are relevant to the UNCRC, see Frances Olsen, “Children’s Rights: Some Feminist Approaches to the United Convention on the Rights of the Child” (1992) 6 Intl J of L & Fam 192 [Olsen 1992]. For an overview of feminists critiques of human rights and rights-based liberal frameworks more generally, see Karen Knop, *Gender and Human Rights* (Oxford: Oxford University Press, 2004); Nicola Lacey, “Feminist Legal Theory and the Rights of Women” in Karen Knop, *Gender and Human Rights* (Oxford: Oxford University Press, 2004) [Lacey 2004]. See also Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20:1 Yale JL & Feminism 1 [Fineman 2008]; Martha Albertson Fineman, “Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency” (2000) 8:13 J Gender Soc Pol’y & L 13 [Fineman 2000]. See Siobhán Mullally, “Introduction” in Siobhán Mullally, ed, *Care, Migration and Human Rights: Law and Practice* (Oxon: Routledge, 2015) at 4 [Mullally 2015]; Anne Stewart, “Care or Work: the Tyranny of Categories”, in Siobhán Mullally, ed, *Care, Migration and Human Rights: Law and Practice* (Oxon: Routledge, 2015) [Stewart 2015]. See further Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of System Discrimination in Canada* (McGill-Queen’s University Press, 2010) [Sheppard 2010] at 65-79.

¹⁷ Within the field of children’s rights and feminist legal theory more generally, the scholars that I primarily draw on include feminist relational theorists Martha Minow and Jennifer Nedelsky. See for e.g. Martha Minow, “Rights for the Next Generation: A Feminist Approach to Children’s Rights” (1986) 9:4 Harv Women’s LJ 18 [Minow 1986]; Martha Minow and Mary Lyndon Shanley, “Relational Rights and Responsibilities: Revising the Family in Liberal Political Theory” (1996) 11:1 Hypatia 4 [Minow & Shanley 1996]. See also Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy and Law* (Oxford: Oxford University Press, 2011) [Nedelsky 2011]; Jennifer Nedelsky, “Reconceiving Rights and Constitutionalism” (2008) 7 J of Hum Rts 139 [Nedelsky 2008]; Jennifer Nedelsky, “Reconceiving Rights as Relationship” (1993) 1 Rev Const Stud 1 [Nedelsky 1993]; Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 Yale J L & Feminism 7 [Nedelsky 1989].

In this second part of the thesis I move from critical exploration of the dominant labour law and human rights law models of intervention in this field, to further analyze the implications of my structural critique – focusing on two key issues – the informal economy and social protection mechanisms. First, I deepen my analysis of the specific challenges of regulating childhood economic exploitation in the informal economy, focussing in particular on the distinctly gendered sectors of domestic work and home-based work, which underscore the challenges and limitations of the ‘prohibition and penalty’ approach of labour law.¹⁸ Through my examination of the specific characteristics of work in these particular areas, I seek to illustrate how the disadvantage of women workers in the informal economy and their children are relationally intertwined, not only at the micro level of the family and household unit, but also at the institutional and macro levels that situates their work along the disadvantaged and undervalued segments of the informal economy spectrum. I explore developments within the ILO Decent Work for All Agenda (Decent Work Agenda)¹⁹ and the approach of the Self Employed Women’s Association of India (SEWA) as examples of interventions that seek to address the ongoing vulnerability

¹⁸ For the most recent ILO research exploring child labour within the domestic work context, see ILO, *Ending Child Labour in domestic work and protecting young workers from abusive working conditions*, (Geneva: ILO, 2013) [ILO CL Domestic Work 2013]. This report finds “[e]vidence shows the practice is highly feminized ... adult domestic workers often steer their girls into a domestic worker role by taking them to work both in order to keep an eye on them and so that they can ‘learn the ropes’” at 16. For research exploring child labour in home-based work in the informal economy, see further Mario Biggeri, Santosh Mehrotra & Ratna M. Sudarsha, “Child Labour in Industrial Outworker Households in India” (2009) 44:12 *Economic and Political Weekly* 47 [Biggeri et al. 2009]; Santosh Mehrotra & Mario Biggeri, “The Subterranean Child Labour Force: Subcontracted Homebased Manufacturing in Asia” (2002) UNICEF Innocenti Research Paper, No. 96 [Mehrotra & Biggeri 2002]; Mario Biggeri & Santosh K Mehrotra, *Asian Informal Workers: Global Risks, Local Protection* (New York: Routledge, 2007) [Biggeri & Mehrotra 2007]; Philips et al., *supra* note 4.

¹⁹ See ILO, *Decent Work, Report of the Secretary General, International Labour Conference 87th Session*, (Geneva: ILO, 1999) [ILO Decent Work Report 1999]. In the context of advancing decent work in the domestic sector, the relevant new international labour standard is the ILO *Convention on Decent Work for Domestic Workers No. 189* (Convention No. 189). See further the preparatory work undertaken by the ILO for this Convention, ILO, *Decent Work for Domestic Workers*, Report no. IV(1) at the International Labour Conference, 99th Session, 2010 (Geneva: ILO, 2010) [ILO Decent Work for Domestic Workers]. In the context of advancing decent work for homeworkers in the informal economy, the relevant new international labour standard is the *Convention on Home Work (ILO Convention No. 177)*, 20 June 1996 UNTS 2108 (entered into force 22 April 2000) [ILO Home Work Convention].

of workers and their children in the informal economy.²⁰ Specifically, I argue that a structural approach to the empowerment of informal economy workers that seeks to combat economic exploitation in childhood would address the interface between work in the productive and reproductive spheres, and would seek to grapple with the implications of ‘reproductive’ work that women and children engage in, and the role of this work for interventions in this field.

Second, I explore the connections between childhood economic exploitation and the emerging consensus and evidence base concerning the role of social protection mechanisms in this field.²¹ With the potential to challenge the structural disadvantage that underpins childhood economic exploitation, including for example poverty, income volatility, exposure to economic shocks, and the vulnerability of informal economy workers generally, the extension of social protection measures appears to offer a crucial and potentially transformative complement to current strategies for economic exploitation in childhood.²² Juxtaposing the approach and discourse of the World Bank and the ILO in relation to social protection mechanisms, I illustrate the similarities and differences between these two approaches. I explore the preliminary evidence that has emerged in relation to the impact of social protection mechanisms on the prevalence of childhood economic exploitation,

²⁰ See further http://www.sewa.org/About_Us.asp. See also Elizabeth Hill, *Worker Identity, Agency and Economic Development: Women's Empowerment in the Indian Informal Economy* (London, New York: Routledge, 2010) [Hill 2010].

²¹ Social protection measures refer to mechanisms that are designed to insure against lack of work-related income (or insufficient income) caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family members; lack of access or unaffordable access to health care; insufficient family support, particularly for children and adult dependents; and general poverty and social exclusion. Social protection mechanisms can encompass cash transfer schemes (both conditional and unconditional), public work programmes, school stipends, unemployment or disability benefits, social pensions, food transfers, user fee exemptions for health care or education and subsidized services. See for e.g. ILO, “World Social Protection Report: Building Economic Recovery, Inclusive Development and Social Justice” (Geneva: ILO, 2014/15) [ILO World Social Protection Report 2014/15]; ILO, *World Report on Child Labour: Economic Vulnerability, Social Protection and the Fight against Child Labour* (Geneva: ILO, 2013) [ILO WR Social Protection and Child Labour 2013].

²² *Ibid*, ILO WR Social Protection and Child Labour 2013 at 1-2.

demonstrating both the strengths of these measures and their potential for equivocal or negative results in this field. The available evidence shows that social-protection mechanisms that neglect the burden and implications of social reproduction and care work for families and children can give rise to more limited positive results and can lead to increased economic exploitation for children in some instances. Reinforcing the strength and relevance of the relational framing of the child, I argue, the mixed results from social protection mechanisms illustrate that these mechanisms should be designed and implemented in a manner that is cognisant of the relational and gendered dimensions of the family as a site of both productive work and social reproductive work, and should be explicitly linked to a broader range of socio-economic rights that are of relevance to children in economic exploitation, in particular the right to education.

Before proceeding to explore my theoretical framework and the specific arguments advanced in this thesis, it is first necessary to define the terms ‘childhood,’ ‘child labour,’ ‘childhood economic exploitation’ and ‘child work,’ and to examine some of the contested contours that surround the legal, policy and statistical definitions of the problem in order to frame the analysis.

1.1 Definitions – Mapping the Contours of Childhood, Child Labour and Childhood Economic Exploitation

1.1.1 Exploring Childhood in the Life Cycle

Childhood is a distinct and evolving phase within the continuum of the life cycle that has a fundamental impact on the survival and development of the child within their family and broader community, and on the range of opportunities that can be availed

of as individuals transition into adulthood.²³ According to the almost universally ratified UNCRC, “a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.”²⁴ Individual countries retain discretion in relation to the delineation of childhood within their domestic legal frameworks. In general, however, the full spectrum of 0-17 years is envisaged as coming within childhood, with an approach that focuses primarily on chronological age. There has been some critique of a purely chronological approach to defining childhood and the degree to which such an approach matches the rich diversity of social and cultural practices that exist worldwide to mark transitions in age.²⁵ Chronological definitions, it is argued, overlook social constructions of childhood and youth, and the fact that biological facts of physical development have differing socio-political implications depending on context.²⁶ Overall, however, a consistent approach has been taken across different types of international human rights treaties with, for example, the African Charter on the Rights and Welfare of the Child adopting a similar chronological age definition.²⁷ Numerous State parties to the UNCRC and other international treaties have adjusted their domestic laws to reflect

²³ For theoretical accounts of the centrality of childhood to the realisation of a range of human capabilities, see for e.g. Rosalind Dixon & Martha C. Nussbaum, “Children’s Rights and a Capabilities Approach: The Question of Special Priority” (2012) 97 Cornell L Rev 549 [Dixon & Nussbaum 2012] at 565-584. For empirical accounts of the impact of childhood on indicators of well-being across the life course, see Paul Dornan & Martin Woodhead, *How Inequalities Develop through Childhood: Life Course Evidence from the Young Lives Cohorts Study*, Innocenti Discussion Paper 2015-01 (Florence: UNICEF Office of Research, 2015)[Dornan & Woodhead 2015].

²⁴ Article 1 of the UNCRC. Similarly, Article 2 of the ILO Convention on the Worst Forms of Child Labour No. 182 provides that, “[f]or the purposes of this Convention, the term child shall apply to all persons under the age of 18 years.”

²⁵ See for e.g. Christina Rose Clark-Kazak, “Towards a Working Definition and Application of Social Age in Development Studies” (2009) 45:8 J of Development Studies 1307 [Clark-Kazak 2009].

²⁶ *Ibid* at 1309 Clark-Kazak argues, “[s]uch chronological definitions and consequent approaches may thus infantilize people who are socially recognized as having passed childhood and youth in their communities.”

²⁷ Article 2 of the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, (1990), entered into force Nov. 29, 1999. See further Aristide Nononsi, “Child Labour and Fragile States in Sub-Saharan Africa: Reflections on Regional and International Responses” in Adelle Blackett & Anne Trebilcock, *Research Handbook on Transnational Labour Law* (London: Edgar Elgar Publishing, 2015) [Nononsi 2015]. See also Clark-Kazak 2009, *supra* note 25.

the international human rights law framework, in some instances as a condition of international development assistance.²⁸ UNICEF asserts that despite intellectual debates about the definition of childhood and cultural differences about what to expect from children, there has always been a substantial degree of shared understanding that “childhood implies a separated and safe space.”²⁹ Notwithstanding whether or not such a consensus exists, the evidence clearly demonstrates that childhood is a key formative phase of the life cycle. Disadvantage experienced over the full spectrum of childhood, including economic exploitation, has a cumulative and lifelong impact on the individual, which in turn is transmitted across generations and time to that individual’s children and their children.³⁰ For example, evidence from the ILO demonstrates that young people who worked as children are consistently more likely to engage in unpaid family work, and less likely to enjoy paid employment, with the differences between former child labourers and other youth particularly pronounced for females. Prior involvement in child labour, therefore, can reinforce pre-existing disadvantages faced by female youth in obtaining decent work.³¹

As well as being a formative phase in the life cycle, childhood encapsulates an evolving continuum of different phases and transitions that include both vulnerability and the need for care, and emerging maturity and capacity. Diverse international agencies have grappled with defining different stages of childhood, from early childhood, to adolescence and youth, and with prioritizing those stages for legal and policy interventions. At the more limited end of the spectrum, the World

²⁸ Clark-Kazak *ibid* at 1308.

²⁹ UNICEF, Childhood Defined, online: <http://www.unicef.org/sowc05/english/childhooddefined.html>

³⁰ See further Dornan & Woodhead 2015, *supra* note 23. See also ILO WR Decent Work Young People 2015, *supra* note 3 at 15.

³¹ ILO WR Decent Work Young People 2015, *supra* note 3 at 15.

Bank, for example, has prioritized early childhood from 0-8 years as a fundamental and worthwhile stage for investment in order to maximize on overall outcomes for ‘human capital formation’ and market participation.³² In contrast, in its policy work, the ILO has developed a conceptual framework called the ‘life-cycle approach’ to understand the distinctive vulnerabilities of individuals at different points of the life cycle.³³ Under this approach, childhood is considered to encompass 0-17 years, and to be a period for learning and physical, emotional and social development that lays the foundation for transition to youth and decent work in adulthood.³⁴ The life-cycle approach recognizes that during certain identifiable periods in the life cycle, including childhood, individuals are exposed to different degrees of risk and enjoy different abilities to cope with risk that may lead to their engagement in exploitative labour.³⁵ The key focus of this approach is on how the transition for individuals from one stage of the life cycle to another can impact his or her vulnerability.³⁶ By focussing on a ‘decent childhood’ as a key developmental stage facilitating the ability to enjoy ‘decent work in the life cycle’ over time, at the policy level the ILO has expanded its understanding of the distinctive vulnerabilities of individuals at different points along the life-cycle continuum. In contrast, agencies such as the World Bank have adopted a more circumscribed approach to interventions,

³² See Judith Evans & Robert Myers, *Early Childhood Counts: A Programming Guide on Early Childhood Care for Development* (Washington DC: World Bank, 2000) [WB Early Childhood Counts]; Mary Eming Young, “Investing in Young Children” World Bank Discussion Paper No. 275 (January 1995) [WB Investing in Children 1995]. See further Chapter Five for a discussion of the limitations of this approach in the context of social protection mechanisms.

³³ For further information on the ‘life cycle’ concept see also A Bonilla Garcia & J.V. Gruat, *Social Protection, Social Justice, A Life Cycle Continuum Investment* (Geneva: ILO, 2003) [ILO Social Protection 2003]. UNICEF also adopts a broad ‘life-course’ perspective on childhood which places the child holistically in a framework that includes the various social processes affecting households and the life course of families more generally. The life course perspective embraces the full spectrum of 0-17 years and sets out to analyze the impact of earlier circumstances on later outcomes, such as the impact of early nutrition or quality of care on physical and social development over time, see Dornan & Woodhead 2015, *supra* note 23 at 9. See further Chapter Four where I juxtapose the approaches of the World Bank and the ILO in their approach to interventions for children.

³⁴ ILO Social Protection 2003 *ibid* at 5; ILO WR Social Protection Child Labour 2013, *supra* note 19.

³⁵ ILO WR Social Protection Child Labour *ibid* at 5; ILO Social Protection 2003, *supra* note 33 at 32.

³⁶ ILO Social Protection 2003, *supra* note 33 at 32-38.

prioritizing early childhood as a particularly critical and formative period that maximizes returns on investments in areas such as education and health.³⁷ As the analysis, in particular in Chapter Five will reveal, these distinct approaches to childhood have important implications for the types of interventions that are designed and implemented in the context of childhood economic exploitation.

While recognizing the full spectrum of childhood, the life-cycle approach emphasizes that there are important distinctions between young children due to their limited capacity and vulnerability, and adolescents or youth who have the emerging capacity and maturity to participate more fully in society, including in decent work. The distinctions between children at different ages are mapped to varying degrees onto the legal definitions that distinguish between exploitative child labour and acceptable forms of child work explored below.

1.1.2 Definitions – Child Labour and the International Labour Law Model

In the context of international labour law, the ILO's International Programme for the Elimination of Child Labour (IPEC) broadly defines child labour as “work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental health.”³⁸ Encapsulated within this broad definition are the parameters of a more precise legal definition that has been accepted by State parties in their ratification of the relevant ILO child labour conventions, the ILO Minimum Age Convention (No. 138) 1976 (Convention No. 138) and the ILO Worst Forms of Child Labour Convention (No. 182), 1999 (Convention No. 182).³⁹ The

³⁷ *Ibid* at 32.

³⁸ See further information from the ILO International Programme for the Elimination of Child Labour, online: <http://www.ilo.org/ipec/facts/lang--en/index.htm>

³⁹ ILO *Convention Concerning Minimum Age for Admission to Employment* (ILO No. 138) 26 June 1973, 1015 UNTS 297 (entered into force 19 June 1976) [Convention No. 138]; ILO *Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour* (ILO Convention No. 182), 17

inclusion of both of these Conventions within the core labour standards in the 1998 *Declaration on Fundamental Principles and Rights at Work* (ILO Declaration) has given them added normative value within the constitutional framework of the ILO. As a result, all members of the ILO, whether or not they have ratified the relevant treaties, are required to comply with their legal requirements.⁴⁰

The legal definitions of child labour distinguish between children of different ages, generally requiring States to stipulate a minimum age for “admission to employment or work” from 15 years upwards.⁴¹ Article 2(3) of Convention No. 138 requires that the minimum age stipulated for work should be not less than the age for compulsory schooling and no less than 15 years.⁴² Convention No. 138 does permit some flexibility for States in the application of the minimum age where a country asserts that its economy and educational facilities are insufficiently developed.⁴³ Therefore, under Convention No. 138, States can initially specify a minimum age of 14 years for a limited time period. In general, however, States are under an obligation to progressively raise the minimum age of admission to employment to a level consistent with the fullest physical and mental development of young persons.⁴⁴

June 1999, 2133 UNTS 161 (entered into force 19 Nov 2000) [ILO Worst Forms of Child Labour Convention No. 182].

⁴⁰ As Hepple observes, “[t]he unique legal character of the Declaration is that obligations are placed on all Member States not by reason of ratification of the named Conventions, but from the very fact of membership. This is therefore a constitutional obligation, not one which rests upon voluntary acceptance.” Overall, however, the Declaration is regarded as promotional as its follow up procedures rely entirely on a reporting mechanism, not on sanctions. The main result of the Declaration has been a significant increase in the number of ratifications of the eight core conventions that have been identified as part of the core labour standards, see Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart, 2005) [Hepple 2005] at 59-63. For a critique of the prioritization approach in the core labour standards see Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime” (2004) 15:3 *Euro J of Intl L* 457 [Alston 2004]; Philip Alston, “Facing up to the Complexities of the ILO’s Core Labour Standards Agenda” (2005) 16:3 *Euro J of Intl L* 467. For a reply to that critique, see Brian Langille, “Core Labour Rights – The True Story (Reply to Alston)” (2005) 16:3 *Euro J of Intl L* 409 [Langille 2005].

⁴¹ Article 2(1) and 2(3) of Convention No. 138.

⁴² Article 2(3) of Convention No. 138. See further Lee Swepston, “Child Labour: Its Regulation by ILO Standards and National legislation” (1982) 121:577 *International Labour Review* at 580.

⁴³ Articles 2(4) and 2(5) of Convention No. 138.

⁴⁴ Preamble of Convention No. 138.

Statistics generated by the ILO demonstrate that child labour at diverse ages, in particular at a young age, remains a significant problem. Globally, it is estimated that 44 per cent of children in child labour are between 5-11 years, and 28 per cent are between 12-14 years.⁴⁵

The definition of the minimum age for work is explicitly linked to the age for the completion of compulsory schooling, in recognition that this is a key transition point for children in the life cycle at which they may be vulnerable to leave education to enter work.⁴⁶ Notwithstanding this link, the ILO has found that in a significant number of countries there are inconsistencies between the minimum age for admission to employment, and the age set for the end of compulsory schooling.⁴⁷ Recent research suggests that only 60 per cent of countries which have specified both these ages have actually aligned them.⁴⁸

In addition to chronological age, a further core element of the legal definition of child labour is the harmful or hazardous nature of the work involved. Convention No. 138 prohibits children up to 18 years from engaging in work that is harmful to the health, safety or morals of children, also termed 'hazardous work.'⁴⁹ Adopting a prioritization approach and informed by the emergence of the international child rights agenda in 1999, the ILO focussed on specifically harmful forms of child labour in Convention No. 182. This Convention requires States to prioritize for immediate action legal interventions to combat the 'worst forms of child labour.' Specifically,

⁴⁵ ILO Global Estimates 2013, *supra* note 5 at 6.

⁴⁶ Article 2(3) of Convention No. 138.

⁴⁷ The ILO's Committee of Experts on the Application of Convention and Recommendations (ILO CEACR) has observed that if the legal minimum age for work is lower than the school leaving age, children may be encouraged to leave school; while if the end of compulsory schooling is below the minimum age of work, a vacuum may arise in which children begin to work before they reach the minimum age. See ILO, *Giving Globalization a Human Face – General Survey of the Fundamental Conventions Concerning Rights at Work* (Geneva: ILO, 2012); see also ILO, *Child Labour and Education: Progress, Challenges and Future Directions* (Geneva: ILO, March 2015) [ILO Education 2015].

⁴⁸ *Ibid* ILO Education 2015.

⁴⁹ Article 3(1) of Convention No. 138.

Article 3 of the Convention defines this category of child labour to include: (1) all forms of slavery or practices similar to slavery, including the sale and trafficking of children, debt bondage, forced or compulsory labour or the forced recruitment of children for use in armed conflict; (2) the use, procuring or offering of children for prostitution or the production of pornography; (3) the use, procuring or offering of children for the production and trafficking of drugs; and (4) work which by its nature or the circumstances in which it is carried out is likely to harm the health, safety or morals of children, also known as ‘hazardous work.’ In relation to ‘hazardous work,’ Convention No. 182 stipulates that national governments are required to compile lists of work that can be considered hazardous for children.⁵⁰ Recent ILO research reveals that 108 countries have developed such lists, while many more have established a general prohibition on hazardous work.⁵¹

In defining child labour, neither of the child labour Conventions explicitly distinguish between child labour occurring in different sectors or parts of the economy, such as the formal or informal economy. In fact, Convention No. 182, is broad in its focus, prioritizing criminal and other forms of activities that are to be predominantly found operating outside of the law, and in some instances in the informal economy. Convention No. 138 applies to all forms of “work or employment,” and does not explicitly distinguish between child labour occurring in the formal economy and the informal economy.⁵² This has been confirmed by the ILO Committee of Experts on the Application of Conventions and Recommendations

⁵⁰ Article 4(1)-(3) of ILO Convention on the Worst Forms of Child Labour No. 182.

⁵¹ See ILO Hazardous Work 2011, *supra* note 2 at 43. See also ILO, *Looking for Answers: Researching Hazardous Work of Children* (Geneva: ILO, Nov. 2014).

⁵² In relation to the scope of international labour standards in their application more generally, see for e.g. Claire La Hovary, “The Informal Economy and the International Labour Organisation: A Legal Perspective” (2014) 4 *Intl J of Comp Lab L & Industrial Relations* 391 [La Hovary 2014]; Anne Trebilcock, “International Labour Standards and the Informal Economy” in J.C. Javellier, B. Gernignon & G. Politakis, eds, *Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos* (Geneva: ILO, 2004). (Geneva: ILO, 2004) [Trebilcock 2004].

(ILO CEACR) which has noted that Convention No. 138 “applies to all kinds of employment or work regardless of the formal nature of the work, unless recourse is made to the flexibility clauses.”⁵³

The potential for the exclusion of the neglected informal economy may arise in the context of the flexibility and exclusion clauses that are provided for in Convention No. 138. Specifically, Convention No. 138 provides that where a Member State’s economy and administrative facilities are insufficiently developed, they may limit the scope and application of the Convention, following consultation by the tripartite partners, by excluding certain branches of economic activity and types of undertakings from the application of the minimum age standard.⁵⁴ This Convention also provides for an exclusion clause in relation to “limited categories of employment or work in respect of which special and substantial problems of application exist.”⁵⁵ In practice, notwithstanding the considerable efforts Member States have expended in drafting and negotiating their clauses, these exclusions have been invoked rarely.⁵⁶ In the instances where they have been invoked, the General Survey by the ILO CEACR on Convention No. 138 found that the most common exclusions entered by

⁵³ ILO Committee of Experts on the Application of Convention and Recommendations, Direct request concerning Convention No. 138 to Equatorial Guinea (1999). See also Trebilcock 2004 *ibid* at 608.

⁵⁴ Article 5(1) Convention No. 138.

⁵⁵ Article 4(1) Convention No. 138. In relation to the exceptions and exclusion clauses Swepston, *supra* note 93 observes that, “it is ... evident that unless the Convention allowed some sorts of exceptions of these kind there would be very few countries that could ratify and apply it, even for those sectors where there is adequate legislation. It is a constant problem in the adoption of international labour standards to include enough exceptions to permit ratification while avoiding the emasculation of the instrument by allowing too many. Convention No. 138 seems to have met the real situation by the kinds of exceptions it allows, which are not so numerous as to render it ineffective” at 584. In addition, the flexibility and exclusion clauses do not apply in the case of ‘hazardous work’; see Article 4(2) of Convention No. 138.

⁵⁶ See Borzaga, *supra* note 1 at 56. On the limited extent to which States use exclusion and exception clauses. Generally, see further, ILO Decent Work for Domestic Workers 2009 *supra* note 19 at para 82. See generally Trebilcock 2004, *supra* note 52 at 608.

States have been related to work in family undertakings, followed by domestic service.⁵⁷

It is important to note that under the international labour law model not all work or employment activities engaged in by children are considered to be child labour within the legal definition. National laws or regulations may permit the employment or work of persons from 13-15 years of age in light work which is not likely to be harmful to their health or development, and not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes.⁵⁸ The key distinction under the international labour law model between exploitative child labour and forms of permissible light work is that the former undermines, in the immediate term, the physical and mental health of the child, while the latter takes place within a framework of socialization that does not interfere with the child's right to education or with her overall welfare.⁵⁹

1.1.3 Definitions – Childhood Economic Exploitation and the International Human Rights Law Model

The UNCRC stipulates that children have the right to be protected from 'economic exploitation' which captures a range of exploitative activities in which children are engaged that are harmful to their physical and mental health. Article 32 of the UNCRC defines 'childhood economic exploitation' as "work that is likely to be hazardous, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, or to interfere with the child's education." Crucially, the UNCRC provides for a more holistic definition of the problem in the manner in

⁵⁷ See Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization*, (2012) International Labour Conference, 101st Session 2012, ILC.101/III/1B at 149-150 para 334.

⁵⁸ Articles 7 and 9-11 of Convention No. 138.

⁵⁹ See Nononsi 2015, *supra* note 27 at 537.

which it clearly integrates work that interferes with the child's right to education within the legal definition of childhood economic exploitation. The UN Committee on the Rights of the Child has not elaborated on the meaning of Article 32 within the context of a specific general comment, however, given the holistic approach to children's rights contained in the Convention, the vital linkage with the right to education is unsurprising.

In contrast to the international labour law model, the UNCRC deals separately with other forms of exploitative activities that engage children in criminal activities that are not considered typically to be 'work or employment.' Therefore, the UNCRC requires States to take all appropriate measures to prevent children from being engaged in the production and trafficking of narcotic substances⁶⁰ and to prevent the sexual exploitation of children, including their engagement in prostitution.⁶¹ Article 36 broadly requires States to "protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare." As distinct from Convention No. 182, the UNCRC does not conflate issues relating to work and employment with criminal and other forms of illicit activities that are exploitative for children. Additionally, Article 36 appears to provide a broad based prohibition on all forms of exploitative treatment of children more generally that could encompass areas that are not considered 'work' such as reproductive activities in the household or other forms of survival activities that do not fit easily within definitions of 'work or employment' employed within labour law. While the impetus to adopt Convention No. 182 was in part inspired by the UNCRC, there are some important distinctions between these different models, which flow from the boundaries of the labour law

⁶⁰Article 32 of the UNCRC.

⁶¹Article 33 of the UNCRC.

framework which has traditionally placed a central focus on ‘work and employment’. The broader, more holistic scope of the human rights law framework on the other hand seeks to advance children’s dignity and the specific rights of the child in a way that integrates children within the community of rights holders.

1.1.4 Exploring the Contested Contours of Child Labour and Childhood Economic Exploitation

Arising from the central focus on ‘admission to employment or work’ within the labour law model, there are some contested contours to the definitions of child labour and childhood economic exploitation, particularly when we contrast the international labour law model and the broader international human rights law model. These contested contours become more apparent when policy and statistical definitions are juxtaposed with the legal definition of child labour. The ILO CEACR has stated Convention No. 138 applies to “all persons engaged in economic activity, whether or not there is a contractual employment relationship and whether or not the work is remunerated, including unpaid work and work in the informal economy. This includes workers in family enterprises and farms, domestic workers, agricultural workers and self-employed workers.”⁶² However, where children are engaged in ‘non-economic’ activity which is not classified as work or employment, and which lies outside what is considered ‘productive activity’ for the purposes of the system of national accounts, questions arise as to whether it can be classified as child labour within the current legal definitions under the labour law model.

⁶² Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization* (2012 International Labour Conference, 101st Session 2012) ILC.101/III/1B [ILO CEACR 2012] at 148 para 332.

In 2008, the International Conference of Labour Statisticians (ICLS) was considered to have broken new ground by including ‘hazardous unpaid household services’ within the statistical definition of child labour.⁶³ In formulating a Recommendation to ensure the consistent measurement of child labour across countries, the ICLS defined this category as unpaid household services performed in the child’s own household for long hours, in an unhealthy environment, or in a dangerous location.⁶⁴ The inclusion of this ‘non-productive’ form of activity was in recognition that in some circumstances the performance of household chores can impact negatively on children’s welfare, in particular their access to education, and therefore it falls within the wider legal definition of childhood economic exploitation under the UNCRC.⁶⁵ While this approach is considered to be progressive for the consistent statistical measurement of child labour, it does not fully include children performing non-hazardous domestic work in their own homes, for example, children engaged in caring for their siblings when adults of the household are engaging in work, and some informal apprenticeships that take place within families that may not be classified as economic activities or hazardous unpaid household services.⁶⁶ Similarly, street children or other children who may not be engaged in ‘work or employment’ but in non-productive survival activities do not appear to come within this definition.⁶⁷

⁶³ See Scott Lyon, Marco Ranzani & Furio C. Rosati, “Unpaid Household Services and Child Labour” (2013) *Understanding Children’s Work*, Working Paper [Lyon et al. 2013] at 5.

⁶⁴ ILO, *Recommendation Concerning Statistics of Child Labour* (2008) ICLS-R-[2008-12-0006-6]-En.doc/v3 at paras 15, 36 and 37 *ibid* paras 15(c), 36 and 37.

⁶⁵ Lyon et al. 2013, *supra* note 63 at 5.

⁶⁶ Nononsi, *supra* note 27 at 537, who observes that, “[t]his approach unfortunately leave children performing non-hazardous domestic work in their own homes, some informal apprentices and street children in a category of ‘no-where’ children. Such indifference towards these groups of working children is regrettable, since it erodes the exercise of their fundamental rights.”

⁶⁷ *Ibid*.

Recent statistical analysis of the activities of children demonstrate that there is a large cohort of so called ‘no-where’ or ‘out of school’ children who are not engaged in work nor in education whose time and activities are unaccounted for.⁶⁸ For example, in the context of Bangladesh, studies demonstrate that over 4.1 million Bangladeshi children between 7-17 years of age are neither working nor in school.⁶⁹ This category of children forms 15 per cent of children in this age cohort and is the highest for countries in South Asia.⁷⁰ There is a large gender divide in ‘inactive children’ with girls representing 63.2 per cent of Bangladesh’s inactive 7-17 year old children.⁷¹ A 2011 report found that girls in Bangladesh are three times as likely as boys to perform household chores for more than 20 hours per week.⁷² This suggests that the statistical measurements of child labour where it is limited to ‘work and employment’ or ‘productive activities’ may represent an underestimate of children engaged in economic exploitation, particularly for children working in their own homes or in other forms of non-economic activities that are not considered to be work or employment or ‘hazardous unpaid household services’.

The contested contours of the legal definitions of child labour and economic exploitation circulating around work in the informal economy and in social reproduction activities are further compounded when international definitions are translated into national labour laws as illustrative examples from Bangladesh and India in Chapters Two and Three will demonstrate. Therefore, while the ILO CEACR

⁶⁸ For specific comparable statistics relating to the incidence of child labour in South Asia, including in Bangladesh and India, see Sherin Khan & Scott Lyon, *Children’s Work in South Asia, Perspectives from National Household Surveys* (Geneva: ILO, 2015) [Khan & Lyon 2015]. See also Lyon et al. 2013, *supra* note 63.

⁶⁹ *Ibid* Khan & Lyon at 38. See also Bangladesh Institute of Development Studies, Bangladesh Bureau of Statistics & UNICEF Bangladesh, *Out of School Children in Bangladesh* (Dhaka: BIDS, BSB & UNICEF Bangladesh, Dec. 2014).

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

has taken a broad approach to the scope of the labour law definition of child labour to include work in the informal economy, including unpaid work, this is not generally reflected within legal definitions of child labour in domestic labour laws. This potentially excludes a large cohort of children from the protections of the labour law model.⁷³

The contested contours of child labour and childhood economic exploitation also point towards some of the boundaries of the labour law model, which centralizes harmful ‘work and employment’ in its legal definition of child labour. This is in contrast to a broader human rights law model which includes within its definition of the harm of childhood economic exploitation work that deprives children of their right to education. These contested contours have important implications for children who are engaged in activities that move between the spectrum of the productive and socially reproductive spheres, or who may combine schooling with work in the socially reproductive sphere. The gender implications of childhood economic exploitation in the socially reproductive sphere are particularly evident in the statistics of ‘out of school’ children which suggest that girls exist in far higher numbers in this cohort of children.⁷⁴ The potential and limits of the labour law model and the distinct human rights law model to capture and challenge this less visible form of childhood economic exploitation is a central theme of this thesis.

⁷³ See Trebilcock 2004, *supra* note 52, who addresses what she terms is the common misconception that international labour standards do not apply to the informal economy. She asserts that the inability of the informal sector to comply with certain aspects of labour legislation is not necessarily an indication that something is wrong with the legislation itself; it should rather be taken as a reflection of the quite unsatisfactory conditions in which the informal sector has to operate, which includes the low productivity trap, the precarious nature of micro-enterprises etc. Trebilcock argues that, “failure to apply those instruments reflects a failure in governance that needs to be addressed by multilateral institutions as well as by governments,” at 592.

⁷⁴ Khan & Lyon 2015 *supra* note 68 at 38.

1.2 Centralizing the Relational Framing of the Child in the Context of Economic Exploitation

To understand the dynamics of childhood economic exploitation, I argue, it is crucial to consider the personal, social and institutional relationships and patterns that reproduce it over time and how the ‘situatedness’ of the child impacts on these dynamics. In distinctive ways, children are inevitably intertwined within relationships of care, dependence and interdependence and, as a result, are specifically situated in the so-called ‘private sphere’ of the family. The distinctive relational context of the child more generally poses a challenge to the law-and rights-based strategies, which are premised on the abstracted individualized legal subject with full capacity who is capable of accessing and enjoying her rights.⁷⁵ In contrast, the child as legal subject is distinctive because of her embeddedness within relationships of dependence and interdependence, her need for care and affiliation, and her evolving maturity and capacity, all of which have crucial implications for children’s socio-economic well-being. Children are distinctly linked legally and daily to the adults entrusted with their care.⁷⁶

Feminist relational theorists have aptly demonstrated how the conceptual frameworks of law- and rights-based theories have historically lacked a rich appreciation and understanding of the significance of *relationships*, including their preconditions, their responsibilities and their consequences, for the advancement of

⁷⁵ See for e.g. Angela Campbell, “Stretching the Limits of ‘Rights Talk’: Securing Health Care Entitlements for Children” (2003) 27 Vt L Rev 399 at 400[Campbell 2003].

⁷⁶ See Minow 1986, *supra* note 17 at 18, who notes that, “[c]hildren are doubly dependent. Their dependency is constructed by legal rules and also in their lives as lived. This double dependency situates children outside the sphere of rights-bearing persons in a system that makes independence a premise for the grant of rights. Children’s dependencies specifically situate them within the sphere of the private family, where parents stand between children and the state.”

rights.⁷⁷ Relational theory on the other hand, embeds rather than abstracts the legal subject, in this case the child within the nested web of relationships that determine her well-being, and it centralizes rather than marginalizes the significance of the inevitability of care and interdependence for people's lives. In general, feminist theorists such as Martha Fineman have illustrated how periods of dependence, care and vulnerability have been largely neglected by dominant theories of liberal rights based frameworks which are built around a universal human subject who is constituted as a self-interested individual with full capacity.⁷⁸ Periods of care have generally been relegated to the private sphere of the family and are considered beyond the scope of State concern, absent extraordinary family failures such as abuse and neglect.⁷⁹ In Fineman's assessment, "the liberal subject stands not only outside the passage of time, but also outside of human experience" because it captures only one possible developmental stage, the least vulnerable, from among the many possible stages a person might pass through.⁸⁰

⁷⁷ See Minow & Shanley 1996, *supra* note 17 at 20. Feminist relational theory can be seen as comprising several connected and overlapping areas of work, including feminist ethic of care scholarship (which draws attention to relations of dependence and care, the ethical differences between men and women, the ethics of care relationships, and the extent to which caring work is overwhelmingly performed by women); relational rights scholarship (which recasts rights as tools revisable in the service of desirable relationships) and a connected scholarship on relational autonomy (which seeks to reconfigure the liberal ideal of autonomy by envisioning what it calls relational autonomy). For an overview of feminist relational theory, see Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto and Buffalo: University of Toronto Press, 2008) [Leckey 2008] at 6.

⁷⁸ See Fineman 2008, *supra* note 16; Fineman 2000, *supra* note 16. See also Barbara Arneil, "Becoming Versus Being: A Critical Analysis of the Child in Liberal Theory" in David Archard and Colin M. MacLeod, *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2002) [Arneil 2002] at 73. For example, historically, Barbara Arneil asserts that, "at the very foundation of liberal theory, the care of children is translated by Locke, to mean the education of sons. This seemingly simple and obvious translation (at least to Locke) has profound implications for all subsequent liberal theory. The question of how to care for children (beyond educational needs) is lost to liberal theory from this point onwards. The development of children beyond the intellectual dimension (namely physical, social, or emotional development), or the extent to which the state might be concerned with their care, is simply written out of liberal theory at its inception," at 73.

⁷⁹ See Fineman 2008, *supra* note 16 at 11.

⁸⁰ *Ibid* at 11-12.

When applied to the context of childhood economic exploitation, the relational frame I argue nests the child within a web of interdependent rights and relationships, thereby revealing the multiple structural processes that contribute towards situations of economic exploitation. The complex relational matrix within which decisions relating to household income and survival are made, as well as the relationship between the child and the various institutional contexts in which they operate are key, relatively unexplored elements of childhood economic exploitation. This is particularly the case in legal scholarship in this context. When we centralize the role of relationships and the significance and implications of care and social reproduction as central elements of political life, as stipulated by relational theory, I argue this enables us to understand why a narrow ‘prohibition and penalty’ approach grounded in labour law inspection as a primary mechanisms of regulation will remain severely limited.

Childhood economic exploitation, when viewed through the relational frame, complicates the boundaries between the diverse sectors and spheres that are incorporated within the international labour law and international human rights law models, including the public/private spheres, the formal/informal economy, productive/reproductive activities, the market/non-market divide and family/non-family work. For example, the child and the family as a site where ‘social reproduction’ occurs are conceived to exist within the boundaries of the labour law model ‘beyond the market’, and within the human rights law model to be located within the private sphere of the family which plays a ‘natural’ and fundamental role

in the best interests of the child.⁸¹ However, when considered through the relational lens, childhood economic exploitation often occurs at the nexus of productive and reproductive labour, where the burden of labour and care responsibilities for adults, in particular women in both the public and private spheres has negative implications for the development of children.⁸² In certain sectors, such as domestic work and home-based work, the gendered burden of care work in particular is implicated in the engagement of children in work, in a way that has intergenerational implications often for children.⁸³

To illustrate this relational framing in more concrete terms in the context of interventions that have focussed on increasing the availability of work and income for the adults of the household, empirical evidence has demonstrated that the positive effects of microcredit projects on gender and household well-being may be offset by the negative impacts of women's increased workload.⁸⁴ In particular, it has been demonstrated that the increase of the mother's time in self-employment may lead to a substitution between the daughter's time in school and her time in

⁸¹ See further Blackett 2011, *supra* note 13 who, "rejects stark characterisations of the metaphorical market, rigidly demarcated from reproductive household labour" by emphasising the market enabling character of care work, at 421.

⁸² See for e.g. Jonas Blume and Julika Breyer, *Microfinance and Child Labour*, (ILO Employment Working Paper No. 89, 2011) [ILO Microfinance 2011] which notes a number of different studies that have demonstrated that an increase in the mother's time in self-employment may lead to a substitution between the daughter's time in school and her time in household production and self-employment. This substitution seems to be especially strong when the girl's time is a close substitute to that of her mother's time. This leads the authors to observe that a positive impact of parents' participation in microfinance income generating projects on the welfare and education of children cannot be automatically assumed. They conclude that, "the additional labour demand that is created by some types of productive assets will increase the workload of children, in particular: where adult labour is not available, cheap or sufficiently flexible; where parents find external labourers untrustworthy or prefer to pass on specific knowledge to their children; or where children have to take on some of the household chores, because the parents have to spend more time working."

⁸³ For the most recent ILO research exploring child labour within the domestic work context, see ILO CL Domestic Work 2013, *supra* note 18. This report finds that, "[e]vidence shows the practice is highly feminized ... adult domestic workers often steer their girls into a domestic worker role by taking them to work both in order to keep an eye on them and so that they can 'learn the ropes,'" at 16. For research exploring child labour in home-based work sector, see further Biggeri et al. 2009, *supra* note 18; Mehrotra & Biggeri 2002, *supra* note 18; Biggeri & Mehrotra 2007, *supra* note 18.

⁸⁴ ILO Microfinance 2011, *supra* note 82 at 12-13.

household production or self-employment.⁸⁵ This substitution seems to be especially strong when the girl's time is a close substitute to that of her mother's time.⁸⁶ Therefore, the porous nature of the boundaries between productive and reproductive activity, market and non-market activities, and the public and private sphere can clearly be seen to apply where childhood economic exploitation is viewed through a relational lens.⁸⁷ These elements require us to interrogate more closely the role of legal and policy interventions in fostering or undermining the personal and institutional relationships that can advance freedom from economic exploitation in childhood which forms a further key theme of this thesis.

1.3 Framing and Mapping the Arguments of the Thesis

1.3.1 An Evolving International Labour Law Approach – Mapping the Boundaries

In exploring the evolution of international labour law's response to the problem of child labour – a historical and enduring priority for the ILO since its inception – I begin by examining the historic evolution of the specific international labour law standards surrounding the child labour problem, which primarily focussed on delineating and regulating the minimum age for entry to work, as well as prohibiting all forms of 'hazardous work' for children under the age of 18 years in Convention No. 138.⁸⁸ Following a long period of low political priority being afforded to child labour, a consensus emerged in the 1990s on the need for a new international labour law convention, namely, Convention No. 182. I trace the various considerations that gave rise to this approach, including the integration of the prohibition of child labour

⁸⁵ *Ibid* at 13.

⁸⁶ *Ibid*.

⁸⁷ See further Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform*, (Boston: Kluwer Law International, 2002) [Rittich 2002] at 129.

⁸⁸ See ILO *Convention Concerning Minimum Age for Admission to Employment* (ILO No. 138), 26 June 1973 1015 UNTS 297 (entered into force 19 June 1976)

within the ILO *Declaration on Fundamental Principles and Rights at Work* as one of the core labour standards. These Conventions combined comprise what I argue is a ‘penalty and prohibition’ approach, relying in particular on the labour inspection model as the primary mechanism for legal enforcement. While Convention No. 182 contains some innovative developments in the form of national action plans that stipulate time-bound and targeted programmes for the removal and rehabilitation of individual children, this approach remains wedded to a regulatory framework that relies centrally on the labour inspection mechanism and the criminal law as deterrent mechanisms of enforcement.

Drawing on feminist and critical labour law scholars, I argue that the procedural safeguards and regulatory regime that informed the ‘prohibition and penalty’ approach were built around the ‘paradigmatic (male) adult worker’ to regulate engagement in a full-time employment relationship primarily located in the formal economy. This model was premised on the simple exclusion of child labour as a market aberration that would diminish through the processes of formalization and industrial style development.⁸⁹ In accordance with this approach, child labour laws should be enforced by a centralized labour inspector visiting and inspecting places of ‘work and employment,’ traditionally envisaged within the formal economy, and operating through the deterrent effect of criminal sanctions and fines enforced against exploitative employers.⁹⁰

⁸⁹ The critical and feminist labour law scholars I draw on primarily in Chapter One include, but are not limited to the following authors: Blackett 2011, *supra* note 13; Blackett 2007, *supra* note 13; Fudge 2011, *supra* note 13; Fudge 2014, *supra* note 6; Vosko 2010, *supra* note 13; Conaghan & Rittich, 2005, *supra* note 13.

⁹⁰ See Fyfe 2007, *supra* note 8 at 8-9.

However, I argue, with some parallels to women workers in the informal economy, both the procedural safeguards and the regulatory regime that were designed for the adult worker of labour law (labour inspection, the employment relationship and the definitions of work/employment) do not map well onto the contextualized realities of childhood economic exploitation, which predominates in the informal economy, and in unpaid family-based work in the ‘productive’ and ‘socially reproductive’ spheres. In fact, children’s lives often move between the ‘productive’ and ‘reproductive’ spheres, and in its most common forms the problem is grounded fundamentally in the socio-economic disadvantage of families rather than the unscrupulous practices of employers which the labour law model was designed to challenge.⁹¹ As a result of this dominant paradigm, in the context childhood economic exploitation the ‘penalty and prohibition’ approach has three specific limitations. First, within the context of the informal economy and socially reproductive work, the labour inspection model confronts huge logistical challenges in a highly diverse and dispersed sector, with its remit often restricted in the areas of domestic work and home-based work in particular due to restrictions preventing entry to private homes. Social reproductive work taking place within families is often explicitly excluded from the labour inspection mandate. As a mechanism of enforcement, therefore, somewhat analogous to the situation of women workers in the most disadvantaged parts of the informal economy, labour inspection is deeply challenged in its ability to capture and regulate the contextual realities of child labour.

Second, while Convention No. 182 acknowledges the role of poverty and underdevelopment in its Preamble, neither this Convention nor Convention No. 138

⁹¹ For an overview of the critique of the ‘paradigmatic adult male’ worker, see for e.g. Fudge 2006 *supra* note 13; Vosko 2010, *supra* note 13.

link their prohibitions with specific enforceable socio-economic rights for children and families. The ongoing endurance of child labour, I argue, clearly demonstrates that beyond adjustments to the market that may be achieved through the setting of minimum legal standards and through the trickle-down impact of economic development, there are multiple *social processes* at play that determine a child's involvement in exploitative labour.⁹² Drawing on critical labour law scholarship, I demonstrate that when we adjust the analytical lens to locate the child within the regulatory dilemmas that arise from *social* character of labour, it becomes clear that the specific regulatory dilemmas circulating around the family's role in allocating labour for the market and the implications and burdens of socially reproduction work are particularly important determinative factors for children's engagement in economic exploitation.⁹³ Applying this critique to the 'penalty and prohibition' approach, I argue that while there was a clear moral, humane and political rationale for prioritizing certain 'worst' forms of exploitative activities in the immediate term under Convention No. 182, the redistributive implications of a response to childhood economic exploitation in its multiples forms were not the subject of prioritization in its substantive provisions. In general, I argue the crucial role of socio-economic rights and social protection supports remain unanswered by international labour law. Finally, initiatives to recognize deprivations of education as an element of the 'worst forms of child labour' were originally mooted during the drafting of the Convention. However, the concern with education was eventually excluded, in a way that diverges from the international human rights law framework.⁹⁴ The failure in Convention No. 182 to specifically link the harm involved in child labour with the

⁹² For the most recent ILO analysis of the various factors that determine children's involvement in child labour, see ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 11-27.

⁹³ For an analysis of the regulatory dilemmas that arise from the social character of labour see Fudge 2011, *supra* note 13 at 131. See also Fudge 2014 *supra* note 6.

⁹⁴ See Cullen 2007, *supra* note 9 at 98 and 151.

systematic prevention of access to education could be considered problematic and a real missed opportunity to prioritize what the ILO has identified within its policy analysis as one of the most effective systemic methods to eliminate child labour.⁹⁵ The unavailability of accessible and relevant educational facilities, as well as the additional costs of sending children to school, is one of the key structural social processes that leads families to engage their children in labour and can be considered one of the fundamental harms of child labour.

Linking my critique of the shortcomings of the ‘prohibition and penalty’ approach with feminist and critical labour law critiques more generally, I argue that in failing to provide a feasible regulatory framework for child labour in the dominant and growing informal economy, in neglecting the implications and burden of care and social reproduction work for children and their families, in failing to grapple with the socio-economic supports to empower and support families and in neglecting the critical role of educational deprivation, a ‘prohibition and penalty’ approach will inevitably remain a truncated response to the child labour problem.

1.3.2 A Holistic Human Rights Law Approach? – Mapping the Potential and Limits

The international human rights law model, in its approach to childhood economic exploitation, raises critical issues regarding the conceptual framing of the child as a rights holder in the economic and social spheres. The approach adopted under the

⁹⁵ See further Julinda Beqiraj, “Hazardous Work as a Worst Form of Child Labour: A Comment on Article 3(d) of ILO Convention 182” [Beqiraj 2008] in Nesi Giuseppe, Luca Nogler & Marco Pertile, eds, *Child Labour in a Globalized World A Legal Analysis of ILO Action* (Aldershot and Burlington, VT: Ashgate Publishers, 2008) [Nesi et al. 2008] at 184, who observes, “[c]reating a connection between the establishment of compulsory education in law and practice and the fact that hazardous forms of occupation and work often hinders these opportunities would have sectioned transversally the phenomenon of hazardous work, helping to combat it even in the informal sector or in invisible environments such as domestic occupations.”

UNCRC model in some ways mirrors elements of the international labour law model. However, there are some significant differences in both the definition of ‘childhood economic exploitation’ and in the approach to the child who is framed in a broader holistic human rights framework.

First, I argue that a key strength of framing child economic exploitation through a human rights lens is the way in which a holistic human rights Convention can address a far broader range of human rights violations that underpin the problem. Crucially, as distinct from labour law, the UNCRC includes within the definition of childhood economic exploitation work that interferes with a child’s right to education. Through this broad definition, I argue, the human rights model has the potential to capture a far broader range of both productive and socially reproductive work for children in ways that more effectively include the cohort of so-called ‘out of school’ children who may not be considered to be engaged in ‘work or employment’ for the purposes of the labour law model.

Having explored the key strengths of the human rights model when contrasted with the labour law model, I proceed to examine the conceptual framing of the child as a rights holder in the economic and social sphere, and the degree to which this framing enables the human rights model to challenge the spectrum of structural disadvantage that surrounds economic exploitation in childhood. A distinctive feature of the UNCRC is its centralization and elaboration of the significance of relationships, in particular familial relationships, for the advancement of children’s rights.⁹⁶ As outlined, feminist relational theorists have illustrated rights-based strategies generally have lacked a rich appreciation of the significance of relationships for the

⁹⁶ See White 2002, *supra* note 16 at 1097.

advancement of rights.⁹⁷ A notable and relatively unexplored feature of the UNCRC, when viewed through a relational lens, is the prioritization and elaboration of the role of the family unit which is signalled throughout the Convention.

When analyzed through the relational lens, I argue that under the UNCRC the child's right to be free from economic exploitation is ultimately framed as the right of the *individual* child, rather than being contextualized within the relational and material well-being of the family unit overall. The Convention falls short of granting full recognition of the right to an adequate standard of living to the child, believing that it will be mediated in recognition of the 'natural' and 'fundamental' role of the family as a vector for socio-economic well-being and the provision of care. The obligation to provide for an adequate standard of living and for the care needs of children is assigned primarily to the 'private' responsibility of the family, with only secondary support being provided progressively by the State. This serves, I argue, to somewhat abstract the child from the range of structural social processes that underpin childhood economic exploitation, namely, income poverty and volatility, worker vulnerability in the informal economy, and the role and implications of care and reproductive work. While the Convention acknowledges the relational context in which child well-being unfolds, in its focus on the child as an individual rights holder

⁹⁷ See for e.g. Minow 1986, *supra* note 17; Nedelsky 2011, *supra* note 17. See also Lacey 2004, *supra* note 16, who summarizes the implications for scholarship in international human rights law as follows: "Nedelsky argues that we should emphasize recognition of the fact that rights inevitably construct, reflect, or express relationships. This simply means that the idea of an atomistic rights-holder makes no sense On this view, rights may be viewed as instituting and fostering relationships of reciprocity and interdependence rather than of competition: the model of rights as relationship attempts to move beyond a subject-object conception of legal relations and its property model of rights. ... All rights, she argues, express a certain view of relationships: all rights affect power relations, and create responsibilities as much as selfish claims. If we put this aspect of rights at the forefront of our thinking, and in particular if we abandon the idea that the paradigm rights are proprietary rights which consist in the power to exclude others, we can gradually reconstruct our rights culture towards a model of democratic dialogue and accountability... In this blend of conceptual and procedural argument, we find, I would argue a rich source of insight for the future development of international human rights, and one in which not only legal institutions such as courts and legislatures but also the institutions of global and local civil society may be invoked," at 52-53.

it fails to fully conceptualize the child as being nested within a web of interdependent rights holders and relationships. As a result, I argue, the Convention fails to fully delineate the types of legal obligations the State should fulfil to develop the conditions that would enable and empower families to deliver on their ‘private’ obligations towards their children, and therefore fails to challenge the continuum of exploitation that surrounds childhood economic exploitation for children and their families.⁹⁸

Building on my critique of the reification of the private sphere and weak nature of the protection of the family within the socio-economic sphere, I proceed to explore the significance of the ongoing debate surrounding the juridical status of economic, social and cultural rights from the perspective of children engaged in economic exploitation. Income volatility, external economic shocks and lack of sustainable livelihoods where no social protection mechanisms are in place to absorb the impacts of these events are core social processes that reproduce the conditions under which children become involved in economic exploitation.⁹⁹ I argue that childhood economic exploitation provides a profound illustration of the artificiality of retaining a sharp distinction between positive/non-justiciable/programmatic economic and social rights on the one hand, and negative/justiciable/immediate civil and political rights on the other hand. Tracing the genealogy of social rights, I explore how social rights and social protections as they were originally conceived were designed to ameliorate the harshness of the market and to ensure the decommodification of labour power in its engagement with the market. Drawing on Judy Fudge, I argue

⁹⁸ In the words of Martha Minow, I highlight the limitations of the Convention in the manner in which it fails to fully “challenge social patterns that permit public neglect, assign private responsibility for children and also perpetuate public failures to develop the preconditions for that private responsibility.” See Minow 1986, *supra* note 17 at 24.

⁹⁹ See for eg. ILO WR Social Protection and Child Labour 2013 *supra* note 21 at 24.

that “labour power is ‘embodied’ in human beings who are born, cared for and tended in a network of social relations that operate outside the direct discipline of the market.”¹⁰⁰ An embodied conception of labour power would recognize the necessity/burden of care work for workers and would acknowledge that individual workers who engage their labour do not do so in an unencumbered way, but with the dependent family members with whom their struggle for material survival is intertwined and necessitated. In adopting an incremental approach to economic and social rights, and in particular in failing to link childhood economic exploitation explicitly to supportive social protection mechanisms, I argue a core element of the challenge of economic exploitation in childhood remains unanswered by the human rights law model.

1.3.3 Exploring the Challenges of the Informal Economy and Social Reproduction Work through the Prism of Domestic and Home-based Work

The challenges of regulating childhood economic exploitation in the informal economy and in social reproduction work become particularly apparent when examined through the prism of domestic work and home-based work. The prevalence of children in these types of work I argue is partly connected with the spectrum of disadvantage that surrounds women’s work in these sectors more generally. Through my examination of the specific characteristics of work in these particular sectors, I seek to illustrate how the disadvantage of women workers in the informal economy and their children are relationally intertwined, not only at the micro level of the family and household unit, but also at the institutional and macro levels that situate their work among the most disadvantaged and undervalued

¹⁰⁰ See Fudge 2011, *supra* note 13 at 130.

segments of the informal economy spectrum and within unrecognized ‘socially reproductive’ work.

Following my analysis of the particular challenges pertaining to these sectors, I proceed to situate childhood economic exploitation within emerging efforts to address economic exploitation in the informal economy. First, I explore in a preliminary way the approach of the Self-Employed Women’s Association (SEWA), the largest and oldest union of informal economy women workers in India, as an effective illustrative example of an approach that addresses the interface between work in the productive and reproductive spheres as a way to advance the rights and empowerment of the ‘whole worker’, in particular for women workers in the informal economy. Second, I explore the example of the International Labour Organisation’s reoriented platform, the Decent Work Agenda, as one approach by the international community to attempt to respond to the disadvantage of informal economy workers. Through the decent work lens, child labour is now conceptualized as a serious ‘decent work deficit’ that undermines the capacity of both children and adults to enter and engage in decent work across the spectrum of the ‘life cycle’ due to the inter-generational implications of its harmful impacts.¹⁰¹ By mainstreaming childhood economic exploitation within its Decent Work Country programming, I argue that at least at the policy level, the ILO has begun to move away from the somewhat decontextualized ‘penalty and prohibition’ approach that I have critiqued in Chapter Two, although it should be emphasized that the Decent Work Agenda is a soft law promotional approach and these developments have not been fully mirrored in international standard setting activities. Specifically, at the conceptual level, the ILO

¹⁰¹ The intimate link between child labour and informality has been recognized within ILO policy work since 2002. See further ILO Director General 2002, *supra* note 12 at 52; ILO Director General 2006, *supra* note 12 at 32; ILO Decent Work Report 1999, *supra* note 19.

increasingly acknowledges the linkages between women's equality at work and the prevalence of child labour; it focusses on extending decent work to adult workers as a key element of unlocking the problem; and it centralizes extending social protection mechanisms as a core element of advancing sustainable livelihoods and diminishing income volatility.¹⁰² The policy discourse surrounding the Decent Work Agenda mirrors elements of the relational approach that I am advocating throughout this analysis in the manner in which it contextualizes the problem within a range of interdependent rights and rights holders.

Nevertheless, I argue the Decent Work Agenda retains some important limitations, both in its conceptual framing and in the manner of its implementation that mirror some of the structural exclusions I have critiqued in the labour law and human rights law models. First, in contrast to the example of SEWA, the ILO has only engaged in a preliminary way with the structurally-undervalued, deeply gendered care labour.¹⁰³ While acknowledging the relevance of care work for working women's lives, both in its norm-creating role and in its policy work, the ILO has retained a central focus on paid, 'productive' work occurring in the employment relationship and it has not yet begun to fully grapple with the large burden of 'socially reproductive' work that women and, in many cases, children bear, and in particular its implications for childhood economic exploitation. Second, while conceptually the Decent Work Agenda contains important developments, my analysis of the Decent Work country programmes of Bangladesh in particular reveals that progressive policy discourse has not always been meaningfully translated into ILO Decent Work Country Programming in practice. Decent Work Country programmes remain wedded to the

¹⁰² For the linkages between child labour and women's work in the informal economy, see ILO Gender Equality 2009, *supra* note 166 at Chapter 4: "A Decent Childhood for Both Boys and Girls" at 59-79.

¹⁰³ See further Blackett & Tsikata 2009 *supra* note 20 at 63.

dominant ‘penalty and prohibition’ approach demonstrating that the political will that would embed childhood economic exploitation within a more structural and integrated approach is not evidenced at national domestic level, particularly in the case of Bangladesh. Specifically, I argue the implications and burdens of care labour for women workers who are highly prevalent in the informal economy where child labour is most common, should form a structural element of legal and policy initiatives that focus on the empowerment of workers in the informal economy. By focussing on the child as nested within a web of relationships that includes the ‘whole worker’ with both productive and reproductive roles and responsibilities, I argue we can begin to more fully capture the subject position of the child within legal and policy strategies.

1.3.4 Exploring the Role of Social Protection Mechanisms – Moving towards a Structural Approach?

With the potential to challenge structural disadvantage and some of the social processes that underpin childhood economic exploitation – including income poverty, exposure to economic shocks, loss or injury of the adult earner within the household for example – the extension of social protection appears to offer a crucial and potentially transformative complement to strategies tackling childhood economic exploitation.¹⁰⁴ In Chapter Five, I demonstrate that the juridical status of social rights and the role of law in extending social protections remain deeply contested among diverse development actors, in particular the World Bank and the ILO.¹⁰⁵ Juxtaposing the discourse of the World Bank and the ILO, I demonstrate the different approaches that exist to the scope of interventions in childhood among the

¹⁰⁴ See for e.g. ILO World Social Protection Report 2014/15, *supra* note 21.

¹⁰⁵ See for e.g. ILO World Social Protection Report 2014/15, *ibid.* at xxii; World Bank, *Resilience, Equality and Opportunity: Social Protection and Labour Strategy, 2012-2022* (World Bank: 2012) [WB 2012].

various agencies, and to the role of law in extending social rights, which in turn reflects broader debates concerning the evolving role and capacity of the State in advancing the welfare of its citizens.

Drawing on critical scholarship within the field of law and development, my analysis demonstrates that the child and the family are increasingly taking centre stage as sites through which divergent approaches to the advancement of human freedom and development are being played out.¹⁰⁶ Examining empirical evidence that is emerging from the social protection field, I probe and complicate the linkages between childhood economic exploitation and the various types of social protection mechanisms that are being used by analyzing some of the mixed results that can flow for the prevalence of the problem, from conditional and unconditional cash transfers, public employment schemes and microfinance interventions among others.¹⁰⁷ This evidence demonstrates that desirable outcomes that reduce economic exploitation for children are not always guaranteed, even when social protection instruments succeed in achieving their broader social goals.¹⁰⁸

Exploring the common themes that link the positive and negative outcomes of these interventions, I claim that the mixed results that flow from social protection mechanisms in this field illustrate distinctly the importance of adopting a relational framing for the child as a subject of law and development. Specifically, I argue that social protection systems should be designed and implemented in a manner that is

¹⁰⁶ See for e.g. Kerry Rittich, "Black Sites: Locating the Family and Family Law in Development" (2010) 58 Am J of Comp L 1023 [Rittich 2010]; Kerry Rittich, "Families on the Edge: Governing Home and Work in a Globalized Economy" (2009-2010) 88 North Carolina L Rev 1527; Kerry Rittich, "The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social" (2004) 26 Michigan J of Intl L 199 [Rittich 2004/2005].

¹⁰⁷ See for e.g. ILO 2014/15, *supra* note 57; Jacobus de Hoop & Furio C. Rosati, *Cash Transfers and Child Labour* (July 2013) Working Paper, Understanding Children's Work Programme Series [De Hoop & Rosati 2013a]; Jacobus de Hoop & Furio C. Rosati, "The Complex Effects of Public Policy on Child Labour" (Nov. 2013) Understanding Children's Work Programme Working Papers Series [De Hoop & Rosati 2013b].

¹⁰⁸ *Ibid.*

cognisant of the relational and gendered dimensions of the family as a site of both productive and care labour, and as a site of equality and potential discrimination/exploitation. A fuller understanding of the family and the gendered impacts of both the burden of care and its market enabling functions is required if social protection mechanisms are to respond sensitively to the position of the child and to some of the underpinning root causes of economic exploitation in childhood.

1.4 Methodological Considerations and Choices

This thesis engages primarily in a conceptual analysis of the framing of the child under the international labour law model and international human rights law model and within the policy discourse of international organisations, rather than engaging in an in-depth case study of a particular jurisdiction or sector to illustrate the arguments made. This choice of the methodology of the work was taken for a number of specific reasons. First, the international legal framework has and continues to play a significantly determinative role in the manner in which questions of child labour and childhood economic exploitation are approached and framed at the domestic level in numerous jurisdictions. This is in part due to the development cooperation work that the ILO engages in through the International Programme for the Elimination of Child Labour (IPEC), and also due to the low political prioritization that is often afforded to the issue at domestic levels.¹⁰⁹ Both Convention No. 182 on the worst forms of child labour, and the UNCRC stand among the most widely ratified human rights Conventions internationally, with the former entering into force less than 18 months from its adoption, recording the fastest ever speed of

¹⁰⁹ For an overview of the activities and priorities of the International Programme for the Elimination of Child Labour see, *ILO-IPEC Strategies and Priorities for Addressing Child Labour and its Resource Needs* (Geneva: ILO, 2013) online: http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_23475/lang--en/index.htm

ratification of a Convention in the ILO's history.¹¹⁰ The political prioritization and visibility afforded to the issue of child labour flowing from these international legal strategies has undoubtedly increased significantly at the domestic level. As a result, both labour law and human rights discourse have become ubiquitous in contemporary legal and political debates on childhood well-being evidenced by the 2016 ILO target for the elimination of the 'worst forms of child labour' and the targets established under the Sustainable Development Goals for the eradication of child labour in all its forms by 2030. The prevalence of the international paradigms necessitates, in my view, analysis to reveal, at the conceptual level, the potential and limitations of these frameworks to expand the capabilities of children to live lives they have reason to value.¹¹¹

In addition to the influential role of the international labour law and international human rights law frameworks as national levels, a review of the literature in the field reveals that the problem of childhood economic exploitation has not been subject to sustained theoretical analysis, notwithstanding the rich literature from critical and feminist labour law scholars and the emerging literature on children's rights from a conceptual perspective. In light of these gaps in the literature, it was felt that a

¹¹⁰ Noguchi 2010, *supra* note 9 at 521. The number of ratifications of ILO Convention No. 182 currently stands at 174 (over 90% of the ILO members) only nine States short of universal ratification. See ILO, online: <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byConv.cfm?hdroff=1&conv=C182&Lang=EN>. The UNCRC has been ratified by 195 States. The United States has signed but has not ratified the Convention.

¹¹¹ See Arneil 2002, *supra* note 78 who observes that, "If you want to take children's needs and interests seriously, and make claim on their behalf that will compete with any other moral claims, it is necessary to make such claims in the language of rights. It is clear that any non-rights moral claim simply does not carry the same weight in the contemporary moral or political debate," at 86. At a more general level Nedelsky similarly observes that, "the prevailing language of justice and entitlement is overwhelmingly that of *rights*. Thus in my view, the debate over the desirability of rights (as concept and legal institution) has, in practical terms, been decisively won by those who opt for the language of rights. Despite the merit of the (ongoing) scholarly objections, the practical issue is not whether but how the language of rights will be used." Nedelsky 2008, *supra* note 17 at 140. For an examination of the relevance of the human capabilities approach to children more generally, see M. Biggeri, J. Ballet & F. Comin (eds.) *Children and the Capabilities Approach* (New York: Palgrave MacMillan, 2011) [Biggeri et al. 2011].

conceptual approach to the subject position of the child under the relevant legal frameworks could provide the most relevant original contribution in the field at this juncture, with potential applicability to a broader range of issues surrounding the child in the context of law and development. As Robert Leckey has argued, a focus on the legal subject “captures the manner in which the legal system structures identity and reconfigures the field of social possibilities in ways over which individuals do not exert full agency.”¹¹²

Throughout the thesis, I draw on examples and developments from Bangladesh and India in particular to illustrate elements of my analysis.¹¹³ These jurisdictions were chosen because of the scale of childhood economic exploitation that exists in these countries, especially in the large and growing informal economy where women and children work in large numbers in the most disadvantaged sectors of informality, including in particular home-based work and domestic work.¹¹⁴ Illustrative examples from the national legislative frameworks in the areas of labour law and human rights law are used to demonstrate the inherent limitations and exclusions of the ‘prohibition and penalty’ approach of labour law and the limitations of the human rights law model in its reification of the private sphere. The choice of these

¹¹² Leckey 2008 *supra* note 77 at 6.

¹¹³ While cognisant that the use of the terms ‘Global South’ and ‘Third World’ have been subject to critique, for present purposes I use the term Global South as a useful term with particular historical connotations that capture a shared history of colonialism and imperialism. Bonaventura de Sousa-Santos uses the term South to express, “not a geographical location but all forms of subordination (economic exploitation; gender, racial and ethnic oppression; and so on) associated with neoliberal globalization. The South, in short, denotes the forms of suffering caused by global capitalism. In this sense, the South is unevenly spread throughout the world, including the North and the West.” See Bonaventura De Sousa Santos and Cesar A. Rodriguez-Garavito, *Law and Globalization from Below, Towards a Cosmopolitan Legality* (Cambridge; Cambridge University Press, 2005). See further Grovogui Siba, “A Revolution Nonetheless: The Global South in International Relations” (2011) 5:1 *The Global South* 175. On the continuing relevance of the term ‘third world,’ see Rajagopal Balakrishnan, “Locating the Third World in Cultural Geography” (1998-1999) 15 *Third World Legal Studies* 1

¹¹⁴ For the context of Bangladesh see in particular *Understanding Children’s Work in Bangladesh*, Country Report (International Labour Organisation and Understanding Children’s Work Programme, July 2011) [UCW Bangladesh 2011]. For the context of India, see Khan & Lyon 2015 *supra* note 68. See also, UCW, *Child Labour in Bangladesh and India: A Preliminary Gender-Based Analysis*, April 2009.

jurisdictions was further shaped by the availability of specific empirical studies that could illustrate the salience of the relational theoretical framework, in particular in the areas of work undertaken in the homework and domestic sectors which have been relatively neglected in empirical work in this field overall.¹¹⁵ In addition, I use a number of illustrative examples grounded in the work of non-governmental organizations and membership based organizations for informal economy workers that are unique to these jurisdictions in order to ground my analysis in some practical examples from the field.

Throughout the analysis I have centralized a number of structural factors and processes that I consider to be of particular interest, specifically the role and prevalence of the growing informal economy, the burden and implications of care and social reproduction work, the role of poverty and income volatility and the implications of structural inadequacies in access to education. In centralizing these specific structural factors, I do not claim that this is a comprehensive analysis of the problem of economic exploitation in childhood, nor that the factors I have outlined are the most determinative factors that give rise to the problem in particular sectors and in specific jurisdictions. The relative weight and importance of the various determinants of economic exploitation in childhood will vary considerably within any given contextualized analysis, within any given sector and within any particular jurisdiction. However, my aim is to reveal some of the relatively neglected elements of the enduring structural processes that underpin economic exploitation in

¹¹⁵ The illustrative examples that I draw on were also shaped by the availability of data and specific case studies that are particularly relevant to the relatively neglected elements of the child labour challenge that I am highlighting. The ILO is the primary international organisation that is building the empirical evidence in this field. However, the studies engaged in by the ILO did not reveal information of sufficient depth and specificity to enable an in-depth case study of a particular jurisdiction or sector of the economy.

childhood, and to unpack the significance of those elements at a conceptual level to probe the manner in which the distinctive position of the child is theorized under international labour law and international human rights law.

1.5 Situating the Contribution of the Thesis within Existing Literature in the Field

1.5.1 Situating the Thesis within International Labour Law Scholarship

The existing legal scholarship on child labour within the international labour law field has mapped the emergence of diverse legal standards, particularly at the international level, and their refinement, prioritization and implementation efforts over time.¹¹⁶ This literature provides a comprehensive and important description of the manner in which the international legal response has evolved from a minimalist approach that focused on the minimum age standard, to what is considered a more robust and prioritized response which focuses on prohibiting the worst forms of the child labour. While pursuing an important doctrinal analysis, in general, existing legal scholarship has treated child labour as a discrete area of study, without examining the connections between the problem and broader questions of disadvantage and inequality, and the structural exclusions of labour law and human rights law more generally highlighted by feminist and critical legal scholars.

Generally, in the context of children's rights, the tendency to treat specific issues in isolation from their broader development context has been noted by Christine Clark-Kazak, who argues that,

¹¹⁶ For existing legal scholarship in the field of international labour law and human rights law, see Franziska Humbert, *The Challenge of Child Labour in International Law* (Cambridge: Cambridge University Press, 2009); Nesi et al. 2008 *supra* note 98; Cullen 2007, *supra* note 9; Weston 2005, *supra* note 8. For existing legal scholarship on specific national legal systems, see for e.g. Myron Weiner, Neera Burra & Aisha Bajpai, *Born Unfree, Child Labour, Education, and the State in India* (New Delhi: Oxford University Press, 2006).

the ghettoization of children's rights and protection issues sometimes results in them being addressed in isolation from, or treated as an 'add-on' to broader development initiatives. This is apparent in a tendency among child and/or young people specific organisations and initiatives to focus on sensationalised categories, such as 'child soldiers', 'street children', 'AIDS orphans' and 'child slave', rather than framing these issues in their broader development context: political violence, urbanisation, poverty, economic exploitation and so on.¹¹⁷

This fragmentation of different types of rights claims has also been observed in the context of labour law more generally where, for example, Adelle Blackett has critiqued the ways in which the relationship between diverse international labour standards is often overlooked, leading to an atomized or decontextualized approach to rights.¹¹⁸ Citing child labour as an example, Blackett notes that "in the stories about child labour, there has been little attention to the 'feminization of poverty', understood broadly to indicate that some of the primary causes of women's poverty are disproportionate placement in low-wage occupations and primary responsibility for unpaid domestic labor."¹¹⁹ In keeping with these trends, current legal literature on economic exploitation in childhood has generally adopted a somewhat decontextualized approach to the phenomenon of child labour. This literature has not situated the problem within a broader legal and policy context that I argue would more appropriately include: the vulnerability and legal neglect of informal economy workers; the feminization of poverty and the unequal burden of care labour; the lack of legal protections for decent work and sustainable livelihoods for families; the lack of legal protection for social protection measures to mitigate the harmful impacts of occupational safety hazards, income volatility and other external shocks; and the lack of accessible education facilities that would incentivize and empower families to

¹¹⁷ See Clark-Kazak, *supra* note 25 at 1311.

¹¹⁸ See Adelle Blackett, "Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation" (1999-2000) 31(1) *Colum Hum Rts L Rev* 80 1 at 29-30.

¹¹⁹ *Ibid.*

engage their children in education.¹²⁰ This thesis aims to adopt such a contextualized approach, with each chapter situating the child and the problem of economic exploitation in childhood within the broader contextual framework of the specific element of the problem that is being discussed.

Diverse labour law scholars have produced a wealth of insights on the various ways in which the international and domestic labour law frameworks fail to fully challenge the disadvantage and vulnerability of large sectors of those at work, in particular women, who predominate in the informal economy and in unrecognized care and socially reproductive work.¹²¹ In response to the ‘crisis’ of labour law that results from the weakening of many of the basic pillars that supported it and enabled it to flourish following the Second World War (the nation state; the standard employment contract; the male breadwinner labour model; and the trade union model), labour law scholars have been attempting to re-imagine the theoretical and conceptual foundations of their discipline, beyond the formal contract for employment model that has excluded vast swathes of diverse workers from its remit and protection.¹²²

¹²⁰ See further Mehrotra & Biggeri 2007, *supra* note 18 who note, “[t]oo often in the child labour literature that has grown in the aftermath of this new concern for a rather old problem, the tendency is to address the issue as a stand-alone problem. The link was usually drawn to general poverty as a cause and child labour as a consequence of poverty. However, before long the discourse descended into ever greater refinement of issues of child labour itself, with scant attention to the forces at work in the macro-economy which characterized the expansion of the informal sector, and within it, the emergence of new forms of child labour in the development process. Most child work in developing countries is in the informal economy in household enterprises, either working for the family (of which the child is a member) as unpaid family labour, or as a paid employee outside the home in another, often unregistered household enterprise,” at 123.

¹²¹ See for e.g. Vosko 2010, *supra* note 13; Conaghan & Rittich 2005, *supra* note 13; Tonia Novitz & David Mangan, *The Role of Labour Standards in Development: From Theory to Sustainable Practice?* (Oxford: Oxford University Press, 2011) [Novitz & Mangan 2011].

¹²² Brian Langille succinctly describes the ‘crisis’ of labour law in the following terms: “[t]he crisis confronting labour law has three dimensions: (1) empirical (has the real world changed so much as to leave traditional labour law beside the point, inoperable, fading from view?); (2) conceptual (are our basic concepts of ‘employee’, ‘employer’, employment contracts, and so on, still viable and capable of organising our thinking in a useful way?); and (3) normative (are the moral ideas which motivate our enterprise still salient, robust and capable of rallying us to the continued defence of our subject?).”; see Brian Langille, “Labour Law’s Theory of Justice” in Davidov & Langille 2011, *supra* note 13 [Langille 2011] at 1-2. See further for e.g. Davidov & Langille 2006, *supra* note 13; John DR Craig & Michael Lynk,

This scholarship invites us to engage in a keen analysis of the underlying premises of legal frameworks, and the legal subjects and regulatory strategies produced by them, as a fruitful strategy to bring into view the ambivalent or negative impacts on those that a legal regime marginalizes or excludes.¹²³ However, existing legal scholarship on economic exploitation in childhood does not generally refer to or draw on these broader labour law debates.¹²⁴ Specifically, the distinctive subject position of the child under international labour law has not been subject to sustained theoretical analysis, nor has the phenomenon of childhood economic exploitation been contextualized within broader debates concerning the conceptual and normative underpinnings of international and domestic labour law. By drawing on feminist and critical labour law scholarship, I aim to begin to address this gap in the literature and to analyze the ways in which legal strategies on child labour are simultaneously strengthened and impeded by the international labour law framework.

Globalization and the Future of Labour Law (Cambridge and New York: Cambridge University Press, 2006); Bob Hepple, Catherine Barnard, Simon Deakin & Gillian Morris, *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Oxford and Portland, OR: Hart, 2004) [Hepple et al. 2004]; Simon Deakin & Bruce Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, (Oxford; New York: Oxford University Press, 2005) [Deakin & Wilkinson 2005].

¹²³ See for e.g. Blackett 2007, *supra* note 13 at 241, who asserts that the insights of critical legal theory and critical race theory in particular remind us of both the potential and limits of rights discourse.

¹²⁴ Holly Cullen situates her work primarily within scholarship on international human rights law. For a comprehensive overview of the role and evolution of international labour law and international human rights law in this field; see Cullen 2007, *supra* note 9 at 13-134. Cullen also provides an overview of some of the potential critiques of the prioritization approach undertaken under Convention No. 182 at 139-156. In addition, she critiques the relative under-development of protective obligations in this field, see Holly Cullen, "The Nature of State Obligations in Relation to Child Labour: Choosing Prosecution over Protection" in Kaiyan Homi Kaikobad & Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Leiden: M. Nijhoff, 2009) [Cullen 2009] at 99-123.

1.5.2 Situating the Thesis within Human Rights Law Scholarship on Children's Rights

In contrast to international labour law, the field of international children's rights and legal theoretical scholarship in this area is a relatively recent field of study.¹²⁵ Legal theoretical scholarship on the child as legal subject tends to explore how the distinctive characteristics of the individual child challenge some of the underlying philosophical premises that have grounded law's conceptual understanding of the legal subject.¹²⁶ In particular, the atomistic, independent, individual with full capacity to understand and exercise rights claims, and to 'trump' the rights claims of others, upon which classical liberal social contract theory is premised, is challenged by the distinctive evolving dependence, vulnerability and capacity that is a distinctive element of childhood.¹²⁷ Taking this as their point of departure, legal scholars in the field of children's rights have primarily engaged with the question of when it is appropriate for the State to intervene in the family in order to protect the best interests of the child at her current age, and/or her well-being as a future adult, while simultaneously taking into consideration her wishes in light of her evolving maturity

¹²⁵ See for e.g. Dixon & Nussbaum, 2012, *supra* note 23 who note the increasing prioritization of children's rights within national constitutions but assert that, "developing a theoretical basis for this increasing recognition of children's rights remains a work in progress. Many existing accounts of children's rights, for example, depend on a theory of children as 'adult-like,' or quasi-adults, entitled to the same rights and entitlements as adults under a social contract approach," at 551-552. See for e.g. Lucinda Ferguson, "Not Merely Rights for Children, but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights" (2013) 21 Intl J of Child Rts. In noting the gap and tensions between theoretical understandings of children's rights and children's rights in practice, Ferguson asserts that, "If children's rights have a special name because of the very identity of the child as a rights holder, then the failure to determine what that means in theoretical terms suggests critical difficulties for working with children's rights in the sphere of legal practiceWhile it is intuitively appealing that children have rights, the critical difficulty is to determine whether we can say that they have children's rights I do not consider that the emphasis on children's rights of itself is problematic but rather that it is currently problematic because we lack a sufficiently workable child-centred conception of children's rights" at 6.

¹²⁶ For a critical overview of the subject position of the child within liberal theory, see Arneil 2002, *supra* note 78.

¹²⁷ See Lacey 2004 *supra* note 16 at 35. See further Nedelsky 2008, *supra* note 17. For an examination of four different approaches feminists theorists might take to the UNCRC, see Olsen 1992, *supra* note 16. For an overview of the relevance of feminist theory for children's rights more generally, see Hilary Lim & Jeremy Roche, "Feminism and Children's Rights" in Jo Bridgeman & Daniel Monk, eds, *Feminist Perspectives on Child Law* (London and Sydney: Cavendish Publishing Ltd, 2000) [Lim & Roche 2000]; Fiona E. Raitt, "The Children's Rights Movement: Infusions of Feminism" (2005) 22 Can J of Fam L 11.

and capacity.¹²⁸ In this sense, child rights theory has been primarily concerned with attempting to ‘emancipate’ the child from the private sphere of the family, by extending the concepts of capacity and rationality to include the evolving maturity and capacity of the child. Article 12 of the UNCRC has been considered a pivotal legal development in this regard.

The manner in which the law accounts for and structures the various *relationships* of dependence, interdependence and care in which children are embedded, in particular those that exist between the child, her family and the infrastructure of the State, has not been subject to sustained theoretical enquiry.¹²⁹ In developing a reconstructive theory of rights, feminist relational theorists assist us to situate the legal subject by contextualizing her within the nested web of relationships that inevitably constitute her life and that structure her capability to live a life she has reason to value, including one free from economic exploitation.

In general, the relational lens has not been applied to a concrete problem such as economic exploitation in childhood to date, nor has it been critically applied to the

¹²⁸ Theorists such as Michael Freeman, for example, have endorsed a theory of ‘liberal paternalism’ based on a Rawlsian conception of the social contract which legitimizes intervention into children’s lives directed at conduct that is irrational when judged against a neutral theory of the good. See for e.g., Michael Freeman, *The Rights and Wrongs of Children* (London: Pinter, 1983); Michael Freeman, “Why it Remains Important to Take Children’s Rights Seriously” (2007) 15 *Intl J of Child Rts* 5. [Freeman 2007].

¹²⁹ For some preliminary examples of the possibilities of this approach, see Minow 1986, *supra* note 17; Minow & Shanley 1996, *supra* note 17. Martha Minow is critical of the ways in which legal theoretical scholarship on children has placed central emphasis on drawing distinctions between adults and children solely on the basis of their differing capacities without also developing a perspective on children’s rights that address children’s and adult’s mutual needs and connections. In particular she asserts, “the effort to understand the current legal universe in terms of rational line drawing presents a theoretical defect: it pretends that competency is the only issue, and that there are knowable boundaries between competence and incompetence for any given societal task ...Even though there seems no obvious line between childhood and adulthood, the many, and many inconsistent, lines drawn by this society to signify legal distinctions between children and adults invoke competing conceptions of the individual’s relationship to the community and the state, not merely competing definitions of adulthood versus childhood. A more candid and comprehensive analysis, then, should turn to the conceptions of the child’s relationship to the state – and to adults – that govern our legal system,” see Minow 1986, *supra* note 17 at 5.

international labour law and the international human rights law models for the protection of the child. While it must be recognized that the UNCRC has moved some way towards a fuller appreciation of the situatedness of the child within the web of familial relationships in particular, I argue it retains some of the structural inadequacies of 'liberal approaches' in its treatment of the individual child, the reification of the family and the private sphere, and in its failure to fully grapple with the question and implications of care and social reproduction work for the maintenance of the family. In engaging in this analysis, this thesis aims to further develop the relevance of feminist relational theory for theorising the subject position of the child under law, and to apply the insights of relational theory to legal and policy strategies that are sensitive to the core significance of various personal and institutional relationships for the advancement of a decent childhood.

1.5.3 Situating the Thesis within Scholarship on the Informal Economy

Legal scholarship exploring the relationship between law and the informal economy, and specifically between legal initiatives relating to childhood economic exploitation and the informal economy, has been limited to date.¹³⁰ Scholars from the field of political economy have explored the central role that gender plays in the predominance of women workers in the informal economy.¹³¹ While there has been more limited legal scholarship on the informal economy, scholars such as Anne Trebilcock have centralized the important links between gender inequality and the informal economy.¹³² This scholarship explores the factors that underpin the high

¹³⁰ See for e.g. Trebilcock 2004, *supra* note 52; La Hovary, *supra* note 52.

¹³¹ In the political economy field Naila Kabeer has engaged in a preliminary exploration of the distinct connections between the gendered informal economy and child labour; see Naila Kabeer, *Gender and Social Protection Strategies in the Informal Economy* (New Delhi: Routledge 2010) [Kabeer 2010] at Chapter 4.

¹³² See for e.g. Trebilcock 2004, *supra* note 52.

prevalence of women in the informal economy, in particular along the more disadvantaged segments of the informal economy spectrum where their working conditions are poor and their pay is low.¹³³ This scholarship has demonstrated the strong correlation between women's involvement in informal employment and their high incidence of poverty.¹³⁴ However, in addition to the gendered nature of the informal economy, *children* form a large cohort of those working within informality and economic exploitation in childhood is very much linked with the persistence and growth of the informal economy.¹³⁵ Nevertheless, the connections between the gendered informal economy and children's economic exploitation have not been extensively explored within the legal academic literature, nor have the implications of legal and policy interventions in the informal economy been analyzed for this context.¹³⁶ I argue that there are distinctive links between the structural vulnerability of workers in the informal economy, in particular women workers, and the high prevalence of economic exploitation of children in informality that require further exploration and analysis. By focussing my analysis on the domestic and home-based sectors, and in the sphere of social reproduction work in the home, I aim to contribute to resolving the lack of academic legal scholarship in this field.

¹³³ Kabeer, *supra* note 135 at 29-46. See further Mehrotra & Biggeri 2007, *supra* note 18 at 7 who observe "[i]nformal employment is normally a larger source of employment for women than men in the developing world; 60 per cent or more of women workers are in informal employment outside of agriculture."

¹³⁴ See Hill 2010 *supra* note 20 at 26-27. See further S. V. Sethuraman, *Gender, Informality and Poverty: A Global Review, Gender Bias in Female Informal Employment and Incomes in Developing Countries* (Geneva: WIEGO/World Bank, 1998) [Sethuraman 1998].

¹³⁵ See ILO Director General 2002, *supra* note 12 at 52; ILO Director General 2006, *supra* note 12 at 32; ILO Decent Work Report 1999, *supra* note 19.

¹³⁶ See, however, Kabeer 2010, *supra* note 131 at Chapter 4.

1.5.4 Situating the Thesis within the Scholarship on Social Protection Mechanisms

The role of social protection systems has emerged to the forefront of the development agenda as a key element of international and national strategies to promote human development, political stability and inclusive growth.¹³⁷ The ILO Decent Work Agenda has played a part in advancing their role in the context of childhood economic exploitation, while influential development players including the World Bank have also endorsed their importance in the broader development context.¹³⁸ Apart from policy-based research by international organizations, the role of social protection mechanisms in this context has not been subject to sustained academic analysis by legal scholars. The child as a subject of law and development more generally is only beginning to be examined in the academic literature.¹³⁹ Drawing on the critical scholarship from the law and development field, I explore the ways in which the child and family are increasingly taking centre stage in the development process and I contextualize the phenomenon of children's economic exploitation within these broader trends.¹⁴⁰ In undertaking this analysis, this thesis aims to develop a more in-depth understanding of some of the complexities that surround social protection mechanisms, using the relational framing of the child to probe their potential for positive, and in some instances, equivocal impacts.

¹³⁷ See for e.g. Micheal Cichon, "The Social Protection Floor Recommendation, 2012 (No. 202): Can a Six Page Document Change the Course of Social History?" (2013) 66:3/4 Intl Soc Security Rev 21 at 23 [Cichon 2013]; Bob Deacon, "The Social Protection Floor and Global Social Governance: Towards Policy Synergy and Cooperation between International Organisations" (2013) 66:3 Intl Soc Security Rev 45 [Deacon 2013].

¹³⁸ See Gerry Rodgers, *The International Labour Organization and the Quest for Social Justice, 1919-2009* (International Labour Office: Geneva, 2009) [Rodgers 2009] at 170. See also ILO WR Social Protection and Child Labour 2013, *supra* note 21.

¹³⁹ For a policy-based analysis of the role of social-protection mechanisms in the child labour context, see ILO WR Social Protection and Child Labour 2013, *supra* note 21. For a conceptual analysis of the child as a subject of development, see for e.g. Rianne Mahon, "After Neo-Liberalism? The OECD, the World Bank and the Child" (2010) 10 Global Soc Pol'y 172 [Mahon 2010]; White 2002, *supra* note 16.

¹⁴⁰ See for e.g. Rittich 2010, *supra* note 106; Rittich 2004/2005, *supra* note 106.

Chapter Two

Child Labour and the International Labour Law Model – Mapping the Boundaries

2.1 Introduction

The history of the emergence of specific national labour movements and the international labour movement itself are intertwined with preliminary legal strategies that were aimed at protecting ‘vulnerable’ women and child workers.¹⁴¹ Starting from the second part of the 19th century and the industrial revolution, children and women were considered in need of specific legal protection because of their particular vulnerability compared to adult male workers. Therefore, the creation of labour law in many ways originated in the perceived needs of children and women for protection from abuse by their employers.¹⁴² Notwithstanding these long historical roots, the distinctive subject position of the child under international labour law has not been subject to sustained theoretical analysis, nor has the phenomenon of child labour been contextualized within broader debates concerning the conceptual underpinnings of international labour law more generally.¹⁴³

In this chapter, I situate the child and the specific legal standards surrounding child labour within the evolving international labour law framework. First, drawing on the approach of feminist and critical labour law scholars, I analyze the extent to which

¹⁴¹ See Matteo Borzaga, “Limiting the Minimum Age: Convention 138 and the Origin of the ILO’s Action in the Field of Child Labour” [Borzaga 2008] in Nesi et al. 2008, *supra* note 98 at 39, who observes that the need for the “protection of children (and women) from abuse by their employers at the beginning of the industrial era was the most important reason for the creation of labour law in general, first at the national and subsequently at the international level.” See also Fyfe 2007, *supra* note 8 at 5-23.

¹⁴² *Ibid.*

¹⁴³ For an overview of the debates concerning the normative underpinnings of labour law generally, see for e.g. Davidov & Langille 2011, *supra* note 13; Davidov & Langille 2006, *supra* note 13; John DR Craig and Michael Lynk, *Globalization and the Future of Labour Law*, (Cambridge and New York: Cambridge University Press, 2006); Hepple et al. 2004, *supra* note 122; Deakin & Wilkinson 2005, *supra* note 122; Novitz & Mangan 2011, *supra* note 121; Hepple 2005, *supra* note 40. See also Harry Arthurs, “Labour Law as the Law of Economic Subordination and Resistance: A Counterfactual” (2012) Osgoode Hall Law School Comparative Research in Law and Political Economy, Research Paper No. 10/2012.

the procedural safeguards and regulatory approach of international labour law, which have been premised on the ‘paradigmatic adult worker,’ are capable of fully integrating and responding to the distinctive subject position of children engaged in exploitative labour.¹⁴⁴ I argue that somewhat analogous to the situation of women workers in the informal economy and women who engage in unpaid care work, there is a disjoint between some of the protective building blocks of the labour law frame and the contextual realities that characterize children’s engagement in exploitative labour. Specifically, I examine the ways in which some of the structural processes arising from the enduring social character of labour that underpin child labour, are not fully integrated within the traditional labour law frame.

Second, I explore the potential and limitations of the specific international labour standards that have been formulated to combat child labour, and the manner in which these standards have evolved and been re-prioritized over time. The international legal regime in this area has changed significantly from a minimalist approach that centralized the minimum age restrictions, to a prioritization approach that focuses pragmatically on addressing the ‘worst forms of child labour,’ with both approaches combined to form part of the core labour standards.¹⁴⁵ Drawing on my critique in the first part of the chapter, I argue that the child labour Conventions combined comprise a ‘penalty and prohibition approach’ which has dominated child labour strategies to date. This approach I claim has narrowed the labour law response in ways that neglect the inherently distributional questions that child

¹⁴⁴ The critical and feminist labour law scholars I draw on in this chapter primarily include, but are not limited to the following authors: Blackett 2011, *supra* note 13; Blackett 2007, *supra* note 13; Fudge 2011, *supra* note 13; Fudge 2014, *supra* note 6; Vosko 2010, *supra* note 13; Conaghan & Rittich, 2005, *supra* note 13.

¹⁴⁵ For a comprehensive doctrinal analysis of the development of the legal standards in the child labour field, see Humbert 2009, *supra* note 143 at 35-132. See also Cullen 2007, *supra* note 9 at 5-6.

labour evokes, and does not map well onto the contextualized realities that locate large numbers of children in the growing informal economy and in unrecognized social reproduction work within their families. Specifically, I argue that the ‘prohibition and penalty’ approach fails to provide a full challenge to the structural processes that underpin the problem, namely, worker vulnerability in the informal economy, the relevance and implications of gendered care work, poverty and lack of social protection mechanisms, and the right to education. Without addressing these structural processes, I claim, the labour law model will remain a somewhat truncated response to economic exploitation in childhood.¹⁴⁶

2.2 Situating the Child within the Overall Framework of International Labour Law

2.2.1 Situating the Child within the Procedural and Regulatory Framework of Labour Law

In situating the child within the procedural and regulatory framework of labour law, it is first important to examine the normative aims of labour law, the procedural and regulatory framework that flows from these normative aims and their relevance for children in exploitative labour.

At a fundamental level, the labour law framework was designed to mediate an individual’s access to the market as a factor of production, and to ensure that their subordinated position is “other than that of a commodity merely bought and sold in

¹⁴⁶ See further Blackett 2007, *supra* note 13 who asserts that, “a focus on labour rights that moves beyond its liberal ‘enabling’ character toward one that identifies how institutions may be marshalled to foster human capabilities resonates with Craig Scott and Patrick Macklem’s poignant affirmation in the South African context that civil and political rights alone “[project] an image of truncated humanity. Symbolically but still brutally it excludes those segments of society for whom autonomy means little without the necessities of life,” at 229-230.

relation to supply and demand.”¹⁴⁷ Specifically, the main normative goals that have inspired international labour law are twofold: first, to counteract the inequality of bargaining power which is inherent in the employment relationship; and second, to resist the commodification of labour in recognition of its ineradicable human and social character.¹⁴⁸ Flowing from these normative goals, labour law has sought to put in place a range of procedural and regulatory mechanisms and safeguards to empower worker agency within the unequal employment relationship, and to advance dignity at work. At first glance, it is unclear where the child sits within these normative goals, with labour law premised historically on the simple exclusion of children below specific ages and from specific sectors of the formal economy. The exclusion of children from the labour market was envisaged to flow automatically from the processes of formalization of the economy and through the trickle-down impacts of economic development, as well as through the enforcement of labour laws by a labour inspectorate.¹⁴⁹

In pursuance of its first goal, addressing the inequality of bargaining power inherent in the employment relationship, the regulatory framework of labour law has traditionally focussed on establishing minimum labour standards, including, for example, the minimum age restrictions surrounding child labour laws limiting entry into the labour market. The standard employment relationship, typically

¹⁴⁷ See Adelle Blackett, “Global Governance, Legal Pluralism and the Decentered State: A Labour Law Critique of Codes of Corporate Conduct” (2001) 8:2 *Ind J of Global Leg Stud* 401 at 418-419 [Blackett 2001]. See also Blackett 2007, *supra* note 13 at 225.

¹⁴⁸ See for e.g. Manfred Weiss, “Re-Inventing Labour Law” in Davidov & Langille 2011, *supra* note 13; Brian Langille, “Labour Law’s Theory of Justice” in Davidov & Langille 2011, *supra* note 13 at 104-105; Fudge 2011, *supra* note 13 at 121-124. See also Blackett 2007, *supra* note 13 at 225 who describes the purpose of labour law as follows: “the dual purpose of labour law is to provide worker protection (through legislation on minimum wage and minimum labour standards, as well as basic human rights norms against discrimination in the workplace) and worker agency through democratic participation (traditionally understood through access to collective bargaining mechanisms).”

¹⁴⁹ See Fyfe 2007, *supra* note 8 at 7-10.

characterized by a full-time continuous employment relationship between a worker and an employer primarily taking place within the formal economy, has been the main conceptual linchpin through which the protective functions of labour law have been delivered.¹⁵⁰ The primary mechanism for enforcement and compliance with minimum labour standards such as the minimum age standard has been through the labour inspectorate, which has predominantly focussed on monitoring labour standards in the formal economy.¹⁵¹

Critical and feminist labour law scholars in recent years have been re-examining the normative goals of labour law in an attempt to move the regulatory imagination of labour law beyond the formal standard employment relationship model.¹⁵² This scholarship demonstrates that the regulatory framework of labour law has excluded vast swathes of workers, in particular informal economy workers and other atypical or precarious employment, from effective protection.¹⁵³ By revealing the ways in which labour law has marginalized these workers, this scholarship has sought to broaden labour law's normative framework from the perspective of workers located

¹⁵⁰ See Fudge 2006, *supra* note 13 at 295. For a critique of the standard employment relationship, see Leah Vosko "Precarious Employment and the Problem of SER-Centrism in Regulations for Decent Work" in Lee Sangheon & Deirdre McCann, *Regulating for Decent Work: New Directions in Labour Market Regulation*, (ILO/Palgrave MacMillan: Geneva, 2011) [Vosko 2011].

¹⁵¹ See Fudge 2006, *supra* note 13 at 295. For a comprehensive overview of the fundamental role of labour inspection within the international labour law framework more generally, see Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports Concerning the Labour Inspection Convention, 1947 (No. 81), and the Protocol of 1995 to the Labour Inspection Convention, 1947, and the Labour Inspection Recommendation, 1947 (No. 81), the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133)* (2006) (International Labour Conference, 95th Session, Report III, Part 1 B).

¹⁵² See for e.g. Blackett 2011, *supra* note 13; Blackett 2007, *supra* note 13; Fudge 2011, *supra* note 11; Vosko 2010, *supra* note 13; Conaghan & Rittich, 2005, *supra* note 13.

¹⁵³ See for e.g. Fudge 2011 *supra* note 13; Harry Arthurs, "Labour Law after Labour" in Davidov & Langille 2011, *supra* note 13 at 13; Brian Langille, "Labour Law's Theory of Justice" in Davidov & Langille 2011, *supra* note 13 at 101; Blackett 2011, *supra* note 11.

on the margins.¹⁵⁴ In particular, critical and feminist labour law scholarship has revealed how the ‘paradigmatic (adult) worker’ around which labour law has built its procedural and regulatory framework centres on the adult (male) worker who is unencumbered with caring responsibilities and primarily engaged in the formal economy.¹⁵⁵ For example, in their critique of the standard employment relationship, feminists have argued labour law has marginalized the experience of atypical workers, in particular informal economy workers and workers in the social reproduction and care areas, where women work in large numbers.¹⁵⁶ In their predominance in the informal economy, in their combination of work in the public and private spheres, and in their engagement in unpaid care work, women in particular challenge many of the boundaries that Joanne Conaghan asserts ‘beset’ the labour law discipline.¹⁵⁷ These boundaries rest on a “dichotomized pairing of concepts hierarchically positioned in relation to one another: public/private; work/family; paid/unpaid; employed/unemployed; formal/informal economy; typical/atypical workers ... to name but a few.”¹⁵⁸

¹⁵⁴ See Blackett 2011, *supra* note 13 at 420 who observes, “it may not be from the standard employment relationship that a transformative politic has most prominently emerged, but from those at the margins whose claim for ‘citizenship at work’ challenges the very notion of the idea of a labour law dependent on exclusion ‘before’ and ‘beyond’ the market,” at 434.

¹⁵⁵ See Fudge 2011, *supra* note 13 at 132. See also Vosko 2010, *supra* note 13 and Vosko 2011, *supra* note 150, who provides the following illustrative example of this critique within the context of international labour standards: “For example, early regulations fostering ‘standardized work time’ rested on the assumption that unpaid (presumably female) caregivers would provide for male workers’ reproduction outside the labour force. Such was the case with the ILO *Convention on Hours of Work (Industry)* (1919), which introduced the eight-hour day and the 48-hour week but covered only wage workers and exclusively those in industry, a designation that effectively encompassed middle-aged workers but which many wage-earning women lacked. In these ways, the SER is gendered at its root as well as targeted specifically at workers in the ‘prime’ wage-earning phase of the lifecycle,” at 61. See also Judy Fudge, “Commodifying Care Work: Globalization, Gender and Labour Law” (Paper delivered at the Inaugural Labour Law Research Network Conference, June 2013) at 3 [Fudge 2013]; Fudge 2014, *supra* note 6.

¹⁵⁶ For an overview of the so-called ‘gender contract’ in the construction of the standard employment relationship (SER) under international labour law and for the exclusions of social reproduction from the SER, see Vosko 2010, *supra* note 13 at 52-70.

¹⁵⁷ See Joanne Conaghan, “Work, family, and the Discipline of Labour Law” in Conaghan & Rittich 2005, *supra* note 13.

¹⁵⁸ *Ibid.*

The relevance of these exclusions is particularly pronounced in the context of the economies of the Global South where the vast majority of workers operate in informality, and where the disadvantage of informal economy workers is highly gendered.¹⁵⁹ For example, globally, an estimated 50 per cent of the global population is engaged in informality, with informal economy workers accounting for 92 per cent and 87.5 per cent of the total workforce in economies such as India and Bangladesh respectively, with women forming the largest cohort of the most disadvantaged workers operating in that part of the economy.¹⁶⁰ These critiques have led feminist scholars to conclude that the ‘paradigmatic (male) worker’ that underpins the various safeguards of the labour law framework has served to reinforce rather than challenge gendered labour market segmentation, and has impeded labour law’s ability to tackle the vulnerability and exploitation experienced by vast swathes of workers in the informal economy or in precarious work, the majority of whom are women.¹⁶¹

¹⁵⁹ See for e.g. Novitz & Mangan 2011, *supra* note 121; Teklè Tzehainesh, ed, *Labour Law and Worker Protection in Developing Countries* (Oxford and Portland, OR: Hart Publishing and International Labour Office, 2010) [Tzehainesh 2010]. See also Anne Trebilcock, “Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law” in Davidov, Guy & Langille Brian, eds, *Boundaries and Frontiers of Labour Law* (Oxford; Portland, OR: Hart Publishing, 2006) at 66-67. For up-to-date statistical information relating to the percentage of workers in informality and the gender segmentation of the informal economy, see ILO, *Statistical Update on Employment in the Informal Economy* (Geneva: Dept of Statistics ILO, June 2011).

¹⁶⁰ For statistics relating to what is termed the ‘unorganized sector’ in India see National Commission for Enterprises in the Unorganised Sector, *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* (New Delhi: NCEUS, 2007). For statistics relating to Bangladesh, see Asia Development Bank, *The Informal Sector and Informal Employment in Bangladesh* (2010) Country Report, at 1 [ADB 2010]. In Chapter Four I will consider the linkages between child labour and informality in more detail. In relation to the impact of informality on the effectiveness of labour laws in countries in the Global South, see Colin Fenwick, “Decency and Fairness in Labour Standards: An Australian Perspective on a Canadian Proposal” (2008) 29:4 Comp Lab L & Pol’y J 491, who notes, “in developing economies it is commonly the case that a significant majority of workers operate in the informal economy. This not only means that these workers are operating beyond the protective scope of national labour laws. It also means that there are both incentives and possibilities for those who engage labour to do so in many ways other than through full-time continuing employment, and in so doing to further marginalize labour law’s effectiveness,” at 507.

¹⁶¹ See Fudge 2011, *supra* note 13 at 132. See further Martha Chen, Joann Vanek & Marilyn Carr, *Mainstreaming Informal Employment and Gender in Poverty Reduction: A Handbook for Policy-Makers and Other Stakeholders* (London: Commonwealth Secretariat and International Development Research Centre, 2004).

While the feminist and critical labour law scholarship has revealed both inadequacies in the procedural and regulatory framework of labour law and some of its boundaries, in particular for women workers, the distinctive – and in some senses marginalized – subject position of the child within labour law has not formed a central part of these debates.

In keeping with conventional economic orthodoxy, which shaped the framework of labour law, early legal strategies reflected the idea that child labour was a market aberration that would decline through overall economic growth in the form of formal modes of industrial-style development, and through adjustments to the market made by laws and policies prohibiting child labour.¹⁶² In her work on the economic approach to child labour, for example, Sonia Bhalotra characterizes the standard economic analysis of child labour in a developing country context as being based on the idea that pursuing policies that promote growth will (eventually) resolve the problem. This approach does not acknowledge that economic growth has a variable record in delivering what is needed, in particular higher and less volatile incomes among the poor, and higher net returns on education.¹⁶³ In keeping with this approach, early legal strategies took the form of simple legal prohibitions restricting children from working under various minimum ages in particular industrial sectors, as well as standards concerning minimal conditions of work for children.¹⁶⁴ For example, in its early years the ILO developed a range of sector-specific minimum age Conventions relating to child labour occurring in industry, at sea, in agriculture, in

¹⁶² See Sonia Bhalotra, “Some Remarks on the Economics of Child Labour” in Novitz & Mangan 2011, *supra* note 121 at 100.

¹⁶³ *Ibid.*

¹⁶⁴ Fyfe 2007, *supra* note 8 at 7-10.

non-industrial employment, fisheries and underground work.¹⁶⁵ Notably, these Conventions contained broad exemptions for employment within the family, and for domestic work performed by members of the family.¹⁶⁶ The labour inspection regulatory mechanism was envisaged as the primary method through which these minimal legal standards would be enforced.¹⁶⁷ Beyond labour inspection, the early legal standards did not provide specific guidance on the means through which children's removal would be attained. In addition, these early legal standards did not stipulate what sort of measures should be in place to ensure children's rehabilitation following their removal and to prevent their return to work.¹⁶⁸

¹⁶⁵ See for e.g. *Convention Fixing the Minimum Age for Admission of Children to Industrial Employment* (ILO No. 5) 28 November 1919, 38 UNTS 81, 84 (entered into force 13 June 1921); *Convention Concerning the Age for Admission of Children to Employment at Sea* (ILO No. 7) 9 July 1920, UNTS 109, 110 (entered into force 27 Sept. 1921); *Convention Concerning the Age for Admission of Child to Employment in Agriculture* (ILO No. 7), 9 July 1920, UNTS 109, 110 (entered into force 27 Sept. 1921); *Convention Fixing the Minimum Age for Admission of Young Persons to Employment as Trimmers and Stokers* (ILO No. 5) 11 November 1921, 38 UNTS 203, 204 (entered into force 20 Nov. 1922); *Convention Concerning the Age for Admission of Children to Non-Industrial Employment* (ILO No. 33) 30 April 1932, UNTS 39 (entered into force 6 June 1935). Subsequent revisions of these international conventions raised the minimum age from 14 to 15 years and almost two decades later two additional minimum age Conventions were introduced in the areas of Fisheries and Underground Work. See *ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment* (ILO No. 59) (Revised 1937) 22 June 1937, 40 UNTS 217, 220 (entered into force 21 February 1941); *Convention Concerning the Age for Admission of Child to Employment at Sea* (ILO No. 58) (Revised 1936) 24 October 1936 (entered into force 11 April 1939); *Convention Concerning the Minimum Age for Admission to Employment as Fishermen* (ILO No. 112) 19 June 1959, 413 UNTS 228, 230 (entered into force 7 Nov. 1961); *Convention Concerning the Minimum Age for Admission to Employment Underground in Mines* (ILO No. 123), 22 June 1965, 610 UNTS 79, 82 (entered into force 10 November 1967). See further David M. Smolin, "Strategic Choices in the International Campaign Against Child Labor" (2000) 22:4 Hum Rts Q 942 at 944-945 [Smolin 2000].

¹⁶⁶ Smolin 2000 *ibid* at 944-945. See further Fyfe 2007, *supra* note 8 at 9, who notes that within early legal strategies on child labour the primary "focus was on industries where workers were unionized and where international competition was an issue – areas, one might add, where working children would be visible. This meant that the informal economy was relatively neglected. It also meant the reinforcement of the geographic focus on Europe and North America." However, see *contra* Yoshie Noguchi, "ILO Convention No. 182 on the Worst Forms of Child Labour and the Convention on the Rights of the Child" (2002) 10 Intl J of Child Rts 355 [Noguchi 2002] who asserts that, "not only C. 182 but also all ILO Conventions concerning child labour (i.e. fixing the minimum age of admission) have covered not only employment of children under a formal employment relationship but also all work performed by children – including for instance self-employment, unpaid work, working within a family undertaking – from the very outset in 1919 (Convention No. 5 on minimum age in industry), unless a specific exception applies," at 360.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid* Fyfe 2007, *supra* note 8 at 9.

While the abolition of child labour was undoubtedly an early ILO priority, it is unclear that there existed in its historic prioritization the intention to apply this standard fully to all countries, particularly those countries subject historically to colonization, many of which are now considered to be located in the so-called ‘Global South.’ As Daniel Maul has demonstrated in his post-colonial critique of labour law, during the 1920s and 1930s the international labour standards that the ILO had created were essentially tailored to the situation in the industrialized countries of Europe.¹⁶⁹ The aim behind international standard setting was to safeguard at the international level the social progress that had been made in particular domestic contexts. However, there was a clear distinction embodied in legal norms such as the Native Labour Code’s ‘colonial clause’ between the industrialized countries of Europe, and the countries that were subject to colonization where less stringent rules and exceptions were applied.¹⁷⁰ For example, ILO Convention No. 5 on the Minimum Age in Industrial Employment required ILO Member States with ‘colonial possessions’ to apply the Convention in the countries they had colonized “except where owing to the local conditions its provisions are inapplicable” or “subject to such modifications as may be necessary to adapt its provision labour local conditions.”¹⁷¹ The ordinances and measures used by colonial powers to adapt this and subsequent international conventions to countries subject to colonization demonstrate that there was little intention to disturb the age and conditions in which

¹⁶⁹ See Daniel Maul, *Human Rights, Development and Decolonization: the International Labour Organization, 1940-1970*, (New York: Palgrave Macmillan, 2012) at 23 [Maul 2012]. See further Fudge 2011, *supra* note 13 at 122, who notes that, “[t]he prevailing (and dominant) understanding of labour is linked to the political economy of hegemonic countries – Western Europe, the United States, and white-settler former British colonies such as Canada – from 1930 to today.” See also Tzehainesh 2010, *supra* note 159.

¹⁷⁰ Maul *ibid* at 23.

¹⁷¹ ILO Convention No. 5, Article (1)(a) and (b).

children were working in the countries that were colonized.¹⁷² Therefore, the early ILO standards were tailored to address child labour not only for industrial and other more formal sectors of the economy, but also to match the conditions of the industrialized countries of Europe, with broad exemptions applied to the colonized countries.

When applied to consider the distinctive subject position of the child within labour law, the feminist analysis of the ‘paradigmatic adult worker’ reveals that the protective building blocks of the labour law regulatory and procedural model do not map well onto the contextual realities of children engaged in exploitative labour. First, child labour predominates in the informal economy, particularly in the agricultural and domestic sectors, as well as in family-based productive and reproductive activities.¹⁷³ While the ILO CEACR has taken a broad approach to the scope of the international labour standards on child labour to encompass work in the informal economy, including unpaid work, this is not generally reflected within legal definitions of child labour in domestic labour laws.¹⁷⁴ These specific spheres are often

¹⁷² See for e.g. Ben White, “Shifting Positions on Child Labor: The Views and Practice of Intergovernmental Organisations” in Weston 2005 *supra*, note 8. For example, White outlines that, “[i]n British Tanganyika (now Tanzania), for example, after two decades of pressure from London, the resulting 1940 ordinance was such a watered-down version of the ILO conventions as to leave the employment of children under twelve years in export crop estates, and the mass long-distance migration of children with their families to estate work, virtually undisturbed. And in the Netherlands East Indies, pressure from plantation companies resulted in an ordinance (1924) that redefined both ‘employment’ and ‘industrial workplace’ and even the hours of night and daytime so as to permit child employment in precisely the (sub)sectors of production in which it was most common,” at 326-327.

¹⁷³ See the most recent global estimates by the ILO which reveal that, “[a]griculture is by far the most important sector, accounting for 59 per cent of all those in child labour and over 98 million children in absolute terms. Child labour in agriculture consists primarily of work on smallholder family farms, although it also extends to activities such as livestock production, fishing and aquaculture. The numbers of child labourers in services and industry are also far from negligible. A total of 54 million are found in the services sector and 12 million in industry. The services sector includes domestic work, which involves a total of 11.5 million children. Child labour in the services sector also includes primarily informal work in hotels and restaurants, in street selling and other forms of commerce, in car repair shops and in transport. Child labour in industry relates primarily to work in construction and in manufacturing, again mainly in informal settings,” ILO Global Estimates 2013, *supra* note 5 at 23.

¹⁷⁴ See Trebilcock 2004, *supra* note 52, who addresses what she terms is the common misconception that international labour standards do not apply to the informal economy. She asserts that the inability of the

effectively excluded from the remit of labour law's protective standards through exclusion clauses that remove the family home or small enterprises from the reach of labour law's protective standards.¹⁷⁵ For example, in the context of Bangladesh, the Labour Act 2006 (2006 Act) replaced a range of fragmentary laws related to child labour and established a uniform minimum age for admission to work.¹⁷⁶ However, the 2006 Act focusses primarily on formal or semi-formal work settings and largely ignores the employment of children in the rural economy.¹⁷⁷ No reference is made in the legislation to the agriculture sector (with the exception of tea plantations), to small-scale informal sector businesses, or to family-based employment, which collectively account for as much as 80 per cent of total children's employment.¹⁷⁸ The ILO and other interlocutors have stated that current legislation does not constitute a comprehensive legal framework for protecting children against child labour, and in particular those working in the informal economy.¹⁷⁹

In addition to legal restrictions on the mandate of labour inspection in specific parts of the informal economy, this regulatory mechanism faces huge logistical challenges in its ability to regulate the highly dispersed sites where child labour takes place in

informal sector to comply with certain aspects of labour legislation is not necessarily an indication that something is wrong with the legislation itself; it should rather be taken as a reflection of the quite unsatisfactory conditions in which the informal sector has to operate, which includes the low productivity trap, the precarious nature of micro-enterprises etc. Trebilcock argues that, "failure to apply those instruments reflects a failure in governance that needs to be address by multilateral institutions as well as by governments," at 592.

¹⁷⁵ See for e.g. ILO, Report VI(1), *Child Labour: Targeting the Intolerable*, International Labour Conference, 81st Session (1998) at 24 and 44 [ILO Targeting the Intolerable 1998].

¹⁷⁶ *Ibid* at 48. Specifically, the Labour Act 2006 sets out a general minimum age of 14 years for employment in any occupation or establishment, but states that a child who has completed 12 years of age may be employed in such light work as not to endanger her health and development or to interfere with her education.

¹⁷⁷ See UCW Bangladesh 2011, *supra* note 118 at 49.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*.

informality, in particular in private homes and in isolated rural areas.¹⁸⁰ As a mechanism of enforcement, therefore, somewhat analogous to the situation of women workers in the most disadvantaged parts of the informal economy, labour inspection is deeply challenged in its ability to capture and regulate the contextual realities of child labour.

Second, the protective function served by procedural safeguards such as collective bargaining are modeled on an adult worker with full capacity who is capable of advocating within a collective for enhanced rights at work, or activating the safeguards available within a formal standard employment relationship. When compared to other disadvantaged groups, such as women working in the informal economy, children, in particular young children, cannot be fully empowered or granted agency to overcome their physical and psychological immaturity nor their dependence and vulnerability.¹⁸¹ While it is important not to overstate the vulnerability and dependence of children and to recognize their capacity for agency and autonomy, as well as the contribution they make towards the well-being of their families, it is undoubtedly the case that during particular phases of childhood, at a practical level children are distinctly limited in their capacity of enjoy protections such as collective bargaining.¹⁸² In their examination of collective bargaining, Colleen Sheppard and Adelle Blackett have demonstrated how the ‘paradigmatic worker’ on

¹⁸⁰See ILO, *The Informal Economy and Decent Work: A Policy Resource Guide Supporting Transitions to Formality* (Geneva: ILO, 2013) [ILO Informal Economy Policy Resource Guide 2013] at section 4.c2, “Labour Inspection and the Informal Economy” at 1-4.

¹⁸¹ See Aoife Nolan, *Children’s Socio-Economic Rights, Democracy and the Courts* (Oxford; Portland, OR: Hart Publishers, 2011) [Nolan 2011] at 11.

¹⁸² *Ibid* at 11. Nolan observes that, “the ‘dependence’ (or, indeed, the vulnerability) of children is, at least partially, the outcome of specific social, historical and cultural attitudes towards, and treatment of, children, rather than being an inevitable result of childhood itself. Inaccurate conceptualisations of children as vulnerable, dependent and passive – and their resultant location in positions in which their agency goes unrecognised and unexercised – has given rise to a vicious circle. False perceptions of children are reinforced by, and give rise to, the limited opportunities available to children to demonstrate their competence and agency.”

which this safeguard is premised is presumed to possess the capacity and agency to bargain collectively, and to be located in a formal employment relationship where the structures of collective bargaining are feasible.¹⁸³ These authors have argued that in the design and application of the machinery to give effect to the right to collective bargaining, certain categories of worker were forgotten, overlooked or excluded because they were not part of the dominant Fordist paradigm which primarily sought to respond to the regulatory challenges of industrial workplaces thereby limiting the capacity of collective bargaining to advance full equality.¹⁸⁴ Premised on the exclusion of the child from the labour force, the collective bargaining safeguard was not designed to take account of the distinctive limited and evolving capacity of the child. In addition, the collective bargaining safeguard does not map well onto the location where children work, predominantly in the informal economy and generally within the family setting, where they may not be recognized as a ‘worker’ as such.¹⁸⁵ For the vast numbers of children working in informality (and for workers more generally in informality), the potential protective function served by collective bargaining remains significantly limited.¹⁸⁶

Third, in its centralization of ‘work and employment’ within the ‘productive sphere’ the labour law model does not fully incorporate children who are engaged in social reproduction work, often replacing the adults of the household who are engaged in productive work, to the detriment of their development, in particular their right to education. As outlined in Chapter One, given the size of the cohort of so called ‘out of

¹⁸³ See Adelle Blackett & Colleen Sheppard, “Collective Bargaining and Equality: Making Connection” (2002) 142 Intl Labour Rev 419 [Blackett & Sheppard 2002].

¹⁸⁴ *Ibid* at 421.

¹⁸⁵ See ILO Global Estimates, *supra* note 5 which reveal that, “child labourers work primarily without being paid by their own families. Unpaid family workers account for more than two-thirds of child labourers (68 per cent), followed by paid employment (23 per cent) and self-employment (8 per cent),” at 23.

¹⁸⁶ See further Blackett & Sheppard 2002, *supra* note 183 at 420.

school' or 'inactive' children, where many of these children are engaged in unpaid work in the social reproduction sphere, current statistical data on child labour may underrepresent the scale of the problem, particularly where such work is not 'hazardous' and does not fit easily within current labour law definitions of the problem. Feminist labour law scholars have emphasized the importance of including caring and domestic labour, whether paid or unpaid that is performed in a private household, within the domain of labour law, and have been at the forefront of grappling with the specific dynamics governing this type of work.¹⁸⁷ For example, Leah Vosko, among others, has argued that the standard employment relationship is premised on what she terms the 'gender contract' which assumes the norms of female caregiving, and reflects the life-course of the adult male citizen in its division of labour into discreet and linear segments of education, work and retirement.¹⁸⁸ She argues that the gender contract pivots on a dichotomous conception of time in which time allocated to the employer in exchange for a wage was defined as 'time spent at work'. In contrast, time spent in the private sphere, including responsibilities attached to biological and social reproduction, was supposedly 'free.'¹⁸⁹ This model assumes that the daily and intergenerational maintenance of workers takes place outside of the labour force or 'beyond the market.'¹⁹⁰ Similarly, Fiona Robinson has argued that labour rights retain a narrow focus on work as *paid labour*, which is decontextualized from the household, and from the local and global relations of care in which people's daily lives are immersed.¹⁹¹ In particular, within the male

¹⁸⁷ Fudge 2014, *supra* note 5 at 2.

¹⁸⁸ Vosko 2010, *supra* note 13 at 61. See further Fudge 2014, *supra* note 6 at 4-5.

¹⁸⁹ *Ibid* at 7-8.

¹⁹⁰ *Ibid* at 8. See further Blackett 2011, *supra* note 13 who challenges the 'deeply permeable' notion of the market by focussing on workers, such as domestic workers, who are have traditionally been considered to be on the margins of work and employment and whose "claim for 'citizenship at work' challenges the very notion of the idea of a labour law dependent on exclusions 'before' and 'beyond' the market," at 434.

¹⁹¹ Fiona Robinson, "Beyond Labour Rights: The Ethics of Care and Women's Work in the Global Economy", (2006) 8:3 Int'l Feminist Journal of Politics 321 [Robinson 2006].

breadwinner model, no account is taken of inevitable networks of relationships and responsibilities that exist within and outside the home, and the power struggles inherent in those relationships.¹⁹² Arguing for a moral and policy orientation towards labour law based on the ethics of care Robinson asserts,

A care perspective compels us to recognize the interrelatedness of care and work in the daily lives of many people, including and especially ‘working’ women in the South. Many of these women engage in a variety of kinds of work: paid wage labour in manufacturing; paid and unpaid ‘care’ work in the home or other social institutions, or often in others’ homes; informal sector activities inside and outside of the home; subsistence agriculture and other survival strategies which often fall outside of conventional categories of work. For these women, care and work are not separate; care, while often motivated by love and personal responsibility, is work, and work, traditionally understood, must continually be balanced with responsibilities of care.¹⁹³

Feminist labour law scholars therefore argue for an integrated approach that considers the role of both productive and reproductive work, and regards workers not as individualized agents, but as people existing, at a fundamental level, in relation with others.¹⁹⁴

When we consider the relevance of this feminist critique for the phenomenon of child labour, it reveals the significant involvement of children, in particular girl children, in social reproduction work in ways that are often detrimental to their right to education and harmful to their overall development.¹⁹⁵ Similar to its approach to the informal economy, the ILO CEACR has stated that it takes a broad approach to the scope of the international labour standards on child labour to include “all persons engaged in *economic* activity, whether or not there is a contractual employment

at 333.

¹⁹² *Ibid* at 330.

¹⁹³ *Ibid* at 334.

¹⁹⁴ *Ibid* at 337. See also Fudge 2014, *supra* note 6 at 19-20.

¹⁹⁵ For comparable statistics relating to the incidence of child labour in South Asia see for eg. Khan & Lyon 2015 *supra* note 68 which reveals that there is a large gender divide in ‘inactive children’ with girls representing 63.2 per cent of Bangladesh’s inactive 7-17 year old children.

relationship and whether or not the work is remunerated, including unpaid work and work in the informal economy.”¹⁹⁶ The ILO CEACR has further specified that this includes workers in family enterprises and farms, domestic workers, agricultural workers and self-employed workers.”¹⁹⁷ However, the explicit inclusion of the ‘hazardous household domestic services’ within the ICLS Recommendation on child labour suggests that there is a lack of clarity, particularly at domestic levels, as to whether and in what ways the labour law model of regulating child labour applies to children in social reproductive work and other forms of non-productive activity, in particular where it may not be considered hazardous.¹⁹⁸ Within domestic labour law regimes, the work undertaken within the family household is very often excluded from the remit of protection. For example, in India, Clause 3 of the Child Labour (Prohibition and Regulation) Act of 1986 prohibits the employment of children in certain occupations and processes with the proviso that “nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family.”¹⁹⁹

The feminist critique of the neglect of care also reveals the intimate relationship between the productive work engaged in primarily by women, and the implications of that work for children and adolescents in the social reproduction sphere. In a context of material disadvantage, it is very often children who are absorbing the costs

¹⁹⁶ See ILO CEACR ILO Declaration 2012 at 148 para 332, *supra* note 61.

¹⁹⁷ See ILO CEACR ILO Declaration 2012 *supra* note 61 at 148 para 332.

¹⁹⁸ See Trebilcock 2004, *supra* note 52, who addresses what she terms is the common misconception that international labour standards do not apply to the informal economy. She asserts that the inability of the informal sector to comply with certain aspects of labour legislation is not necessarily an indication that something is wrong with the legislation itself; it should rather be taken as a reflection of the quite unsatisfactory conditions in which the informal sector has to operate, which includes the low productivity trap, the precarious nature of micro-enterprises etc. Trebilcock argues that, “failure to apply those instruments reflects a failure in governance that needs to be addressed by multilateral institutions as well as by governments,” at 592.

¹⁹⁹ Child Labour (Prohibition and Regulation) Act 1986. For the implications of these legal exclusions within the area of homework, see Philips et al., *supra* note 4 at 8.

of their parents' involvement in productive activities, by sharing the burden of reproductive activities and care work in order to replace their parents' engagement in these activities.²⁰⁰ As Rittich observes, "there is nothing natural or inevitable about the boundaries between productive and reproductive activity or the ability of different parties to pass on or absorb greater or lesser parts of the costs of production."²⁰¹ For example, interventions that have been designed to increase women's access to income generating activity such as microfinance, have been shown in some instances to increase the involvement of children in labour where they begin to work alongside their parents.²⁰² These interventions have led to perverse results, in part, because of their failure to take full consideration of the care needs of the household and the tendencies by adults when they become engaged in productive activities to substitute their own unpaid labour in the home with the labour of their children.²⁰³ An integrated approach that considers the role of both productive and reproductive work, and regards workers as nested within a web of relationships, in particular at the household and family level, appears to provide a broader conceptual basis from which to include the contextualized realities of children in exploitative labour. This approach would be capable of capturing the ways in which children often move between the productive and reproductive spheres, between stages of dependent/interdependence/independence, between paid/unpaid work, and

²⁰⁰ See for example, Saul Becker, "Global Perspectives on Children's Unpaid Caregiving in the Family" (2007) 7:1 Global Soc Pol 23.

²⁰¹ See Rittich 2002, *supra* note 87 at 129.

²⁰² See ILO Microfinance 2011, *supra* note 82, which notes a number of different studies that have demonstrated that an increase in the mother's time in self-employment may lead to a substitution between the daughter's time in school and her time in household production and self-employment. This substitution seems to be especially strong when the girl's time is a close substitute to that of her mother's time. This leads the authors to observe that a positive impact of parent's participation in microfinance income generating projects on the welfare and education of children cannot be automatically assumed. They conclude that, "the additional labour demand that is created by some types of productive assets will increase the workload of children, in particular: where adult labour is not available, cheap or sufficiently flexible; where parents find external labourers untrustworthy or prefer to pass on specific knowledge to their children; or where children have to take on some of the household chores, because the parents have to spend more time working," at 8.

²⁰³ *Ibid.* (See further Chapter Five of this thesis.)

between education and various forms of productive and reproductive activities, depending on the demands and needs of their household.

2.2.2 Centralizing the Child within the Distinctive Social Character of Labour

Contrary to conventional economic orthodoxy, the ongoing endurance of child labour clearly demonstrates that beyond adjustments to the market that may be achieved through the setting of minimum legal standards and through the trickle down impact of economic development, there are multiple *social processes* at play that determine a child's involvement in exploitative labour.²⁰⁴ Jamie Peck has outlined four social processes that illuminate the distinctive *social* character of labour; namely, labour supply, labour allocation, labour control and the reproduction of labour.²⁰⁵ The problem of labour supply arises because the market does not govern the supply of labour; rather, families determine the quality and quantity of labour in accordance with multiple variables. In a context where child labour occurs, these include variables such as household economic vulnerabilities associated with poverty, risk and external shocks, and the existence of accessible alternative activities for children, in particular accessible education.²⁰⁶ In relation to labour allocation, labour is not allocated by price, but matched by institutions that reproduce many of the societal disadvantages ascribed to particular social groups on the basis of their gender, race, age, ethnicity and so on.²⁰⁷ In the context of labour control, Peck observes labour is only partially commoditized; human beings sell their capacity to work, not themselves, and therefore their cooperation in the workplace, which is based on a

²⁰⁴ For the most recent ILO analysis of the various factors that determine children's involvement in child labour, see ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 11-27.

²⁰⁵ See Jamie Peck, *Workplace: The Social Regulation of Labour Markets*, (New York: Guilford Press, 1996) quoted in Fudge 2011, *supra* note 13 at 130.

²⁰⁶ See Fudge 2011, *supra* note 13 at 130. On the role of household economic vulnerability in child labour, see further ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 11-27.

²⁰⁷ Fudge 2011, *supra* note 13.

blend of coercion and consent, is essential to the success of any enterprise.²⁰⁸ Finally, as Peck outlines, the reproduction of labour occurs through the processes of ‘social reproduction.’²⁰⁹ While definitions of the term ‘social reproduction’ have been debated, as outlined above, Fudge broadly defines it to refer to the processes and labour that go into the daily and generational maintenance of the population, including the training of the individual capabilities necessary for interaction in the social context.²¹⁰ Social reproduction is typically organized by families in households, predominantly by women through their unpaid care labour, and by the State through health, education and welfare policies.²¹¹

Children, particularly young children, in light of their dependency and location within the family, are distinctly impacted by the distinctive social processes that determine the social character of labour. As Fudge has argued, the social character of labour gives rise to a series of ongoing and systemic ‘regulatory dilemmas’ for labour law.²¹² Traditionally, labour law has addressed only two of these regulatory dilemmas, namely, labour allocation and labour control, through minimum legal standards, collective bargaining and anti-discrimination law.²¹³ In contrast, the regulatory dilemmas relating to the role of the family in labour supply and the role of social reproduction as a key element in the reproduction of labour for the market, have fallen outside the traditional scope of labour law.²¹⁴ In particular, as outlined above, women’s unpaid domestic work, a key element in the social reproduction of

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ See Fudge 2013, *supra* note 155 who outlines that the concept of ‘social reproduction,’ which is drawn from political economy literature, has been used by feminists to illuminate the significance of women’s unpaid labour for the functioning of labour markets, at 3.

²¹¹ Fudge 2011, *supra* note 13 at 130-131.

²¹² Fudge 2011, *supra* note 13 at 131.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

labour, has been treated as a question of either family law or social law and has been neglected by the traditional labour law frame.²¹⁵ When we adjust the analytical lens to locate the child within the regulatory dilemmas that arise from *social* character of labour, it becomes clear that the family's role in allocating labour and the implications and burdens of social reproduction work, which have been marginalized in the labour law frame, are particularly important determinative factors for children's engagement in economic exploitation and should form a central part of the framing of the child as a subject of labour law.

When we adjust the analytical lens to centralize child labour within the social character of labour, the *structural* rather than temporary nature of these social processes is also revealed.²¹⁶ As Fudge has outlined, when we conceive of the labour market as an *instituted* process, then it becomes clear that regulation is necessary to *constitute* a market for labour, rather than to simply adjust market inefficiencies or aberrations.²¹⁷ Contrary to orthodox economic expectations that child labour would decline through overall economic growth, its ongoing endurance demonstrates that the distinct and ineradicable social character of labour is structural rather than temporary, thereby continuing to reproduce regulatory dilemmas for labour law.²¹⁸ Where some of the social processes that are partly determinative of children's engagement in labour are conceived to fall outside of the labour law framework, or where they are actively ignored by relevant legal and policy interventions, the

²¹⁵ *Ibid* at 131-132. As Fudge outlines, "This unpaid care work is a systematic transfer of hidden subsidies to the rest of the economy, and because it is women who disproportionately perform this work it functions as a time tax on women throughout their life cycle. Time spent caring is a major factor limiting people's, particularly women's, participation in the formal economy," see Judy Fudge, "Gender Equality and Capabilities, Care Work and Sustainable Development" in Novitz & Mangan 2011, *supra* note 121 at 46.

²¹⁶ Fudge 2011, *supra* note 13 at 131.

²¹⁷ *Ibid.*

²¹⁸ *Ibid* at 131.

structural disadvantage that compels parents to supply their children for labour will remain unchallenged by labour law. The key question for labour law scholars engaged with child labour therefore is: how can we re-imagine the boundaries of labour law in order to re-capture its transformative potential for the child in ways that takes full consideration of the social processes that reproduce the conditions under which children labour?²¹⁹

2.2.3 Situating the Child within the Normative Premise that 'Labour is not a Commodity'

The second normative premise of labour law embodied in the phrase 'labour is not a commodity,' marks out the distinctive and profound difference between labour power and other forms of commodities. As Blackett has asserted, labour law's *specificity* is rooted in its resistance to the commoditization of labour, and in its aim to imbue the subordinated nature of the employment relationship with dignity, which cannot be provided for by the market alone.²²⁰ Commitment to the core value of dignity reflects the fact that in 1944 the constitutional objectives of the ILO were reviewed in light of the atrocity of "[c]oncentration camps, in which not only genocide but also forced labour was rife" and as a result the principle that 'labour is not a commodity' became a core principal of the ILO's normative vision.²²¹ While labour is allocated through the market and institutionally it is treated as a commodity, labour power is "embodied in human beings who are born, cared for, and tended in a network of social relations that operate outside the direct discipline

²¹⁹ See further Blackett 2011, *supra* note 13 at 435-436 who concludes, "[a] project for labour 'lawyers' then, is to decide whether to engage with the transformative potential of labour law, as it affects both productive and 're-productive' capacity, and across multiple borders – one of which is the deeply permeable notion of the 'market.'"

²²⁰ *Ibid.* See further Fudge 2011, *supra* note 13 at 130.

²²¹ See Judy Fudge, "The New Discourse of Labour Rights: From Social to Fundamental Rights" (2007) 29:1 Comp Lab L & Pol'y J 29 at 37 [Fudge 2007]. See also Tonia Novitz & Colin Fenwick, eds, *Human Rights at Work: Perspectives on Law and Regulation* (Portland OR: Hart, 2010).

of the market.”²²² Social formations that allow labour to be treated as if it were purely a commodity, such as child labour, result in dysfunctional social consequences and often produce a movement to socially re-embed labour markets in ways that recognize and respond to its human character.²²³

In the context of child labour, the prevention and removal of children from working below the minimum age and in hazardous conditions can be considered one key element of the resistance to the commoditization of labour. This not only recognizes the harmful physical and psychological impacts that diverse types of labour can have on children and adolescents, but also that there are some forms of economic exploitation that cannot be consented to within the context of resisting the commodification of labour.²²⁴ The most recent ILO Global estimates of child labour reveal that childhood economic exploitation at young ages remains a considerable problem forming 44 per cent of the total child labour population.²²⁵ As the ILO observes, “[t]hese young child labourers constitute a particular policy concern as they are the most vulnerable to workplace abuses and compromised education.”²²⁶ Notably, in its interpretation of the ILO Convention on Forced Labour (No. 29) the ILO CEACR has considered the question of whether and under what circumstances a minor can be considered to offer himself or herself ‘voluntarily’ for work or service, and whether the consent of the parents is required and may be considered sufficient to allow work or employment.²²⁷ However, the Committee has consistently asserted

²²² Fudge 2011, *supra* note 13 at 130.

²²³ See Eric Tucker, “Renorming Labour Law: Can we Escape Labour Law’s Regulatory Dilemmas?” (2010) 39:2 *Indus LJ* 99 at 100.

²²⁴ For an overview of the specific physical and psychological harms that can occur in the context of ‘hazardous work,’ see ILO Hazardous Work 2011, *supra* note 2.

²²⁵ See ILO Global Estimates, *supra* note 5 at 6.

²²⁶ *Ibid.*

²²⁷ ILO *Convention Concerning Forced or Compulsory Labour* (ILO No. 29) 28 July 1930, UNTS 39 (entered into force 1 May 1932). See Report of the Committee of Experts on the Application of Conventions and

that “employment that is likely to jeopardize health, safety or morals is generally prohibited for persons below 18 years of age, in conformity with the relevant ILO Conventions, so that neither the children nor those having parental authority over them may give valid consent to their admission to such employment.”²²⁸ Minimum age restrictions and restrictions on work in hazardous work under 18 years, recognize that one of the key factors that marks the boundaries whereby an employment relationship is considered exploitative, is the extent to which it is considered a commoditization of labour and therefore labour to which consent cannot be given. As Blackett observes, the rationale for the minimum age labour standards is premised on the view that children’s engagement in work below a certain age can be considered *presumptively* exploitative in contravention of the core normative goal of labour law to prevent the commoditization of labour.²²⁹

Beyond the setting of minimum age standards, it can be argued in line with feminist critiques outlined above that implicit in the normative premise that ‘labour is not a commodity,’ particularly the minimum age standard, is a positive acknowledgement that “[l]ong periods of dependency are a normal and inevitable part of everyone’s life cycle” during which time individuals’ capacity to engage in productive or reproductive labour will be limited or non-existent.²³⁰ As feminist critiques of the structural exclusions of labour law have highlighted, while unpaid care labour is generally not explicitly recognized within the labour law framework, it is

Recommendations, *General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, (International Labour Conference, 96th Session, 2007, Report III (Part IB)) at 21 para 41. In relation to the distinctions between forced and voluntary labour more generally, see for e.g. Kirsten Shields, “Labour Exploitation: Crossing the Threshold Between Acceptable and Unacceptable Labor Conditions” in Paulus Kaufmann, Hannes Kuch, Christian Neuhauser & Elaine Webster, eds, *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht and New York: Springer, 2011).

²²⁸ *Ibid.*

²²⁹ See Blackett 1999-2000, *supra* note 72 at 20.

²³⁰ See Elizabeth Anderson, “What is the Point of Equality?” (1999) 109 *Ethics* 287 at 311.

undoubtedly an indispensable condition of the continuation of human society that many adults devote a great deal of their time to caretaking.²³¹ In setting a minimum age standard for labour law, it could be argued that the necessity of dependency and care during childhood is implicitly being acknowledged within the labour law framework, as is the imperative for the processes of social reproduction that ensure the nurturing and training of the population to fulfil their full potential.

2.2.4 Towards a Relational Normative Grounding for the Child within Labour Law

As outlined, the normative goals that have inspired labour law have been subject to re-examination and re-imagination in recent years, in particular from the marginalized perspective of women workers in the informal economy and in various forms of ‘atypical’ or precarious employment.²³² Through the lens of feminist analyzes of labour law, the child and child labour appear to sit somewhat uneasily within labour law’s protective conceptual building blocks which were originally premised on the child’s exclusion from the labour market. Feminist scholarship assists us to contextualize the specific location of the child and child labour within some of the structural and enduring social processes arising from the social character of labour; it demonstrates how the exclusion of these social processes from the traditional labour law frame has specific implications for children as subjects of labour law. However, the distinctive subject position of the child has not been

²³¹ *Ibid.*

²³² See for e.g. Davidov & Langille 2011, *supra* note 13; Davidov & Langille 2006, *supra* note 13; Hepple et al. 2004, *supra* note 122. The exercise of formulating an ideal theory of labour law has been critiqued by Bob Hepple as merely an exercise in applied ethics that will be sterile unless we first try to understand why real employers, workers, politicians and judges act as they do in practice. In answer to that critique, Brian Langille reasserts the importance of developing a normative account of labour law. In particular, he asserts, “[w]ithout an account of our normative purposes we have no way of seeing our reality as divisible into and constituted by subject matters such as labour lawLabour law does not simply exist and exist waiting to be found, it must be normatively imagined,” Langille 2011, *supra* note 122 at 103 and 111.

considered fully within these debates.²³³ While I have argued that the distinctive subject position of children is somewhat analogous to women workers in the informal economy and the social reproduction sphere, there is also a limit to the parallels that can be drawn between these distinct groups. The specific subject position of children, given their embeddedness within relationships of dependence and interdependence, their need for care and affiliation, and their evolving maturity and capacity, presents a particular challenge to the labour law frame that remains unanswered to date within theoretical scholarship in the field.

First, children challenge the paradigmatic individualized adult holder of labour rights because children continue to be dependent in a number of practical ways and are distinctly limited for particular periods in the life cycle in their ability to meet their own socio-economic and care needs.²³⁴ While this is not to suggest that adults are never vulnerable or dependent on others, including on their children for the provision of care and economic support, childhood is a distinct and formative phase in the life cycle where dependency is inevitable, particularly for young children.²³⁵ Second, children's dependence and vulnerability, in particular that of young children, continues to situate them within a web of familial or other care-giving relationships that act as important vectors for the delivery of rights, such as freedom from exploitative child labour and as important elements that absorb or are impacted by the correlative 'burden' and responsibility of engaging in caring work. The relationship and duty of care between the State and the child, as well as the child's

²³³ As Robert Leckey has argued, a focus on the legal subject, "captures the manner in which the legal system structures identity and reconfigures the field of social possibilities in ways over which individuals do not exert full agency." Specifically, Leckey asserts that scholarship that focuses on the legal subject has the capacity to highlight the ambivalent impacts of legal reforms, see Leckey 2008, *supra* note 77 at 6.

²³⁴ See further Nolan 2008, *supra* note 189 at 14. See further Lim & Roche 2000, *supra* note 127 at 235.

²³⁵ *Ibid* Nolan at 14.

relationship with the labour market, will inevitably be mediated and structured by the family or other caregivers who are located in some senses ‘between’ the child, the State and the labour market.²³⁶ Crucially, in a context such as childhood economic exploitation, the socio-economic well-being and care needs of the child cannot be fully conceptualized outside of the context of the relationships of dependence and interdependence between the child and their primary caregivers, as well as the child’s relationships with the various institutions of the State.²³⁷ Third, when compared to other disadvantaged groups, children, in particular young children, cannot be fully empowered to overcome their physical and psychological immaturity, nor their dependence and vulnerability.²³⁸ In this sense, the situation of children is not analogous to other excluded groups such as women working in the informal economy where increased empowerment and representation as a collective has been demonstrated to enhance their dignity at work.²³⁹ Children wield significantly less (if no) political and strategic economic power compared to adults, and are excluded from the vast majority of important societal institutions, including, for example, collective bargaining mechanisms.²⁴⁰ Finally, when we consider the life cycle in its entirety, it is clear that childhood is a key *formative* period of the life cycle that has implications across time for children, especially in their ability to access decent work later in the life cycle. Disadvantage experienced in childhood, in particular child labour, has a cumulative and lifelong impact on the individual, which in turn is

²³⁶ See further Minow 1986, *supra* note 17, who observes that, “[c]hildren’s dependencies specifically situate them within the sphere of the private family, where parents stand between children and the state,” at 18.

²³⁷ Minow 1986, *supra* note 17 at 24; a focus Minow argues is necessary in order to “challenge social patterns that permit public neglect, assign private responsibility for children, and also perpetuate public failures to develop the preconditions for that private responsibility.”

²³⁸ See Nolan 2011, *supra* note 181 at 11.

²³⁹ *Ibid* at 10-12 and 16-20.

²⁴⁰ See further Nolan 2011, *supra* note 181 at 7.

transmitted across generations and time to that individual's children and their children.²⁴¹

When we centralize these four key elements that distinguish the subject position of children and apply them to the labour law frame, it becomes clear that the normative goals of labour law, to redress the inequality of bargaining power in the employment relationship and to resist the commodification of labour, represent a “dangerously thin conceptual starting point” when viewed from the marginalized subject position of the child and from those, primarily women workers, who are ascribed social responsibility for their care.²⁴² If we are to fully prioritize the child as a subject of labour law then the necessity and burden of care, dependence and interdependence would need to be centralized, with workers regarded as existing at a fundamental level in relation to others, rather than as singular individuals engaged in the labour market absent their caring responsibilities.²⁴³ Centralizing the child as a subject of labour law would require us to complicate the boundaries between ‘productive’ work and ‘reproductive’ work, and would ensure the well-being of the family is more fully integrated within the labour law frame, rather than being considered to exist ‘beyond

²⁴¹ See further Dornan & Woodhead 2015, *supra* note 23. See also ILO WR Decent Work Young People 2015, *supra* note 3 at 15.

²⁴² I have borrowed this approach from Adelle Blackett, who considers the normative goals of labour law from the marginalized position of workers who have remained outside the story of the paradigmatic worker, namely domestic workers. Blackett argues that, “[t]he normative core of labour law must surely entail more than worker protection. To the extent that labour law helps to resist commoditization, its regulatory response should not only be protection, but emancipation. In other words it recognizes resistance and creates/preserves space (capabilities) for the effective exercise of agency,” see Blackett 2011, *supra* note 13 at 430-431. For a different type of critique that remains centred within a liberal frame and grounded in the human capabilities approach, see Langille 2011, *supra* note 122 at 114, who asserts that in intimately connecting the idea that “labour is not a commodity” with the other core normative premise of labour law, “inequality of bargaining power,” we have reduced the normative power of the idea of resistance to commodification of labour, and we have placed both substantive and procedural constraints on the project of labour law. This approach has been critiqued by Judy Fudge, among other authors.

²⁴³ See Robinson 2006, *supra* note 191 at 337.

the market.’²⁴⁴ Rather than being conceived of solely as atomized individuals engaging with the market, workers would be conceived of as ‘working and caring citizens,’ in ways that would broaden the conceptual framework of labour law to more fully integrate children’s as well as women’s everyday experience of their working and caring lives, including the implications and burden of care work. Integrating the question of care work, when considered from the perspective of countries in the Global South, is particularly attuned to the working and caring lives of women workers in the informal economy. Many women in this sector combine paid and unpaid ‘care’ work in the home or other social institutions, or often in others’ homes; many others engage in informal economy activities inside and outside of the home, including for example subsistence farming, homework and other survival strategies, all of which have implications for their children’s engagement in labour and work.²⁴⁵ Therefore, the full inclusion and prioritization of the distinctive subject position of the child within the remit of labour law in my view *necessarily* strengthens and deepens the ongoing discussion by labour law scholars for a normative rethinking of the parameters of their field.

Having explored some of the conceptual limitations surrounding the position of the child within the labour law frame, I turn now to examine the specific international labour law standards relating to child labour and the manner in which these have

²⁴⁴ See Fudge 2013, *supra* note 155 at 19, who observed that, “[a]s a demand, broadening the scope of labour law [to include all the processes of social reproduction, including unpaid domestic work] provokes us to consider why certain forms of subordination and segregation are acceptable and other forms are not, and how what we consider to be unacceptable forms of subordination and acceptable methods to redress them change over time and across space. If unpaid, but socially necessary, reproductive work is considered to be as valuable as paid labour to individual and social development, employers would be able to design jobs based on the assumption that it is the worker’s private and individual responsibility to adapt their caring responsibilities to the temporal requirements of the job. Instead, working-time norms would be designed on the assumption that all workers engage in domestic labour for others and women would no longer be expected to shoulder the economic burden of unpaid care work,” at 20.

²⁴⁵ Robinson 2006, *supra* note 191 at 327-329.

evolved in recent years. In particular, I explore how the normative goals and the corresponding procedural and regulatory framework of labour law explored above, have resulted in what I describe as a ‘penalty and prohibition’ approach in the child labour context which privileges labour inspection and criminal sanctions as the primary legal approach in this context.

2.3 Tracing the Emergence of the International Legal Standards Relating to Child Labour

2.3.1 The Historic Prioritization of the Minimum Age Standard

Historically, the abolition of child labour has formed a key feature of the foundational legal framework of the ILO.²⁴⁶ Article 427 of the Treaty of Versailles sets “the abolition of child labour and the imposition of such limitations on the labour of such young persons as shall permit the continuation of their education and assure their proper physical development” as one of the foundational aims of the ILO. Following an early period of norm creation in this field where five sector-specific minimum age Conventions were formulated, almost 50 years elapsed before child labour re-emerged as a priority issue for the ILO. Specifically, the proposal for a minimum age convention was placed on the agenda of the 57th International Labour Conference in 1972 with the acknowledgement that the diverse industry and sector specific Conventions on the minimum age “can no longer be an effective instrument

²⁴⁶ For an overview of the origins of the worldwide movement on child labour, see Fyfe 2007, *supra* note 8 at 5-20. Notably, Fyfe observes that in the 1830s and 1840s in Britain, “[t]he emerging campaign against child labour borrowed from the experience of the anti-slavery movement to the point of depicting child workers as ‘slaves.’ This resonated with the growing view of children as persons whose rights needed to be protected,” at 6. See also Borzaga 2008, *supra* note 141 at 39.

of concerted international action to promote the well-being of children.”²⁴⁷ This consensus led to the adoption of Convention No. 138, which was intended to gradually replace the multiple Conventions drafted historically with one comprehensive Convention on the minimum age. Convention No. 138 made the ‘effective *abolition* of child labour,’ as well as progressive increases in minimum age standards over time, an explicit aim for national law and policy.

In line with the mainstream approach of labour law that I have argued is built around the ‘paradigmatic (male) adult worker,’ the enforcement mechanism under Convention No. 138 places central emphasis on the labour inspection mechanism as the primary means for ensuring the regulation of the minimum age standard. In his commentary on the Convention, for example, Lee Swepston observes that Convention No. 138 lays great emphasis on the utility and functioning of inspection services in securing the effective implementation of standards in this field, and that “the most indispensable enforcement mechanism in this field is an adequate labour inspection service.”²⁴⁸ Article 9 of the Convention provides that all necessary measures shall be taken, including the application of appropriate penalties, to ensure the effective enforcement of the provisions of the Convention. The Convention does not provide a detailed outline of the manner in which the legal obligations of States should be enforced at the domestic level, in line with the general approach of international labour law in its interaction with domestic legal systems. However, Recommendation No. 146 accompanying the Convention envisages a central role for the labour inspectorate, calling for specific measures to train labour inspectors to

²⁴⁷ See ILO, Minutes of the 181st Session of the Government Body (Geneva, 1970) Appendix II para 8. See also Lee Swepston, “Child Labour: Its Regulation by ILO Standards and National Legislation” (1982) 121 Intl Labour Rev 577 at 580 [Swepston].

²⁴⁸ See Swepston, *ibid* at 591.

detect abuses in the employment of children and young persons.²⁴⁹ Additionally, Recommendation No. 146 stipulates that there should be close co-operation between the labour inspectorate and the services responsible for the education, training, welfare and guidance of children and young persons.²⁵⁰ As outlined in Chapter One, Convention No. 138 mirrors some of the exclusion and flexibility clauses of the earlier ILO Conventions on the minimum age; however these have rarely been invoked in practice by States.²⁵¹ In addition, ILO CEACR has stated that it takes a broad approach to the scope of the international labour standards on child labour to include “all persons engaged in *economic* activity, whether or not there is a contractual employment relationship and whether or not the work is remunerated, including unpaid work and work in the informal economy” unless the exemption clauses have been invoked by States.²⁵²

Despite the scale of children working below the minimum age (44 per cent of the total child labour population²⁵³), until the mid-1990s Convention No. 138 enjoyed a very low level of ratification and came to be seen as “a complex and difficult convention to apply in its entirety, at least in the short term.”²⁵⁴ As Fyfe acknowledges, “[d]espite fierce debates at the ILO Conferences over Convention No. 138, its adoption did not prove to be a springboard to a global campaign” against child labour.²⁵⁵ The number of ratifications of Convention No. 138 has increased significantly in recent years, in particular following its inclusion as one of the core labour standards under the ILO *Declaration on Fundamental Principles and Rights*

²⁴⁹ See ILO, *Recommendation Concerning Minimum Age for Admission to Employment* (No. 146), 26 June 1973, 58th ILO Session, at articles 14-16.

²⁵⁰ *Ibid* article 14(3).

²⁵¹ See Chapter One at 26-27.

²⁵² See ILO CEACR ILO Declaration 2012 at 148 para 332, *supra* note 61.

²⁵³ See ILO Global Estimates 2013, *supra* note 5 at 6.

²⁵⁴ See Noguchi 2010, *supra* note 9 at 518. See also ILO 1998, *supra* note 27 at 57.

²⁵⁵ See Fyfe 2007, *supra* note 8 at 11.

at Work.²⁵⁶ However, the ILO CEACR has noted that despite its flexibility clauses, the application of Convention No. 138 continues to give rise to serious difficulties in practice, even in countries that have obtained the technical assistance of the ILO to resolve the problem of child labour.²⁵⁷ For example, both Bangladesh and India have thus far failed to ratify Convention No. 138, notwithstanding its inclusion within the ILO Declaration.

2.3.2 Debates Concerning the Relevance and Implementation of Convention No. 138

Some legal scholars, as well as scholars from critical childhood studies, have sought to explain the relative unpopularity of Convention No. 138 by reference to what is described as its ‘Western-centric’ bias, pointing to the fact that this standard emerged historically in response to the conditions of the late Industrial Revolution in European societies and reflects a universal and monolithic conception of childhood that marginalizes the childhoods of many child workers in the Global South.²⁵⁸ Many of these critiques draw stark dichotomies between what they characterize as the ‘legal abolitionist’ approach, which is stated to be embodied in Convention No. 138, contrasting it with a ‘legal regulation’ approach which seeks to regulate and improve the situation of children who are working in recognition that they need to work to

²⁵⁶ See Cullen 2007, *supra* note 9 at 138. In the early 1990s, the ratification of Convention No. 138 stood at 49 Member States. As of early 2007, it has been ratified by 147 states. Part of this has been due to its being elevated to a core convention under the 1998 Declaration of Fundamental Principles and Rights at Work.

²⁵⁷ See General Observations of the CEACR, Report of the International Labour Conference (2004) 92nd Session, at 186.

²⁵⁸ See for eg Michael Bourdillon, Deborah Levison, William Myers & Ben White, *Rights and Wrongs of Children's Work* (New Brunswick; London: Rutgers University Press, 2010) [Bourdillon et al. 2010] who assert that: “[t]he vision of a workless childhood has been traced to ideas of the late 18th and 19th century Romantic Movement ... and is now widely viewed as a cultural artefact. Anthropological and child development studies demonstrate that children thrive in a great diversity of childhoods, including many that carry important work responsibilities,” at 110.

ensure their own and their family's economic survival.²⁵⁹ For example, Holly Cullen has critiqued the 'abolitionist' approach said to be embodied in Convention No. 138 which she argues is "based on a policy that employment of children is fundamentally unacceptable."²⁶⁰ Noting that the language of progressive abolition derives from anti-slavery movements of the 18th and 19th centuries, she argues that it is questionable whether such an extreme approach was ever necessary in the context of child labour.²⁶¹

The legal strands of these critiques assert that children are disadvantaged because of their lack of recognition as workers under the law, notwithstanding the clear contribution they are making to their families and their own survival.²⁶² For example, Karl Hanson et al. argue that if children are to be fully recognized as legal subjects, then their work-related rights must be acknowledged, as it is only when children are recognized as contributors to the economy that they will be fully recognized under the law.²⁶³ These authors cite studies from critical childhood studies that claim there is a place and value for work in the lives of children, both from the perspective of generating income for their families and as an important source of self-esteem,

²⁵⁹ For a legal critique of the international labour standards in this vein see for example, Karl Hanson & Arne Vandaele, "Working Children and International Labour Law: A Critical Analysis" (2003) 11 Int J of Child Rts 73 [Hanson & Vandaele 2003]. These authors provide the following classification of the various approaches to child labour, "The first and most common historical response to child labour is the abolitionist perspective, aiming at the full abolition of child labour. The second approach contends that children can work when adequate protective legislation exists. This points to the so-called regulative approach towards child labour ... Thirdly, the so-called empowerment perspective views children more as active subjects or agents of change and focuses on promoting the self-organisation of working children," at 78.

²⁶⁰ See Cullen 2007, *supra* note 9 at 2-3

²⁶¹ *Ibid.*

²⁶² See Hanson & Vandaele 2003, *supra* note 259 at 247 who state "international labour law with respect to child labour reflects the dominant paradigm with regard to child labour ... the primordial importance of Convention No. 138 still demonstrates that current international labour law adheres to the abolitionist perspective," at 132-133.

²⁶³ Hanson & Vandaele *ibid* at 133.

placing central emphasis on the agency of children as social actors.²⁶⁴ Originating from a child empowerment perspective, these critiques argue that the improvement of children's working conditions should be considered as one of the important tools to provide a protective environment for working children, even where they are working below the minimum age for employment.²⁶⁵ Specifically, Karl Hanson et al. assert,

From a legal point of view, working children under the established age limits do not exist. They work clandestinely, outside the law and outside protective networks. It is even argued that legislation prohibiting child labour which is intended to protect children 'often turns out in practice to be regressive and counterproductive, driving child work underground and making children even more vulnerable to exploitation.'²⁶⁶

A second, and somewhat related critique, contends that the minimum age standards have not been subject to a comprehensive policy analysis that would determine the harms and benefits for children working at different ages.²⁶⁷ Diverse scholarship within the field of critical childhood studies has sought to argue that in some instances work can be beneficial to children's well-being, to their self-esteem, their development of agency and to their overall recognition within their communities.²⁶⁸

²⁶⁴ *Ibid* at 78-79.

²⁶⁵ *Ibid* at 87.

²⁶⁶ *Ibid* at 121.

²⁶⁷ See Michael Bourdillon, Ben White & William Myers, "Re-assessing Minimum-age Standards for Children's Work" (2009) 29:3/4 *Intl J of Sociology* 106 [Bourdillon et al. 2009]. These authors note that "[t]he global survey conducted by the ILO in preparation for Convention 138 provided ample evidence of the failure of previous Minimum-Age Conventions in abolishing child labour, and that the majority of child labour was performed in contexts of small-scale, informal sectors difficult to control by laws and labour inspection. The convention's approach, however, remained unaffected: 'the minimum-age campaign suffered from a permanent 'hangover from history,'" at 108.

²⁶⁸ For an overview of this line of scholarship see, Tatek Abebe & Sharon Bessell, "Dominant Discourses, Debates and Silences on Child Labour in Africa and Asia" (2011) 32:4 *Third World Q* 765 [Abebe & Bessell]. See further Manfred Liebel, *A Will of their Own: Cross-Cultural Perspectives on Working Children* (London and New York: Zed Books, 2004); Manfred Liebel, "Working Children as Social Subjects: The Contribution of Working Children's Organizations to Social Transformations" (2003) 10:3 *Childhood* 265; Manfred Liebel, ed, *Children's Rights from Below: Cross-Cultural Perspectives* (New York: Palgrave MacMillan, 2012); Martin Woodhead "Combatting Child Labour: Listen to What the Children Say" (1999) 6:1 *Childhood* 27; Mélanie Jacquemin, "Can the Language of Rights Get Hold of the Complex Realities of Child Domestic Work? The Case of Young Domestic Workers in Abidjan, Ivory Coast" (2006) 13:3 *Childhood* 389 [Jacquemin 2006]; Agnes Zenaida Camacho, "Family, Child Labour and Migration: Child

Similar to the legal critiques outlined above, the harm that is cited concerns the enforcement of the minimum age standards without adequate and sustainable alternative provision for children's education, accommodation, well-being and survival.²⁶⁹ In some instances, interventions without adequate alternatives for children have resulted in children's return to work, reportedly in more hazardous sectors of employment.²⁷⁰ In some cases, the fate of children removed from work has not been monitored adequately and it is often unclear whether they have remained engaged in education, or whether they have returned to work and, where this has occurred, what sectors they have returned to work in.

The situation of children who were dismissed from the Bangladesh garment export industry in anticipation of a legislative proposal in the United States is the most frequently cited example of the ambivalent impacts of legal regulation surrounding the minimum age.²⁷¹ The early 1990s witnessed the intensification of debates concerning social clauses in international trade agreements linked to core labour standards such as the abolition of child labour. In 1991, trade unions, human rights groups, consumer and religious organizations, under the umbrella of the Child Labour Coalition in the US, promoted legislation to prohibit imports into the United States of products made with child labour. The garment industry in Bangladesh in particular formed a common theme within these debates.²⁷² In 1992, a legislative proposal, now commonly known as the 'Harkin Bill,' was presented to the US Senate

Domestic Workers in Metro Manila" (1999) 6:1 *Childhood* 57; Rachel Baker & Rachel Hinton, "Approaches to Children's Work and Rights in Nepal" (2001) 575 *The Annals of the American Academy of Political and Social Science* 176.

²⁶⁹ Bourdillon et al. 2009, *supra* note 267 at 111; see also Michael Bourdillon, "Children and Work: A Review of Current Literature and Debates" (2006) 37:6 *Development and Change* 1201 [Bourdillon 2006].

²⁷⁰ Bourdillon et al. 2010, *supra* note 258 at 181-202.

²⁷¹ For an extended discussion of this set of events, see Bourdillon et al. 2010 *ibid* at 181-190.

²⁷² *Ibid* at 181.

to ban imports made with child labour. Though this legislation was never passed, the Bangladesh Garment Exporters and Manufacturers Association (BGMEA) responded by urging its members to remove all under-age workers from their workplaces in conformity with national labour laws that set the minimum age for employment at 14 years.²⁷³ As a result, abrupt dismissals of many thousands of children began in 1993. Approximately 40,000-50,000 children were dismissed in total, with evidence from tracing studies (that followed some of these children) suggesting that the dismissed children were returning to work in more hazardous industries such as chipping bricks, maid service and prostitution and with many of the children not being traced at all.²⁷⁴ A further systematic tracer study found that the former child workers in garment export factories found jobs in non-export clothing factories where their pay and working conditions were notably inferior to those in the export oriented garment factories.²⁷⁵ When the BGMEA announced its self-imposed deadline of a child-labour-free industry by October 1994, both the ILO and UNICEF sought to design a response.²⁷⁶ In 1994-‘95 an agreement emerged in which the BGMEA was persuaded to set aside its deadline in favour of a phased and measured programme. Specifically, UNICEF, the ILO and the BGMEA signed a Memorandum of Understanding which sought the removal of child workers from the garment industry and their placement in appropriate education programmes.²⁷⁷ While this is a particularly visible and high-profile example of the potentially negative impacts of the minimum age standard, further micro-studies have demonstrated that where child labour laws, including minimum age laws, have been enforced effectively in the formal economy, the

²⁷³ *Ibid* at 184.

²⁷⁴ *Ibid* at 185.

²⁷⁵ *Ibid*.

²⁷⁶ *Ibid*.

²⁷⁷ See ILO & UNICEF, *Addressing Child Labour in the Bangladesh Garment Industry 1995-2001, A Synthesis of UNICEF and ILO Evaluation Studies of the Bangladesh Garment Sector Projects* (New York; Geneva: August 2004) [ILO& UNICEF 2004].

problem is often being displaced into the informal economy, in particular in areas such as garment production where children's labour is integrated within complex chains of production resulting from the pronounced segmentation of the value chain in the production of garments for export.²⁷⁸

There is undoubtedly historical continuity between the minimum age standard that emerged in the latter part of the industrial revolution and the current minimum age standard, as well as the regulatory mechanism that the ILO envisages under Convention No. 138 for its application.²⁷⁹ The scholarship from critical childhood studies demonstrates the reciprocal and relational nature of the family environment, particularly where there is a situation of economic deprivation for the family overall, and it has contributed to a more contextualized socio-cultural understanding of the meaning of work in children's lives in specific locations and geographic spaces. It also attempts to respond to the distinctive subject position of the child, by challenging the construction of children as being inherently vulnerable and incompetent, and by demonstrating children's potential for agency and resilience. However, in my view, much of the debate that distinguishes the 'legal abolitionist' approach and a 'legal regulation' approach centres around dualistic constructions of

²⁷⁸ See for e.g. Philips et al., *supra* note 4, who argue in the context of the garment production sector in India that, "[t]here has been a visible decline in the incidence of child labour in factory settings, in reaction to growing public and political pressure within India and beyond. Yet this decline represents merely a displacement of the problem: child labour has shifted out of factory-based production into the arena of household activity, as the restructuring of garments production to reduce costs and evade regulation has dramatically increased the importance of home-based work and the numbers of (particularly women) workers in the burgeoning household sector." These authors argue that these shifts in the profile and utilization of child labour represent an exacerbation of the adverse terms on which both the child workers themselves and the households to which they belong are incorporated into the productive economy, at 6.

²⁷⁹ See for e.g. William E. Myers "The Right Rights? Child Labour in a Globalizing World" (2001) 575 *The Annals of the American Academy of Political and Social Science* 38, who observes that Convention No. 138 "starts from the original Northern idea, first developed in the late-eighteenth-century and early nineteenth-century England, that children have a natural right not to work and that their very presence in the workplace is the crux of the child labor problem" at 46. For further critiques of various elements of Convention No. 138, see Borzaga 2008, *supra* note 141 at 53-55.

children as being either competent and resilient agents who *choose* to engage in work, or dependent and vulnerable victims who are in presumptively exploitative working conditions and relationships. These dualisms obscure the wide spectrum of capacity and maturity that is engaged throughout the continuum of childhood and the ways in which the specific attributes of the child, in particular their gender, age, ethnicity, as well as the sectors in which they work, expose them to diverse forms of risk and harm.²⁸⁰ For example, a study of domestic workers in Bangladesh found that 70 per cent of girls involved in domestic service experienced physical abuse and systematic beatings.²⁸¹ By perhaps too readily accepting children's work as demonstrative of the exercise of childhood agency, the childhood studies literature fails to fully interrogate the extent to which labour is *meaningfully* engaged in within the context of the family environment, or more broadly within the community, certainly by young children, as well as by those in their early adolescence.²⁸² For example, Abebe and Bessel have noted exploitation may be more concealed and more difficult to deal with in family enterprises and contexts, where work is undervalued or described merely as 'help', 'training' or a family 'apprenticeship.'²⁸³ In addition, the childhood studies literature fails to consider the degree to which labour, in particular below the minimum age, can be considered presumptively exploitative and as an element of the resistance to the commoditization of labour that forms a central building block of labour law.

²⁸⁰ See for example ILO Hazardous Work 2011, *supra* note 2 at 7-16. For instance, this report notes that, "[h]azardous work is highest in agriculture, which comprises fishing, forestry, livestock herding and aquaculture, in addition to subsistence and commercial farming. Fifty-nine per cent of children in hazardous work aged 5-17 are in this sector, in comparison with 30 per cent in services and 11 per cent in industry. While boys are more likely to work in agriculture and industry, girls out-number boys in services. Approximately two-thirds of children in hazardous work between 5 and 17 years old work as unpaid family workers; of the remaining, 28 per cent are in paid employment and 7 per cent are self-employed," at 7.

²⁸¹ M. Rezaul Islam, *Study on the Situation of Domestic Child Workers in Dhaka City*, (Dhaka: Bangladesh Shishu Adhika Forum, 2013).

²⁸² See Abebe & Bessell, *supra* note 272 at 772.

²⁸³ *Ibid.*

By placing a central focus on children's presumed 'choice' to work or upon their capacity to exercise agency, the critiques outlined obscure important political questions about the commodification of labour that is involved where children are working, often alongside their parents, in broader exploitative working relationships and chains of production.²⁸⁴ The celebration of childhood agency in this scholarship, while demonstrating children's resilience in the face of economic hardship, fails to fully interrogate the broader socio-economic context in which child labour is occurring. By constructing children's participation in labour as a question of choice and agency, this debate fails to acknowledge the modes of child labour's institutionalization in local, national and global labour markets. For example, in the context of a micro study in Delhi, Philips et al. have illustrated how the commercial dynamics of global production networks in the garment production industry function to favour and reinforce the use of child labour in the homework sector both directly, in order to respond to the low price per piece and the exploitative conditions in which their parents are working; and indirectly, resulting in the use of children in the reproductive household economy so that adults are made available for wage labour.²⁸⁵ Through a central focus on choice and agency, this scholarship fails to fully interrogate the relationship between children's labour and their parent's lack of access to decent work.²⁸⁶ Childhood agency is particularly shaped and constrained by the limited choices involved in meeting the demands of existence and survival in the

²⁸⁴ See for e.g. Philips et al. 2011, *supra* note 4.

²⁸⁵ *Ibid* at 8-9.

²⁸⁶ *Ibid*. In a critique of what they term the "socio-cultural literature" on child labour, Abebe & Bessell, *supra* note 272, observe that some of this scholarship tends to "overlook contemporary structural forces that disrupt the livelihoods of families. They provide insufficient insights into children's changing work patterns, which are framed within the context of deeply unequal relations of power and reciprocity both locally and ... in relation to the international economy that keeps many poor countries in deeply exploitative forms of labour," at 771.

present, and by the hierarchical relationships in which their agency plays out within the family setting.²⁸⁷

On the other hand, it is clear from the Bangladesh example and from other cases that the removal of children who are working below the minimum age or in hazardous work without adequate social support mechanisms in the form of alternative sources of income for the family, accessible educational facilities, as well as alternative accommodation where the child is unable to return to their families, may give rise to negative impacts for the children concerned, including in some instances their return to work in more hazardous sectors.²⁸⁸ Rather than calling into question the very project of setting a minimum age standard under international labour law or pointing towards the need for a regulatory approach that improves the lives of working children below the minimum age, in my view, the potential harm that arises in these circumstances raises far more fundamental and relevant questions concerning the capacity of the State to regulate and enforce minimum age laws where the full range of social processes that give rise to child labour continue to remain outside the protective framework of labour law. The limited capacity of the household to absorb the costs of children's removal from labour highlights not only the household's lack of a decent sustainable livelihood through productive activities,

²⁸⁷ While not directly considering childhood agency, on questions of agency and capabilities in the Decent Work for All Agenda, see further Blackett & Tsikata 2009 *supra* note 20 at 63. In a similar critique of legal pluralism's celebration of the agency of informal sector women workers, for example, Radha D'Souza has asserted that, "[l]egal pluralism's celebration of agency misdirects us from important political questions about the commodification of labour, the modes of its institutionalization in global labour markets, and the way in which human agency might apply its desire for emancipation towards intentional structural transformations beyond existence and survival in the present." D'Souza asserts that, "[t]he celebration of agency in legal pluralism misjudges the cause of creativity, in this case the resilience of informal sector workers and their capacities to create alternative norms to survive. It is the ontological desire for freedom that drives the creativity of the unorganized sector workers. The inability to conceptualize this ontological drive, which is an essential attribute of being human, leads to epistemological confusion over how to understand their creativity and resilience." See Radha D'Souza, "Imperial Agendas, Global Solidarities, and Third World Socio-Legal Studies: Methodological Reflections" (2012) 49 *Osgoode Hall Law Journal* 407 at 438.

²⁸⁸ Bourdillon et al. 2010, *supra* note 258 at 181-202.

but also the trade-offs and costs of involvement in productive activities which are balanced against responsibilities of care and reproductive labour in the private sphere. These trade-offs often have negative spill-over impacts on children's engagement in labour. In the absence of a minimum social safety-net or minimum socially protective floor that would replace the income provided through children's earnings, it will continue to be a challenge to empower families to comply with the minimum age standard. Rather than demonstrating its 'complexity' or 'inflexibility,' however, the application of the minimum age evokes more fundamental questions concerning the real redistributive implications of an effective response to child labour and the role of supportive socio-economic rights as a key element in this challenge. This would involve an examination of the types of incremental socially protective measures and socio-economic rights that should be built around the minimum age standard that would fully integrate within labour law many of the social processes surrounding labour supply and the reproduction of labour.²⁸⁹

I will return to examine social protection and the linkages between child labour and women's work in the informal sector in Chapters Four and Five. However, for the present analysis it is sufficient to note that the perceived inadequacies, complexity and enforcement problems surrounding Convention No. 138, particularly for States in the Global South, formed a key part of the political consensus to adopt a further convention on child labour that provides for a more pragmatic prioritization approach to the elimination of child labour that would distinguish between exploitative child labour and child labour more generally.

²⁸⁹ See further Chapter Five in relation to the role of social protection mechanisms.

2.4 Exploring the Emergence of a Prioritization Approach

2.4.1 Exploring the Emergence of a Prioritization Approach within Child Labour

For over 25 years Convention No. 138 enjoyed a low level of ratification. However, a number of different developments specific to the child labour legal regime, as well as exogenous developments within international labour law and international human rights law more generally, influenced the emergence of a consensus within the ILO on the need for an additional Convention on child labour. The low level of ratification of Convention No. 138 in particular influenced the emergence of this consensus. Following on from the UNCRC, both the Member States of the ILO and its executive body, demonstrated increased concern with forced child labour and other forms of exploitative treatment of children that did not fit comfortably within the ‘work and employment’ paradigm.²⁹⁰ In particular, the UNCRC raised awareness of the diverse types of exploitative relationships and situations for children that were rooted in economic deprivation, which did not necessarily originate from work undertaken in the formal or informal economies, but from a broader range of relationships and circumstances that involved coercion or criminal activities.²⁹¹ Increased awareness of these types of exploitative situations gave rise to a concern that international labour law was not comprehensive enough in dealing with these types of situations for children. For instance, in 1995, the Government representative of the United Kingdom questioned whether there was actually an adequate instrument for forced child labour as the exploitative elements of this tended to be examined under the

²⁹⁰ In 1994, the General Report of the Committee of Experts on the Application of Conventions and Recommendations highlighted “one aspect of significant disquiet,” namely forced child labour and the exploitation of children for prostitution and pornography. See General Report of the Committee of Experts on the Application of Conventions and Recommendations (1994) online: www.ilo.org/ilolex/

²⁹¹ Cullen 2007, *supra* note 9 at 5.

Forced Labour Convention No. 5 of 1930.²⁹² The representative noted that Convention No. 138 was not a suitable instrument to use for the investigation of this complex issue, as it had a very low level of ratification and it did not deal with the exploitative elements of child labour. The representative concluded that a more focused, promotional Convention or else a radical revision of Convention No. 138 was required.²⁹³

The consensus emerged in the form of Convention No. 182 which sought to differentiate and prioritize legal and policy strategies to combat child labour in its worst forms.²⁹⁴ This approach was adopted as a pragmatic, immediate term strategy in light of the large scale of the child labour problem and in response to the concern that Member States were not institutionally or financially equipped to attack all forms of child labour at once.²⁹⁵ In its preparatory report on the draft Convention, the ILO observed that “[c]hoices must be made about where to concentrate available human and material resources” and concluded that the most “logical and humane” strategy must be to focus scarce resources on the most intolerable forms of child labour.²⁹⁶ This shift in approach by the ILO was influenced by the development cooperation experience it had gained through IPEC which had been established in 1992.²⁹⁷ Additionally, the ILO was influenced by its inter-agency dialogue with the World Bank (WB) that had become engaged with the child labour issue in 1997 following extensive lobbying by various international non-governmental

²⁹² General Report of the Conference Committee on the Application of Conventions and Recommendations, 1995, accessed at www.ilo.org/ilolex.

²⁹³ *Ibid.*

²⁹⁴ For an overview, see Fyfe 2007, *supra* note 8 at 25-30.

²⁹⁵ See ILO 1998, *supra* note 27 at 16.

²⁹⁶ *Ibid.*

²⁹⁷ See Sabine Schlemmer-Schulte, “The Contribution of the World Bank in Fostering Respect for ILO Child Labour Standards” in Nesi et al. 2008, *supra* note 98 at 239.

organizations.²⁹⁸ Informed by an economic analysis of child labour in the development context, senior management at the WB decided that for an institution like the Bank solutions such as the imposition of the minimum age for employment or the requirement of having completed compulsory education prior to beginning work, ran the risk of worsening the situation of children because they ignored the economic, social and cultural factors underlying child labour and were beyond the legal mandate of the WB.²⁹⁹ As a result, the WB formed the view that it was more appropriate for it to promote an approach to child labour that focussed on the clearly exploitative forms of child labour that were unacceptable, no matter the level of development of a particular country.³⁰⁰ According to Schlemmer-Schulte, when the WB took the lead in focussing on the most harmful forms of child labour from a developmental perspective, the ILO began to rethink its approach, partly as a result of the dynamics of this inter-agency dialogue.³⁰¹ Finally, the prioritization of the ‘worst forms’ of child labour was adopted as a pragmatic political strategy in order to garner and maintain focussed attention on the phenomenon of child labour.³⁰² In its preparatory report on the Convention, the ILO asserted that in focussing on the worst forms and most socially repugnant examples of child labour, this may have the advantage of helping to maintain the necessary social commitment and consensus in relation to the issue, and may therefore indirectly benefit all working children.³⁰³

2.4.2 Situating Child Labour within Debates on the ILO Core Labour Standards

In addition to the various considerations specific to the child labour legal regime outlined above, the consensus relating to the necessity for a further convention on

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid* at 233.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid* at 239.

³⁰² ILO 1998, *supra* note 27 at 16.

³⁰³ *Ibid.*

child labour emerged against the backdrop of a broader debate within the ILO on the urgent need to prioritize labour standards more generally. Seeking to respond to the perceived crisis in international labour law, characterized by a high proliferation of international labour standards with low levels of ratification and compliance by ILO Member States, the ILO sought to focus on a number of core or fundamental labour standards.³⁰⁴ This crisis formed part of an increasing concern within the ILO and the international community more generally to curb the negative social and economic impacts of globalization and trade liberalization.³⁰⁵ Prioritization of core labour standards emerged therefore as part of a broader political compromise which resulted from the lack of willingness to place binding legal obligations on States to curb the potentially negative impacts of trade and globalization, in particular in relation to the enjoyment of labour standards.³⁰⁶ As Blackett observes “it became apparent that in a real world that tolerates working conditions that make a mockery of the ILO’s goal of social justice, the ILO needed to extract from the 400 odd paper conventions and recommendations a small set of fundamental principles and rights at work that would be prioritized.”³⁰⁷

³⁰⁴ For an overview of the emergence of the ILO Declaration more generally, see Hepple 2005, *supra* note 40 at 56-63. Although the rate of ratification has improved since the ILO Declaration, as Hepple observed in 2005 only three-fifths of ILO Member States have ratified fewer than one-quarter of ILO Conventions open for ratification and more than one-fifth have ratified fewer than 20 Conventions, see at 35.

³⁰⁵ See further Alston 2004, *supra* note 40, who describes the narrative surrounding the emergence of the ILO Declaration in the following terms: “in the face of an ever-more powerful set of rules and institutions promoting international trade liberalization, the ILO responded to pressures to promote respect for labour standards by adopting in 1998 a soft law instrument ... The Declaration provided the necessary flexibility in the face of the forces of globalization and universalized the reach of the core labour standards. While it left intact the pre-existing labour law regime, it made it potentially more effective,” at 458. See also Leah Vosko “‘Decent Work’: The Shifting Role of the ILO and the Struggle for Global Social Justice” (2002) 2:19 *Glob Soc Pol’y* 25 at 27 [Vosko 2002].

³⁰⁶ See Vosko 2002, *ibid* at 27. For example, Smolin 2000, *supra* note 169, observes that the issues of child labour became the “poster child of a broader effort to seek social justice in the context of trade liberalization and the dominance of economic neo-liberalism,” at 946. The prioritization approach surrounding the core fundamental labour standards has led to a significant debate and disagreement among scholars within international labour law which is beyond the scope of this thesis, most notably Philip Alston and Brian Langille. See further Alston 2004, *supra* note 40; Alston 2005, *supra* note 40; Langille 2005 *supra* note 40.

³⁰⁷ See Blackett 2007, *supra* note 13 at 226.

As a result of these concerns, in its 1998 Declaration, the ILO isolated four key principles which included the *effective* elimination of child labour.³⁰⁸ The impetus to prioritize these four core labour standards in particular emerged from a report by the Organisation for Economic Co-operation and Development (OECD) which suggested that the improved enforcement the elimination of forced and child labour might raise economic efficiency for developing countries.³⁰⁹ The choice of eight conventions within these four core areas rested on a view that they are of “particular significance” in maintaining the link between social progress and economic growth.³¹⁰ This linkage was considered to exist because the Conventions enable “persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate and to achieve fully their human potential.”³¹¹

The main result of the Declaration has been a significant increase in the number of ratifications of the eight core conventions, including Convention No. 138 relating to the minimum age for employment and an increase in the frequency and scope of supervision of these core conventions. While the ILO’s existing supervisory machinery already provides the means for ensuring that Member States that have ratified certain conventions fulfil their obligations, the ILO Declaration offers the ILO a new tool for promoting the ratification and enforcement.³¹² Targeting nations that have not ratified core conventions, it establishes that they still have an obligation to respect the fundamental rights that are the subject of these conventions. Thus, the ILO Declaration applies to all Member States, all countries that have formally

³⁰⁸ The ILO Declaration also included freedom of association and collective bargaining, the elimination of all forms of forced or compulsory labour and the elimination of discrimination with respect to employment and occupation.

³⁰⁹ See Hepple 2005, *supra* note 40 at 57. See further Lee Swepston, “The Contribution of the ILO Declaration on Fundamental Principles and Rights at Work to the Elimination of Child Labour”, in Nesi et al. *supra* note 98 at 65.

³¹⁰ *Ibid* at 59.

³¹¹ ILO Declaration 1998, Preamble.

³¹² See Vosko 2002, *supra* note 305 at 27.

accepted the ILO Constitution. To encourage ratification and implementation, the ILO Declaration requires that the ILO publish a major report annually providing “a dynamic global picture” on one category of fundamental principles and rights.

2.4.3 The Distinctive Features of the ILO Worst Forms of Child Labour Convention

Convention No. 182 emerged therefore against a backdrop of diverse and intersecting legal, political and institutional developments which combined to produce a somewhat unique Convention that can be distinguished in a number of ways from other labour law and human rights treaties.³¹³ First, the Convention is distinctive within international labour law more generally because it engages with the contemporary children’s rights agenda and reflects concerns within the UNCRC and other human rights conventions, rather than the traditional minimum standards approach embodied in Convention No. 138.³¹⁴ The Convention recognizes and prioritizes for immediate legal action a broader range of exploitative relationships in which children can be engaged, all of which are rooted in economic vulnerability but that in some instances go beyond the traditional competence of labour law.³¹⁵ Article 3 of the Convention defines the ‘worst forms of child labour’ to include: “all forms of slavery or practices similar labour slavery, including the sale and trafficking of children, debt bondage, forced or compulsory labour or the forced recruitment of children for use in armed conflict; the use, procuring or offering of children for prostitution or the production of pornography; the use, procuring or offering of children for the production and trafficking of drugs; and work which by its nature or

³¹³ For an overview of the specific features and drafting debates surrounding the Convention, see Deepa Rishikesh, “The Worst Forms of Child Labour: A Guide to ILO Convention No. 182 and Recommendation 190” in Nesi et al. 2008, *supra* note 98 at 83-101.

³¹⁴ See Cullen 2007, *supra* note 9 at 136.

³¹⁵ Article 1 ILO Worst Forms of Child Labour Convention No. 182.

the circumstances in which it is carried out is likely labour harm the health, safety or morals of children.”

While forced labour and bonded labour have a long history of prioritization by the ILO, child prostitution, pornography, and recruitment of children for involvement in illicit activities and armed conflict are novel features which have not been extensively considered by the ILO tripartite structure.³¹⁶ Acknowledging that these various crimes of violence against children are far removed from any standard notion of work or labour, the ILO however observed that similar to forced labour and slavery, these various ‘worst forms’ of child labour are all rooted in economic exploitation.³¹⁷ The explicit inclusion of these forms of exploitative and coercive practices in a labour law convention brings within the remit of labour law activities that have traditionally been conceived of as being best tackled through the deterrent penalties and investigative procedures of criminal law.

A second distinctive feature of Convention No. 182 is that compared to other international labour law Conventions, it is prescriptive about the exact nature of the positive legal obligations that States parties undertake through their ratification. While generally ILO Conventions require States to apply their provisions in law and practice, there is a large amount of discretion allowed to the national authorities as to their methods of implementation. Convention No. 182 in contrast is action-oriented, in that it requires States to take immediate and effective measures to secure the prohibition of the worst forms of child labour as a matter of urgency through both the design and implementation of programmes of action, and the establishment or

³¹⁶ See Cullen 2007, *supra* note 9 at 136.

³¹⁷ See ILO 1998, *supra* note 27 at 31. Noguchi 2010, *supra* note 9 at 521, states that, “[b]efore the adoption of C182, the jurisprudence of ILO bodies supervising the implementation of its standards had already dealt with issues such as slavery-like practices, sale and trafficking of children, and their sexual exploitation as forced labour under C29. C 182 confirmed that these – and also the use of children in armed conflict and in illicit activities – are indeed problems of child labour.”

designation of monitoring mechanisms.³¹⁸ Article 7 provides that all necessary measures shall be taken to implement and enforce the Convention, including provision for penal sanctions or, as appropriate, other sanctions. Such measures should be “effective and time-bound,” and should be designed to prevent children from engaging in the worst forms of child labour, and to remove, rehabilitate and socially re-integrate those children who are engaged in such labour.³¹⁹ Where children are removed from one of the worst forms of child labour they should be ensured access to basic free education or vocational training as appropriate.³²⁰ Effective and time-bound measures should include special protective measures that identify and reach out to particularly vulnerable children, in particular girl children.³²¹ Therefore, Convention No. 182 contains important positive and prescriptive obligations for States to implement their legal obligations in the immediate term.

A third innovative element of Convention No. 182 is that it explicitly, and as part of its substantive provisions, calls for international cooperation assistance in efforts to tackle the worst forms of child labour. Article 8 provides that Member States shall take appropriate steps to assist one another in giving effect to the Convention through enhanced international cooperation and/or assistance, including support for social and economic development, poverty eradication programmes and universal education. This is innovative because, traditionally, international labour law requires States to establish and enforce labour standards within their national boundaries only. By way of contrast, Convention No. 138, for example, requires the fixing of “a minimum age for admission labour employment or work within its territory.” The

³¹⁸ Article 1, Article 5 and Article 6. See also Noguchi 2002, *supra* note 170 at 360.

³¹⁹ Article 7(2) ILO Convention No. 182.

³²⁰ Article 7(2)(c) ILO Convention No. 182.

³²¹ Article 7(2)(d) and 7(2)(e) ILO Convention No. 182.

new Convention thus confirms international concern in relation to the worst forms of child labour, wherever it is occurring, and offers grounds for the ILO's appeal to make the elimination of the worst forms of child labour a global cause.³²²

2.5 Evaluating the Prioritization Approach – Informality, Education and Socio-Economic Rights

Convention No. 182 entered into force in November 2000, less than 18 months from its adoption and recorded the fastest ever speed of ratification of a Convention in the ILO's history.³²³ The whole process surrounding the elaboration of the Convention is credited as contributing to the international debate on child labour and to a prioritization of the child labour issue by the international community more generally.³²⁴ The positive spin-off effects of its impact are particularly evident in the significant increase in ratifications of Convention No. 138.³²⁵ Both Conventions were integrated into the ILO Declaration and in 2006 the ILO Governing Body set 2016 as the target year for when its 183 Member States should have eradicated the worst forms of child labour, which the ILO currently estimates includes 180 million children worldwide.³²⁶ Therefore, Convention No. 182 is now a core priority for the ILO as it works towards the 2016 target.

³²² See Noguchi 2002, *supra* note 170 at 364.

³²³ See Noguchi 2010, *supra* note 9 at 521-522. The number of ratifications currently stands at 174 (over 90% of the ILO members) only nine States short of universal ratification. See ILO, online: <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byConv.cfm?hdroff=1&conv=C182&Lang=EN> For a general critique of the prioritization approach, see further Smolin 2000, *supra* note 169, who argues the prioritization approach adopted in Convention No. 182 is largely irrational, outside of the expertise and competence of the ILO and driven by political and ideological considerations.

³²⁴ Noguchi 2010, *supra* note 9 at 523; Cullen 2007 *supra* note 9 at 156.

³²⁵ See Noguchi 2010, *supra* note 9 at 518-519.

³²⁶ See ILO 2006, *supra* note 1 at para 33.

The strength of the approach is that it has focussed political attention and prioritization on the immediate physical and psychological harms that occur where children's labour is commoditized, particularly in sectors and areas where the worst forms of child labour occur. The prescriptive legal obligations outlined in the Convention have resulted in numerous countries both compiling and implementing national action plans, with specific targets to remove and rehabilitate specific cohorts of children from the worst forms of child labour.³²⁷ The political will as well as the framework to engage in this type of exercise was not present before the widespread ratification of the Convention and its large-scale endorsement by the international community. Overall, this approach has served to raise the political profile and prioritization of the issue.

The Convention can certainly be applauded for a number of its unique features. It creates immediate positive legal obligations to address clearly exploitative forms of labour, it recognizes the multiple forms of exploitative relationships and activities, particularly those taking place in the criminal sphere, in line with UNCRC, it recognizes the role of international cooperation as a vital element of the international response, thereby potentially widening the ambit of labour law beyond the nation state, and it demonstrates some recognition of the distinctive vulnerability of certain groups of children, particularly those suffering serious physical and psychological damage as a result of their engagement in certain forms of labour and other activities. As a tool to gain political consensus, awareness raising and mobilization it has been useful, at least at the level of international law. The progress achieved in the resulting Convention needs to be contextualized and understood against the

³²⁷ See for Ministry of Labour and Employment, Government of the People's Republic of Bangladesh, *National Child Labour Elimination Policy*, available at <http://clu-mole.gov.bd/wp-content/uploads/2015/06/National-Child-Labour-Elimination-Policy-2010-English-Version.pdf>. See also International Programme for the Elimination of Child Labour, *Implementation Report 2014: IPEC Action against child Labour 2012-2013: Progress and Future Priorities*, (Geneva: ILO, May 2014).

backdrop of the broader political and institutional developments both within and outside the ILO at the time, in particular the low level of ratification of Convention No. 138, the low level of political priority afforded at that time to the issue of child labour and the emergence of a broader international child rights movement in the form of the UNCRC. Undoubtedly, Convention No. 182 is the outcome of struggles between different groups of countries with diverse geo-political interests, social actors, ideologies, political imperatives and power relationships that structure much of the norm creation within the ILO more generally. While these *realpolitik* considerations are important to our assessment of the prioritization approach, if we are to engage with the transformative potential of international labour law for the child, in my view the prioritization approach needs to be assessed against the core structural processes underpinning child labour that I have centralized in my analysis.³²⁸

2.5.1 Whither Informality and Social Reproduction Work – The Continued

Prioritization of Labour Law Inspection

In its regulatory framework, Convention No. 182 retains a central focus on the capacity of the labour inspection mechanism as well as the criminal law to both monitor and deter those who might engage child labour in its worst forms. Article 7 of the Convention requires Members States to “take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.” This includes the designation of a competent

³²⁸ In answer to Bob Hepple’s claim that formulating an ideal theory of labour law is merely an exercise in applied ethics and will be sterile unless we first try to understand why real employers, workers, politicians and judges act as they do in practice, Brian Langille reasserts the importance of developing a normative account of labour law. In particular, he asserts, “[w]ithout an account of our normative purposes we have no way of seeing our reality as divisible into and constituted by subject matters such as labour law. ... Labour law does not simply exist and exist waiting to be found, it must be normatively imagined,” Langille 2011, *supra* note 122 at 103 and 111.

authority, presumably the labour inspectorate as well as elements of the criminal law enforcement agencies, which are responsible for the implementation of the Convention and the implementation of specific effective and time-bound measures to prevent the engagement of children in the worst forms of child labour, to provide direct assistance in the removal of children and, where they are removed, to ensure their access to free basic education and other rehabilitative measures.³²⁹ Recommendation No. 190 accompanying the Convention further provides that ratifying State should provide “as a matter of urgency for other criminal, civil or administrative remedies, where appropriate, to ensure the effective enforcement of national provisions for the prohibition and elimination of the worst forms of child labour.” The Recommendation further specifies that this could include the special supervision of enterprises which have used the worst forms of child labour, and, in cases of persistent violation, the temporary or permanent revoking of permits to operate.³³⁰ Therefore, a distinctly ‘prohibition and penalty’ approach is retained within this Convention, relying on a retroactive mechanism of application.

In line with the dominant labour law paradigm that I have critiqued at the beginning of this chapter, the challenge of addressing the ‘worst forms of child labour’, including in the informal economy, was conceived of during the preparatory phase of drafting the Convention as one of inadequate coverage of law, legal exclusions and the limited capacity of the labour inspectorate.³³¹ Therefore, in its preparatory report on Convention No. 182, the ILO executive retained the focus on formal labour inspection as the primary mode of regulation.³³² The debates circulated around the

³²⁹ Article 7 of the ILO Worst Forms of Child Labour Convention No. 182.

³³⁰ ILO Recommendation No. 190.

³³¹ ILO Targeting the Intolerable 1998, *supra* note 175 at 24-27.

³³² *Ibid* at 86.

inadequacies of legal frameworks, flowing from their inadequate coverage of the locations where child labour takes place, particularly in the informal economy.³³³ In its preparatory report on the Convention, the ILO focussed on legal restrictions on the inspection of unregistered workplaces that restrict access to private homes; and penalties that failed to act as effective deterrents to individuals who engaged children to work in exploitative situations.³³⁴ This approach was encapsulated in the ILO observation that “[i]t is widely recognized that a major obstacle to effective legal protection against child labour is the weakness of enforcement mechanisms,” which are most acute in the informal economy.³³⁵

While the Convention requires States to “reach out to children as special risk” and to “take account of the special situation of girls,” it fails to explicitly prioritize the core sectors in the informal economy where child labourers predominate in large numbers, in particular in the agricultural sector and in the services sector, as well as the high prevalence of children in family based social reproduction work. In centralizing the labour inspection model this approach fails to attend to the huge logistical challenges of enforcing labour standards in a large, dispersed and highly diverse informal economy. As outlined above, somewhat analogous to the situation of women workers in the most disadvantaged parts of the informal economy, labour inspection has proved highly challenging at the domestic level in the highly dispersed sites where child labour takes place in the informal economy, in particular where it takes place in private homes, within the context of the family, and in isolated rural

³³³ *Ibid* at 46-50.

³³⁴ *Ibid.*

³³⁵ *Ibid* at 44.

areas.³³⁶ As a mechanism of enforcement, as I have argued, labour inspection is deeply challenged in its ability to capture and regulate the contextual realities of child labour, particularly for the large swathes of children in the informal economy and in those working in the social reproduction sphere.

2.5.2 Whither Education – Educational Deprivation as a Worst Form of Child Labour?

The systematic prevention of children from gaining access to education can be considered one of the fundamental harms of child labour, given the long-term implications of the denial of access to education to one's overall capacity to enjoy substantive human freedom or, in the words of Amartya Sen, to enabling individuals to lead the types of lives that persons value or have reason to value.³³⁷ Facing restricted opportunities to develop the skills and competencies they need during their school years, child labourers subsequently experience diminished life-chances and elevated risks of working poverty in adulthood.³³⁸

In its preparatory report on Convention No. 182, the ILO observed that in addition to protecting children from unsuitable work or working conditions, the aim of child

³³⁶ For the challenges in regulating the informal economy generally see ILO Informal Economy Policy Resource Guide 2013, *supra* note 180 at s4.c2, "Labour Inspection and the Informal Economy," at 1-4.

³³⁷ See for e.g. Amartya Sen, *Development as Freedom*, (Oxford: Oxford University Press, 1999) [Sen 1999]. The human capabilities approach was pioneered within development economics by Amartya Sen as an alternative to growth-based models of development that equate improvement in the quality of life with increased GDP. Sen argues that growth-based models are deficient because they neglect the distribution of resources amongst individuals and fail to disaggregate and separately consider distinct aspects of individual human lives that impact on their ability to use those resources for full human freedom. As an alternative, he proposes that the best metric or space for determining equality is through the concepts of human functioning and human capability. A person's capability to achieve a particular range of functionings is determined by characteristics not just of their person and of their environment, but also of the institutional structure of the society in which they live. For Sen, the goal of development should be to expand the capabilities of persons "to lead the kind of lives they value – and have reason to value." See also Amartya Sen, *Inequality Re-examined*, (Oxford: Clarendon Press, 1992).

³³⁸ For further analysis and statistical information in relation to the relationship between child labour and education, see Brown 2012, *supra* note 1 at 35-47. See also ILO WR Decent Work Young People 2015, *supra* note 3 at 5-8.

labour legislation is to ensure that children's education and development are not jeopardized through their engagement in labour.³³⁹ The ILO observed that compulsory education laws and minimum-age laws have played an interdependent role, with the enforcement of compulsory education laws contributing towards the enforcement of the minimum age.³⁴⁰ In particular, the ILO observed that "affordable education of good quality and which is relevant to the needs of children and their families will ultimately be *the most effective instrument for the elimination of child labour*."³⁴¹ Without citing specific evidence on the relationship between education and the prevention of the worst forms of child labour, the ILO asserted that school attendance has a major effect on eliminating child labour in hazardous work because it should reduce excess hours of work among children, and go a long way towards eliminating child labour in hazardous industries where workers need to be at the worksite for a full shift.³⁴²

In addition to the preventative role of education, the ILO cited a number of positive long-term impacts of education across the life cycle, including the training of more informed and active citizens who are less likely to accept hazardous working conditions, the empowerment of individuals (especially women) leading to more control over reproductive decisions and better health outcomes for children, and the training of a more productive workers that can help increase economic growth overall.³⁴³ Nevertheless, the ILO acknowledged that the relationship between education and child work is a complex one, and that seemingly obvious solutions

³³⁹ ILO Targeting the Intolerable 1998, *supra* note 175 at 35.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid* at 53.

³⁴² *Ibid.*

³⁴³ *Ibid.*

may produce perverse effects.³⁴⁴ In particular, the preparatory report noted that while shortcomings in the public education system encourage the flow of children into the workplace, the availability of schooling may not be sufficient to eliminate child labour for poor families in the absence of income replacement or other economic incentives that address the imperative for children labour earn an income.³⁴⁵

Notwithstanding the ILO's assertion in its preparatory work on the Convention that affordable, good quality education is the most effective instrument for the elimination of child labour, the substantive provisions of Convention No. 182 create limited legal obligations for States to link their legal strategies to eliminate the worst forms of child labour with specific legal obligations relating to the provision of free primary education. In this respect, Convention No. 182 clearly diverges from the international child rights framework, which I will examine in more detail in the next chapter. While calling on States to take into account the importance of education in eliminating child labour, Article 7(2)(c) limits the legal obligations of States to provide access to free basic education solely to those children who have been removed from the worst forms of child labour.

During the drafting debates an amendment was proposed to include a sub-paragraph in Article 3(d) that would have read “work, which systematically deprives children of access to education in accordance with applicable compulsory education requirements as established by national laws or regulations or by the competent

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

authority” shall amount to a worst form of child labour.³⁴⁶ This proposal was put forward particularly by worker representatives and was supported by a number of OECD countries from the Global North.³⁴⁷ Following negotiation, the proposed amendment was withdrawn with some regret by its sponsors.³⁴⁸ During the debate on its potential inclusion as a worst form of child labour, the Government member of India stated that while his Government attached a great deal of importance to free, basic education its inclusion would have made the Convention “unimplementable and unratifiable as it would have expanded the scope of the Convention to virtually all forms of child labour which were rooted in poverty, as all working children in these circumstances were unable to attend school.”³⁴⁹ The representative from India asserted that the inclusion of this element “would be tantamount to imposing sanctions on poverty, while ignoring the fact that economic and social rights such as free basic education were achievable only progressively and in a developmental context.”³⁵⁰ The withdrawal of this proposal was clearly motivated by a reluctance to undermine political support for the Convention among countries in the Global South, some of whom had significant deficits in their systems of primary education and were clearly reluctant to ratify a Convention that would highlight their failures in this area, or that would require them to urgently or immediately rectify the situation.³⁵¹ In light of the fact that many nations from the Global South had failed to ratify Convention No. 138 on the minimum age, there was a clear concern to produce a

³⁴⁶ International Labour Conference 87th Session, *Report of the Committee on Child Labour* (Geneva, June 1999) at para178. The amendment was proposed by government members of Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, Italy, Luxembourg, Netherlands, New Zealand, Norway, San Marino, Spain, Sweden, Switzerland, Turkey, the United Kingdom and United States. See further Cullen 2007, *supra* note 9 at 149-150. For an overview of this element of the debate and the conceptualization of hazardous work more generally, see further Beqiraj 2008 *supra* note 102.

³⁴⁷ See Cullen *ibid*.

³⁴⁸ *Ibid*.

³⁴⁹ International Labour Conference 87th Session, *Report of the Committee on Child Labour* (Geneva, June 1999) at para 179.

³⁵⁰ *Ibid*.

³⁵¹ *Ibid* at 150. See further Smolin 2000, *supra* note 169.

Convention that was sufficiently concise, targeted and easy to ratify, regardless of a country's level of development.³⁵² As a result, substantive provisions linking harmful child labour with educational deprivation were omitted as an outcome of the political struggle between various groups operating within the ILO and the imperative to garner a strong consensus around Convention No. 182. As Cullen observes, "ultimately, C. 182 defines access to education as part of the solution to child labour rather than its deprivation being part of defining the problem."³⁵³

The failure in Convention No. 182 to specifically link the harm involved in child labour with the systematic prevention of access to education could be considered problematic and a real missed opportunity to prioritize what the ILO has identified within its policy analysis as one of the most effective systemic methods to eliminate child labour.³⁵⁴ The unavailability of accessible and relevant educational facilities, as well as the additional costs of sending children to school, is one of the key structural social processes that leads families to engage their children in labour. In fact, the systematic prevention of children from gaining access to education can be considered one of the fundamental harms of child labour. In this important respect, Convention No. 182 diverges from the recognition of the universal right to free primary education under the UNCRC, by limiting its education provisions to those children removed from the worst forms of child labour. This is in keeping with the tone of the Convention which was underpinned by the intention to prevent the most egregious harms labour children as an immediate term strategy, rather than a positive account of the rationale for child labour laws which would take full account of the long term forms of unfreedom that child labour laws seek to prevent.

³⁵² Noguchi 2010, *supra* note 9 at 522.

³⁵³ Cullen 2007, *supra* note 9 at 151.

³⁵⁴ See Beqiraj 2008 *supra* note 102 at 184.

2.5.3 Whither Socio-Economic Rights – A Focus on Moral Harm rather than Root Causes?

While recognizing the overall role that development and poverty reduction play in the continuance of child labour in its Preamble, Convention No. 182 does not address many of the core social processes that underpin child labour. The prioritization approach undoubtedly pushes the boundaries of labour law in its recognition of a broader range of exploitative relationships grounded in economic exploitation. However, it does not prioritize justiciable socio-economic rights or social protection mechanisms as a core structural solution to the underlying disadvantage that gives rise to child labour. Cullen has argued that there is a risk that the ‘worst’ and least common forms of exploitation of children could become the entire campaign on child labour, to the neglect of the most common forms which are found in the informal economy in the agricultural and domestic sectors.³⁵⁵ More broadly, it can be observed that while the absolute ‘worst forms’ of child labour have a clear ‘victim’ and an ‘exploiter’ (the child victim of trafficking, the child soldier etc.) which is emotive and intuitively appealing, and which were consciously chosen as a political strategy to mobilize attention on child labour, a focus on *morally* objectionable issues such as trafficking, prostitution and the use of children during armed conflict among others may serve to obscure more politically sensitive questions concerning the economic vulnerability of families and households that underpins *all* forms of childhood exploitation. While there was a clear moral, humane and political rationale for prioritizing certain ‘worst’ forms of exploitative activities in the immediate term, the redistributive implications of a response to childhood economic exploitation in its multiples forms, while acknowledged in the preamble of the Convention, were not the subject of prioritization in its substantive provisions and remain unanswered by

³⁵⁵ Cullen 2007, *supra* note 9 at 137.

international labour law more generally. The key social processes that play a determinative role in child labour, in particular the economic and social vulnerability of families and households that lie at the root cause of *all* forms of childhood economic exploitation, including its worst forms, remain unchallenged by Convention No. 182.

2.6 Conclusion

At the beginning of this chapter I noted that the original historical impetus for the establishment of an international system of labour law lay in the concern to protect ‘vulnerable’ women and children from exploitative conditions of work. However, as I have sought to demonstrate throughout this chapter, the child as a subject of labour law has occupied a somewhat paradoxical position. While child labour has been a historical and enduring priority for the ILO evidenced by its inclusion in the core labour standards, the child has also occupied a somewhat marginalized position within the labour law frame, somewhat analogous to women workers in the informal economy. The fundamental building blocks of the labour law frame, in particular the labour inspection mechanism, do not map well onto the contextualised realities of child labour. The ‘prohibition and penalty’ approach encapsulated in the child labour standards retains a central faith in the capacity of labour inspection and criminal prosecution to effectively regulate child labour in a way that I argue is inattentive to the contextualized realities of child labour which predominates in the highly dispersed informal economy and within unpaid family work, often in the sphere of social reproduction.³⁵⁶ Simultaneously, the international labour law standards in this area fail to address socio-economic rights and social protection supports as a vital complementary element to current legal strategies that would mitigate the

³⁵⁶ See further Chapter Four which deals with the challenges of regulating child labour in the informal economy.

potentially negative impacts of enforcing laws that remove children from labour where the underlying economic necessity is not addressed.³⁵⁷ One of the foundational harms of child labour, deprivation of the right to education which gives rise to enduring limitations in human development across the life cycle, has not been fully captured in the labour law frame, notwithstanding that labour law drew much of its inspiration from the UNCRC in the formulation of its most recent Convention. Finally, social reproductive work and care undertaken by children, particularly where it is not considered ‘hazardous’ but may compromise the right to education, does not fit fully within the labour law frame, thereby excluding a large cohort of so called ‘inactive’ or ‘out of school’ children who form a hidden element of the spectrum of children in economic exploitation, in particular disadvantaging girl children.

In the next chapter, I turn to analyze the manner in which the broader concept ‘childhood economic exploitation’ is conceptualized under international human rights law. The UNCRC was designed to draw children as rights holders into a community where they can be seen and heard, thereby raising their identity from outsiders to included members of the rights holding community. Specifically, I examine to what extent a legal framework that seeks to capture the ‘irreducibility’ of childhood has the potential to address the structural social processes underpinning child labour that I have centralized when compared against the labour law model.³⁵⁸

³⁵⁷ See further Chapter Five which deals with the role of social protection mechanisms as a potentially transformative complementary strategy in this field.

³⁵⁸ See further Campbell 2003, *supra* note 75 at 407-408.

Chapter Three

Childhood Economic Exploitation and the Human Rights Law Model – On the Relational Child and Socio-Economic Rights

3.1 Introduction

In this chapter I turn to analyze the manner in which childhood economic exploitation is conceptualized under the international human rights law framework. More broadly, in this analysis I aim to explore how the child is framed as a rights holder in the economic and social realms under the UNCRC.

First, I explore the framing of childhood economic exploitation within the international human rights law model, tracing the similarities and distinctions between the labour law model and the human rights law model. A crucial distinction between the two models is the latter's inclusion of deprivations in the right to education as a core harm of childhood economic exploitation. Specifically, I explore how focussing on the linkages between 'out of school' children and childhood economic exploitation has the potential to form one element of a structural approach that could capture a larger cohort of children in both productive and socially reproductive work, as well as in the formal and informal economies. Moreover, I argue that an approach grounded in educational deprivation has the potential to overcome some of the limitations and binaries of the 'penalty and prohibition' approach that I have explored in the previous chapter. Second, I examine the various relationships and boundaries that the human rights law regime uses to mediate the framing of the child as a rights holder in the economic and social sphere, in particular between the child, the family, and the infrastructure of the State, and their relevance in contexts of childhood economic exploitation. Drawing on strands of

feminist relational theory,³⁵⁹ and building on the relational framing of the child in the previous chapters, I argue that one of the distinctive features of the UNCRC, in contrast to the individualized paradigmatic adult worker of labour law, is its prioritization and elaboration of the role of relationships, in particular familial relationships, for the advancement of children's rights. The Convention acknowledges the relational context in which child well-being unfolds within the family. Nevertheless, I claim the legal construction of the child retains a central focus on the individualized child whose wellbeing is primarily provided for through the 'private' socio-economic and caring responsibilities of the family in the 'private sphere.' In its reification of the 'private sphere', and in its failure to fully centralize the relevance and burden of caring activity and care work, the Convention only provides a partial challenge to the spectrum of exploitation that surrounds economic exploitation in childhood, namely, worker vulnerability in the informal economy, the relevance and burden of gendered care labour, and poverty and lack of sustainable livelihoods. Policy analysis by UNICEF that focusses on the 'life course perspective' demonstrates an emerging cognisance of the conceptual framing of the child and family in their broader relational context.³⁶⁰ However, the analysis reveals progressive policy discourse has not always been meaningfully translated into legal frameworks at the domestic level. Third, I situate childhood economic exploitation

³⁵⁹ Feminist relational theory comprises several connected and overlapping areas of work, including feminist ethic of care scholarship, relational rights scholarship and a connected scholarship on relational autonomy. In this chapter I focus primarily on the ethic of care scholarship specific to the area of children's rights by authors Barbara Arneil 2002, *supra* note 78. I also focus on the scholarship of Jennifer Nedelsky 2011, *supra* note 17 and Martha Minow; see for e.g. Minow 1986, *supra* note 17. Both of these authors seek to recast rights in the service of relationships, with Nedelsky in particular developing a theoretical account of relational autonomy. For an overview of the diverse strands of feminist relational theory, see Leckey, *supra* note 128 at 7-12; see also Jocelyn Downie & Jennifer J. Llewellyn, "Introduction" in Jocelyn Downie & Jennifer J. Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Toronto, Vancouver: UBC Press, 2012) [Downie & Llewellyn 2012]. See also Sheppard 2010, *supra* note 16.

³⁶⁰ See for e.g. Dornan & Woodhead 2015, *supra* note 23 at 9-13; Armando Barrientos, Jasmina Byrne, Juan Miguel Villa & Paola Pena, "Social Transfers and Child Protection" (April 2013) UNICEF Research Working Paper [UNICEF Social Transfers 2013] at 36.

within the debate concerning the contested juridical nature of economic and social rights more generally. Drawing on elements of the human capabilities approach,³⁶¹ I demonstrate how economic exploitation in childhood challenges the ongoing relegation of economic and social rights to programmatic, non-justiciable rights that will be realized over time, through overall economic development. Exploring the genealogy of economic and social rights within both the human rights and labour law frameworks for the child, I argue that a central rationale for economic and social rights is the decommodification of labour through the existence of social protections to ameliorate the harshness of the market.

3.2 Contextualizing Childhood Economic Exploitation within the Framework of the UNCRC

The UNCRC is considered a paradigmatic shift in the conceptualization of the child in international law and politics, and stands as the most widely ratified human rights treaty internationally.³⁶² As a result of its widespread ratification, the UNCRC

³⁶¹ The human capabilities approach was pioneered within development economics by Amartya Sen as an alternative to growth-based models of development that equate improvement in the quality of life with increased GDP. Sen argues that growth-based models are deficient because they neglect the distribution of resources among individuals and fail to disaggregate and separately consider distinct aspects of individual human lives that impact on their ability to use those resources for full human freedom. As an alternative, he proposes that the best metric or space for determining equality is through the concepts of human functioning and human capability. A person's capability to achieve a particular range of functionings is determined by characteristics not just of their person and of their environment, but also of the institutional structure of the society in which they live. For Sen, the goal of development should be to expand the capabilities of persons "to lead the kind of lives they value – and have reason to value." See for e.g. Sen 1999, *supra* note 337; Amartya Sen, *Inequality Re-examined* (Oxford: Clarendon Press, 1992). Martha Nussbaum on the other hand has developed on the capabilities approach from a philosophical perspective, grounding her analysis in an intuitive idea of a life that is worthy of the dignity of the human being. See for e.g. Martha Nussbaum, *Women and Human Development, The Capabilities Approach* (Cambridge: Cambridge University Press, 2000) [Nussbaum 2000]; Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Press, 2011). For an examination of the relevance of the human capabilities approach to children more generally, see M. Biggeri, J. Ballet and F. Comin, eds, *Children and the Capabilities Approach* (New York: Palgrave Macmillan, 2011) [Biggeri et al. 2011].

³⁶² For an overview of the relevance of the human rights framework within the context of child labour more generally, see Judith Ennew, William E. Myers & Dominique Piere Plateau, "Defining Child Labour as if Human Rights Really Matter" in Weston 2005, *supra* note 8; Alessandro Fodella, "Freedom from Child Labour as a Human Rights: The Role of the UN System in Implementing ILO Child Labour Standards", in Nesi et al., *supra* note 98. For a comprehensive overview of the role and evolution of international human

provides an important site of analysis through which to unpack the manner in which the law structures relations between the child, the family, the school and the State, particularly in the economic and social spheres, and in contexts of economic exploitation. Given the ubiquitous nature of rights discourse in contemporary legal and political debates on child well-being, it is more crucial than ever to reveal, at the conceptual level, the potential and limits of rights frameworks to expand the capacity of children to live lives they have reason to value.³⁶³

In light of some of the distinctive elements that surround the subject position of the child as a rights holder outlined in Chapter Two, it is perhaps unsurprising that the UNCRC sought not only to reaffirm the child as a holder of existing ‘traditional’ human rights norms, but also to reformulate aspects of human rights law to respond to specific characteristics of childhood. For example, the UNCRC innovatively recognizes new forms of rights for children that had not previously formed part of the human rights lexicon, in particular the right of children to participate in decisions

rights law in this field, see Cullen 2007, *supra* note 9. For an overview of the significance of the UNCRC more generally, see for example, Philip Alston, *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford: Oxford University Press, 1994); Trevor Buck, *International Child Law* (London, New York: Routledge, 2011) [Buck 2011]; Geraldine Van Bueren, *The International Law on the Rights of the Child* (London: Martinus Nijhoff, 1994); Michael Freeman, *Article 3: The Best Interests of the Child* (Leiden: M. Nijhoff, 2007); Freeman 2007, *supra* note 128; Michael Freeman & Philip Veerman, *The Ideologies of Children’s Rights* (Dordrecht: M. Nijhoff, 1992) [Freeman and Veerman 1992]; Deirdre Fottrell, *Revisiting Children’s Rights: 10 Years of the UNCRC* (The Hague: Kluwer Law International, 2000) [Fottrell, 2000]; Claire Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (The Hague and New York: M. Nijhoff Publishers, 2002). For a specific consideration of the right of the child to participate in decisions that impact him/her see Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Abingdon, Oxon: Routledge, 2013).

³⁶³ See Arneil 2002, *supra* note 78, who observes that, “If you want to take children’s needs and interests seriously, and make claim on their behalf that will compete with any other moral claims, it is necessary to make such claims in the language of rights. It is clear that any non-rights moral claim simply does not carry the same weight in the contemporary moral or political debate,” at 86. At a more general level, Nedelsky similarly observes that, “the prevailing language of justice and entitlement is overwhelmingly that of *rights*. Thus in my view, the debate over the desirability of rights (as concept and legal institution) has, in practical terms, been decisively won by those who opt for the language of rights. Despite the merit of the (ongoing) scholarly objections, the practical issue is not whether but how the language of rights will be used,” Nedelsky 2008, *supra* note 17 at 140.

that impact upon them in accordance with their evolving maturity and capacity.³⁶⁴ This specific provision of the UNCRC is considered to be a significant shift in the treatment of the child within international law and politics, because in the words of Anna Holzscheiter it “elevated the status of the child in international law from a passive, ‘mute’ object of charity to a social agent endowed with the capability to voice his or her interests (an active rights-holder).”³⁶⁵ At a broader conceptual level, the UNCRC forms part of a trend towards the diversification, or what Frédéric Mégret terms the “pluralization of human rights” norms.³⁶⁶ Tracing the emergence of a more plural form of human rights treaty, Mégret asserts that specialized treaties such as UNCRC attempt to respond to the ‘irreducibility’ of the experience of children, as a specific group within humanity, who require the creation of new rights that supplement and extend existing rights based frameworks.³⁶⁷ This trend was reflected during the drafting process of the UNCRC with the perspective gradually emerging that children were fundamentally different from adults and as such required special provisions exceeding those contained in the two 1966 International Covenants.³⁶⁸

³⁶⁴ See further Parkes 2013, *supra* note 366.

³⁶⁵ See Anna Holzscheiter, “Power of Discourse or Discourse of the Powerful? The Reconstruction of Global Childhood Norms in the Drafting of the UN Convention on the Rights of the Child” (2011) 10:1 J of Language and Pol 1 [Holzscheiter 2011] at 7. Providing some historical context Holzscheiter outlines that, “[t]he international politics of childhood was until the 1970s a protectionist movement that posited children in an outright victimised and ‘suffering’ light, placing the strongest emphasis on children as the most vulnerable part of society. Child welfare and early childhood development were the main agenda in international concern for children.” On the significance of the development of Article 12, see also Fottrell 2000, *supra* note 3 at 1; Freeman, “Introduction” in Freeman & Veerman 1992, *supra* note 3 at 5. For a discourse analysis of the emergence of the concept of the child’s right to participate within the drafting process of the UNCRC, see Anna Holzscheiter, *Children’s Rights in International Politics: the Transformative Power of Discourse* (New York: Palgrave Macmillan, 2010).

³⁶⁶ See Frédéric Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30:2 Hum Rts L Q 494 at 496 [Mégret 2008].

³⁶⁷ *Ibid.* While Mégret’s theoretical analysis of the diversification of international human rights norms discourse focusses on the Convention on the Rights of Persons with Disabilities, is of particular relevance to the UNCRC which forms part of the increasing number of specialized human rights treaties that address the rights of a particular group. Mégret goes further to argue that, “the most theoretically interesting question arising out of the ‘pluralization of human rights’ is the way it potentially implicitly challenges the idea that human rights are about promoting equal rights for all, by suggesting that human rights may also be about delving deeply into issues of identity, survival, and dignity of particular groups,” *ibid* at 496.

³⁶⁸ See Holzscheiter 2011, *supra* note 365 at 17.

3.2.1 Mapping the Similarities with the Labour Law Model

Childhood economic exploitation illustrates quite starkly the inability of families to meet their obligations towards their children in a context of material disadvantage, as well as the failure by the State to engage with its secondary supportive role whether in the provision of adequate and accessible education, or in the effective protection of the right to an adequate standard of living. Article 32 of the UNCRC recognizes the right of the *individual* child to be protected from economic exploitation. Economic exploitation in childhood is broadly defined as “work that is likely to be hazardous, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, or to interfere with the child’s education.” States parties are required to implement a range of legislative, administrative, social and educational measures to ensure the implementation of Article 32. Specifically, the UNCRC stipulates that States should specifically provide for a minimum age(s) for admission to employment, accompanied by appropriate penalties or other sanctions to ensure the effective enforcement of these minimum standards. Article 32 further stipulates that State parties shall provide for appropriate regulation of the hours and conditions of work engaged in by children.

To date, the Committee on the Rights of the Child has not issued a General Comment to elaborate on the nature of legal obligations that arise from Article 32, in particular the range of legislative, social and educational measures that would be considered adequate by the Committee to ensure the effective implementation of Article 32. However, the Committee has been active within the context of the periodic State reporting process in critiquing States for their failure to meet their obligations under

Article 32.³⁶⁹ The Committee has focussed in a number of its Concluding Observations on the weak nature of the enforcement of child labour laws in numerous States, and on the inadequacies of the labour inspectorate mechanism, recommending that this element should be prioritized as an element of enhanced implementation. In the context of its examination of Bangladesh in 2009, for example, the Committee expressed concern about the “lack of enforcement mechanisms of specific laws to protect child workers, absence of mechanisms to monitor child workers’ working conditions ... and the very limited data on the number of children affected.”³⁷⁰ The Committee recommended that urgent measures should be taken to address exploitative forms of child labour, including the enforcement of laws prohibiting employment of children under 18 years in hazardous work and the ratification of Convention No. 138 on the minimum age.³⁷¹ In addition, the Committee recommended that in the context of seeking technical assistance from the ILO among others, the relevant State agencies should develop “gender-sensitive and child-friendly rehabilitation and reintegration programmes for child labourers.”³⁷² Similarly, in the context of its examination of Pakistan, the Committee focussed among other issues on the “ineffectiveness of labour inspection machinery [which] reduces the likelihood of investigations of reports of child labour, making unlikely prosecution, conviction or punishment for the exploitation of children.”³⁷³ Specifically, the Committee recommended that the Pakistan Government “[s]trengthen the labour inspectorate and provide the labour inspectors with all the

³⁶⁹ See for eg. Concluding Observations of the Committee on the Rights of the Child in respect of the 3rd and 4th Periodic Reports of Togo, CRC/C/OPSC/TGO/CO/1, 8 March 2012, at paras 65-66. See Concluding Observations of the Committee on the Rights of the Child in respect of the 3rd and 4th Periodic Reports of the Syrian Arab Republic, CRC/C/SYR/CO/3-4, 9 February 2012, at paras 76-77.

³⁷⁰ See Concluding Observations of the Committee on the Rights of the Child in respect of the third and fourth periodic reports of Bangladesh, CRC/C/BGD/CO/4, 26 June 2009, para 82-83.

³⁷¹ *Ibid* para 83.

³⁷² *Ibid*.

³⁷³ See Concluding Observations of the Committee on the Rights of the Child in respect of Pakistan’s third and fourth periodic reports, CRC/C/PAK/CO/3-4, 15 October 2009 at paras 88-90.

necessary support, including child labour expertise, with a view to enabling them to monitor effectively at the State and local levels the implementation of labour law standards and to receive, investigate and address complaints of alleged violations.”³⁷⁴

Increasingly, the Committee has focussed on child labour in the informal economy, including more ‘hidden’ forms of child labour such as domestic labour, as well as the specific gendered implications of this form of child labour. For example, in its Concluding Observations on Bangladesh and India, the Committee expressed concern in relation to the high prevalence of child labour in the informal economy and the prevalence of girls engaged as child domestic workers where they are more vulnerable to violence and exploitation.³⁷⁵ Similarly, in its recent concluding observations on the periodic report of Togo, the Committee noted that children, especially girls as young as nine years, are working in the domestic sector in conditions that involve very long hours, with a lack of rest days and with little or no remuneration where they are regularly subjected to verbal, physical and sexual violence.³⁷⁶ The Committee recommended that the State take the necessary measures to remove, as a matter of priority, all children in hazardous work, paying particular attention to child domestic workers, and recommended the State should consider ratifying the recent ILO Convention on Decent Work for Domestic Workers No. 189, 2011 (Convention No. 189).³⁷⁷

³⁷⁴ *Ibid* at para 90.

³⁷⁵ See Concluding Observations of the Committee on the Rights of the Child in respect of India’s third and fourth periodic reports, CRC/C/IND/CO/3-4, 7 July 2014, paras 81-82; Concluding Observations CRC Bangladesh, *supra* note 441.

³⁷⁶ Concluding Observations of the Committee on the Rights of the Child in respect of Togo’s Second Periodic Report, CRC/C/15/Add. 255, 31 March 2005, paras 63-65.

³⁷⁷ *Ibid* Concluding Observations Syrian Arab Republic *supra* note 373 at para 76-77. *Convention on Decent Work for Domestic Workers (ILO Convention No. 189)*, 16 June 2011, (entered into force 5 Sept 2013).

While cognisant of some of the challenges posed by child labour in the informal economy, in many of its concluding observations, the Committee on the Rights of the Child appears to adopt an approach somewhat similar to the labour law model in that it envisages the implementation of specific child labour laws to occur through the deterrent impact of legal sanctions, monitored primarily under the mechanisms of criminal or labour law. In this sense, the human rights model replicates elements of the international labour law model, with the specific provisions of Article 32 stipulating a ‘penalty and prohibition’ approach which I have argued in Chapter Two will inevitably comprise a truncated response to the problem.

3.2.2 Deprivations in the Right to Education as a Core Harm of Economic Exploitation in Childhood

In contrast to the international labour law model, the UNCRC includes within the definition of childhood economic exploitation work that interferes with a child’s right to education. This is a significant strength of the UNCRC when assessed against the more restricted provisions in Convention No. 182, despite initial attempts during the drafting process of the ILO Convention for the inclusion of educational deprivation within the definition of child labour in its worst forms.³⁷⁸ The UNCRC clearly establishes that one of the key harms of child labour is the prevention of children from gaining access to education which given its long-term implications for a child’s ability to live a life that she has reason to value is perhaps one of the most long-lasting forms of harm that flows from economic exploitation in childhood.³⁷⁹

The advantages of a holistic definition of childhood economic exploitation that includes work that interferes with a child’s right to education become more apparent

³⁷⁸ See Chapter 2 at 119-123.

³⁷⁹ *Ibid.*

when we examine the challenges of distinguishing legally between hazardous and non-hazardous labour, and the significant statistical cohort of so-called ‘out of school’ or ‘inactive’ children who are not fully integrated within the labour law model. In his capacity as UN Special Envoy for Global Education, Gordon Brown has examined the linkages between child labour and education, and has noted the practical difficulties that can arise in distinguishing different forms of work by children.³⁸⁰ Specifically, Brown observes that,

[c]ategorising and differentiating activities within this spectrum is made difficult not just by data constraints, but by the continuity between different forms of labour. Boundaries between different forms of child labour are often blurred. For example, the data on child labour excludes children involved in ‘permissible light’ work for less than fourteen hours a week - but there is seldom a neat dividing line between light work and unacceptably arduous work. Similarly, while international standards used in surveys draw a distinction between ‘non-hazardous’ and ‘hazardous’ work, many children are engaged simultaneously in both activities.³⁸¹

In light of the serious challenges for the labour law inspection model that I have explored, particularly in the large, growing and highly dispersed informal economy and in the context of social reproduction work, an approach that focuses on work that interferes with the right to education may provide for a more practical, workable regulatory framework that does not seek to draw fine distinctions between hazardous and non-hazardous work, as well as between work occurring in the productive and non-productive spheres. As outlined, where children are engaged in ‘non-productive’ activity which is not classified as ‘work or employment’ for the purposes of the system of national accounts, there is some uncertainty as to whether it is classified as child labour under the labour law model. While the ICLS has explicitly included “hazardous unpaid household services” as an element of the statistical measurement

³⁸⁰ See Brown 2012, *supra* note 1.

³⁸¹ *Ibid* at 26.

of child labour, this definition excludes children who are performing non-hazardous domestic work in their own homes, for example, as well as other survival activities that might not be classified as work or employment, but could have a detrimental impact on children's access to education only includes household services provided in hazardous conditions.³⁸² The provision of sibling care, for example, has particular gender implications with the household division of labour in many countries typically requiring girls to assume a greater share of this care to the detriment of their school attendance.³⁸³ Evidence from Bangladesh illustrates that 63 per cent of 'inactive' or 'out of school' children are girls and further studies demonstrate that girls predominantly perform household chores, and are up to 15 times more likely to report their primary activity as housework compared to their male peers.³⁸⁴ There is an increasing policy concern among the ILO and other stakeholders in relation to the large cohort of so-called 'inactive' or 'out of school' children, particularly in the South Asian context, with calls for further research and prioritization to understand the time use of these children and to what extent their activities amount to a 'hidden form' of economic exploitation.³⁸⁵

An illustrative example of an approach that centralizes the right to education as the core harm of childhood economic exploitation is the approach of the MV Foundation, a non-governmental in Andhra Pradesh in India.³⁸⁶ The MV Foundation has a

³⁸² ILO, *Recommendation Concerning Statistics of Child Labour* (2008) ICLS-R-[2008-12-0006-6]-En.doc/v3 at paras 15(c), 36 and 37. See also Lyon et al. 2013, *supra* note 63 at 5.

³⁸³ See Brown 2012, *supra* note 1 at 9.

³⁸⁴ See Khan & Lyon 2015, *supra* note 68 at 38. A 2011 report found that girls in Bangladesh are three times as likely as boys to perform household chores for more than 20 hours per week, see Bangladesh UCW Country Report 2011. A 2009 study found that girls in India between 7 and 14 years were more than 15 times as likely as male peers to report their primary activity as housework, see UCW, *Child Labour in Bangladesh and India: A Preliminary Gender-Based Analysis*, April 2009.

³⁸⁵ See Khan & Lyon 2015, *supra* note 68 at 31-33.

³⁸⁶ See Neera Burra, "Crusading for Children in India's Informal Economy" (2005) *Economic and Political Weekly* 5199 at 5207 [Burra 2005]. See also Wazir Rekha & Ashwani Saith, "MV Foundation Achievements and Future Directions: A Review" (Andhra Pradesh: MV Foundation, 2006), online:

number of what it terms ‘non-negotiable principles’ in its approach to the issue of child labour that diverge somewhat from the human rights law model but place a central role on the right to education as a core part of the solution.³⁸⁷ Specifically, the MV Foundation asserts that “*all* children that are out of school are either child labourers or potential child labourers” and that “*all* work is hazardous and harms the overall growth of the child.”³⁸⁸ On the basis of these principles, the MV Foundation disputes the application of distinctions between hazardous and non-hazardous work, as well as the idea that work can be beneficial for children which has underpinned the rationale of Indian policymakers and legislators as being unworkable and undesirable in practice.³⁸⁹

This approach provides a strong counterpoise to the legal framework within India which adopts what is described as a pragmatic approach to child labour and which focuses centrally on prohibiting child labour under 14 years in specific occupations and processes. The Child Labour (Prohibition and Regulation) Act of 1986 (‘1986 Act’) as amended provides a list of the various categories of industrial and non-industrial occupations and processes, including for example domestic work in a recent amendment.³⁹⁰ A number of national commissions, in particular the Second National Commission on Labour have been critical of important loopholes in the 1986 Act.³⁹¹ Primarily focusing on a sectoral approach to what is considered hazardous work for children in areas encompassing both the formal and informal

<http://mvfindia.in/wp-content/uploads/2014/07/M.-V.-Foundation-Achievements-and-Future-Directions-A-REVIEW.pdf>

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ See List of Hazardous Occupation and Processes in Schedule to the Child Labour (Prohibition and Regulation) Act 1986, as updated 8th Oct. 2010, online: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=27803

³⁹¹ See Government of India, Report of the Second National Commission on Labour, Vol. 1 Part II, Ministry of Labour, 2002 Government of India, online: <http://www.prsindia.org/uploads/media/1237548159/NLCII-report.pdf> [Second National Commission on Labour 2002].

economies, it is unclear to what extent the list of 18 processes and occupations included provides a comprehensive and workable framework that is capable of capturing the full range of activities undertaken in the highly diverse informal economy.³⁹² Additionally, the 1986 Act explicitly excludes both productive work and social reproduction work undertaken within the home from its ambit, with clause three providing that the prohibition on child labour shall not “apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by or receiving assistance or recognition from, Government.”³⁹³ The Declaration entered by the Indian Government to Article 32 of the UNCRC upon ratification provides further insight to the scope of its approach stating,

for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that *it is not practical immediately to prescribe minimum ages for admission to each and every area of employment* in India – the Government of India undertakes to take measures to progressively implement the provisions of article 32.³⁹⁴

In her commentary on the Indian context, Neera Burra has argued that “[w]hile child labour narrowly defined is difficult to eradicate, child labour broadly defined can be easier to tackle.”³⁹⁵ Citing the approach of the MV Foundation, Burra argues that in a

³⁹² *Ibid* at 1027, para 9.254, which states, “[a]lthough the Act prohibits the employment of children in certain hazardous industries and processes, it does not define what constitutes hazardous work. It only provides a list of hazardous occupations/processes ... As a result, it leaves a loophole for employment of children in hitherto unidentified hazardous occupations and processes, and the use of hazardous materials.”

³⁹³ See Clause 3 of the Child Labour (Prohibition and Regulation) Act of 1986, online: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93653&p_country=IND&p_classification=04 See further Second National Commission on Labour 2002 *supra* note 391 at 1027, which criticises these exclusions in the following terms: “whether the child is employed in enterprises and industries outside the home, or at home, for wages or to help in domestic chores or family occupations, it does result in the forfeiture of opportunities for education and for ‘formation.’”

³⁹⁴ See further Reservations and Declarations entered by States parties to the UNCRC, online: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>

³⁹⁵ See Burra 2005, *supra* note 386 at 5207.

context where the labour inspectorate is under-resourced and sometimes in collusion with employers, as well as with the new phenomenon of subcontracting work where child labour can be passed off as a form of family labour, thereby evading the legal prohibitions, a more practical and comprehensive regulatory approach would focus on the category of ‘out of school’ children rather than seeking to combat child labour in specific sectors.³⁹⁶ Therefore, an approach that centralizes educational deprivation as the core harm of childhood economic exploitation potentially provides a more holistic approach and may obviate the gendered exclusions of social reproduction work which can clearly be seen to have more negative impacts for girl children.

3.2.3 Childhood Participation and Agency – Exploring the Potential and Limits

A further core and innovative principle under the UNCRC is the right of the child to participate in decisions that impact upon her in accordance with Article 12. The recognition of evolving childhood capacity and autonomy within the Convention has been welcomed as a paradigmatic shift in the ways in which the child is viewed as a subject of international law and politics.³⁹⁷ Michael Freeman, for example, notes an intimate link between the respect for a child’s autonomy and their recognition as a rights holder with moral integrity who is entitled to equal concern and respect.³⁹⁸

³⁹⁶ *Ibid* at 5205. In a critique of the ‘penalty and prohibition’ approach the Second National Commission on Labour of India states, “[i]t assumes that the bureaucracy, poorly staffed and ill-equipped as it is today, will be able to ensure that children do not work in hazardous processes and occupations, and conditions of work in non-hazardous settings will be upgraded. The bureaucracy is also expected to determine whether a child is working in a non-hazardous process or a hazardous occupation. Again, under the law, the employer is supposed to notify the Labour Department whether any children are working in his establishment. This means that one expects those who may be guilty or proven to be guilty, to notify their improprieties or illegal acts to the authorities. Moreover, the onus of proving the age of the child lies with the prosecutor, and not the offender,” at 1028.

³⁹⁷ See Holzscheiter 2011, *supra* note 365 at 7.

³⁹⁸ See Freeman 2007, *supra* note 128 at 36.

Given the innovative emphasis on children's participation rights in Article 12, the Committee has taken the opportunity to elaborate on the intersection between Article 12 and Article 32, in particular the extent to which due weight should be given to children's views where they are working contrary to the minimum age legal standards. Notably, the Committee has stated,

Children working at younger ages than permitted by laws and International Labour Organization Conventions Nos. 138 (1973) and 182 (1999) have to be heard in child-sensitive settings in order to understand their views of the situation and their best interests. They should be included in the search for a solution, which respects the economic and socio-structural constraints as well as the cultural context under which these children work.³⁹⁹

In contrast to the requirements of Convention No. 182, which simply stipulates that children and their families should be consulted in the design and implementation of national programs for action rather than in specific cases where children are being removed from labour, the Committee appears to advocate an individualized process to determine whether legal and policy interventions that intend to remove children are appropriate in light of the individual child's views and best interests.⁴⁰⁰ Rather than recommending the strict enforcement of the minimum age laws, the Committee appears to favour a contextualized assessment that would take into consideration the child's views and best interests, and an individualized solution that would involve the child and respect her "economic and socio-structural constraints," as well as her cultural context.

³⁹⁹ See UN Committee on the Rights of the Child, General Comment No. 12, The Right of the Child to be Heard, CRC/C/GC/12, 20 July 2009, at para 116.

⁴⁰⁰ General Comments are soft law and non-binding normative standards that provide best practice guidance to States for the specific measures that are required for the implementation of human rights treaties. General Comments by the Committee may also act as a guide to the operations of the International Labour Organisation, in particular IPEC, in the delivery of its technical cooperation activities.

One of the most divisive debates within academic literature on childhood economic exploitation as well as in practice explored in Chapter Two, is the stark dichotomy that is drawn between the ‘legal abolitionist’ approach said to be encapsulated in Convention No. 138, and a ‘legal regulation’ approach that would grant greater legal recognition to the status of children as workers and that would dispute the rigid application of a minimum age standard.⁴⁰¹ Within the human rights law model, by adopting an individualized and contextualized assessment and solution, the Committee appears to be mediating a compromise position between these polarized perspectives. The General Comment, if adopted as best practice, would have the strength of a contextualized and individualized assessment that would take consideration of the views of older children who may be capable of forming a view on how a solution can be constructed that is in their best interests. Nevertheless, as I have argued previously, it will be important to interrogate the extent to which a child’s assessment of their best interests which falls on the side of remaining at work is meaningful where that choice is constrained by meeting the material demands of existence and survival for themselves and their families. The language used by the Committee is notable in that it appears to concede that “economic and socio-structural” constraints may limit the range of solutions for an individual child, and in some instances may prevent their removal from work. In addition to integrating the child’s views within the process, it will be crucially important to assess to what extent the economic and socio-structural constraints the Committee alludes to result from the failure by the State to extend minimum economic and social protections to children and their families. As I have argued in Chapter Two, while the inflexible application of a minimum age standard has been problematic in some instances leading to negative impacts for children who were removed from working without

⁴⁰¹ See Chapter Two at 96-106.

adequate socio-economic and other rehabilitative supports, rather than calling into question the very project of implementing a minimum age, the economic and socio-structural constraints the Committee explicitly refers to in its General Comment raise questions about the types of incremental social protective measures that should be built around the minimum age standard to ensure its effective implementation. In the absence of a minimum social safety-net or minimum-social protective floor, for example, it will continue to be challenging to enable children to exit work where they are working under the minimum age, and their choices will inevitably remain constrained in such a context.

It is important to remain cognisant of the inherent limitations of childhood participation and autonomy rights for the advancement of child well-being. Critical theorists from the ethics of care tradition have expressed concern about the prioritization of participation and autonomy rights for children within the UNCRC, without equal prioritization of their need for care.⁴⁰² Arneil asserts that by expanding the scope of autonomy simply to include children within the parameters of adult liberal citizenship rights, theorists are moving from ‘nurturance’ to ‘self-determination,’ when in fact they should be moving towards a reconceptualized understanding of the need for (and responsibility) to care.⁴⁰³ Crucially, the capacity to participate and to form an autonomous view on the exercise of one’s rights is a process that unfolds during childhood in part through the support made available during the context of quality nurturance and care. The form that evolving childhood autonomy takes is deeply influenced by the surrounding relational context of the child. Where there is a context of material disadvantage, children may be distinctly limited in their ability to develop the capacity to participate in decisions that have

⁴⁰² See Arneil 2002, *supra* note 78 at 86-78.

⁴⁰³ *Ibid.*

implications for their exercise of rights as a result, for example, of their engagement in exploitative labour. The development of the capacity for participation rights for children is therefore intimately linked and perhaps premised upon their enjoyment of a variety of other rights, including at a minimum the availability of quality care and the material conditions for child well-being.

The limitations of childhood participation rights move beyond the dynamics that foster or inhibit individual autonomy at the micro level to the broader structural patterns that have a bearing on their enjoyment of rights. Children generally wield (considerably) less political and/or economic power than adults and this reality is unlikely to change significantly by merely extending participation rights to children.⁴⁰⁴ To illustrate this point at a practical level, the integration of children's participation into the development cooperation project planning processes in line with Article 12 of the UNCRC has been embraced with widespread enthusiasm by international organizations.⁴⁰⁵ While noting the transformative intentions behind some of the interventions that include children's voice by organizations such as UNICEF, Jason Hart observes that one conceptual consequence of the localization of children's participation within development planning is the maintenance of a narrow view of power relations as these shape the lives and possibilities of children, to the neglect of broader political, economic and structural conditions.⁴⁰⁶ Asymmetrical power relations between children and those presumed to play the most direct role in their lives – typically teachers, community figures and, above all, parents – come to

⁴⁰⁴ See Campbell 2003, *supra* note 75 at 408.

⁴⁰⁵ See further Hart 2008, *supra* note 158.

⁴⁰⁶ *Ibid* 412. Hart draws on critiques of adult participatory involvement in development cooperation planning which demonstrate a disconnect between local participatory efforts and larger systems, structures and power relations. As Hart further notes, "by conceptualizing the 'local' as separable from larger structures and systems, participatory development leaves unexamined and unchallenged the forces that reproduce poverty and marginality as a matter of course. Thus, the political-economic status quo remains firmly intact."

be seen as a major inhibiting factor to their participation and, consequently, the progressive realization of their rights.⁴⁰⁷ However, referring to work on recognition and redistribution by Nancy Fraser, Hart notes, “the lives of poor children are constrained not simply by lack of recognition of them as children (their place in the status order of society, according to Fraser) but also their membership of the rural underclass or urban proletariat (their place in the economic structure).”⁴⁰⁸ In noting the limitations of childhood agency therefore, it is crucial that a shift towards the integration of children within participative processes should not divert from broader political and economic questions concerning the structural conditions and changes that are required to enable children’s capacity for autonomy to flourish over time.⁴⁰⁹

3.3 The Child, the Family, the State – Exploring the Relational Framing of the Child under the UNCRC

As Chapter Two has illustrated, the individualized ‘paradigmatic (male) adult’ worker of labour law, fails to fully attend to the relationships of dependence and interdependence that characterize young children’s lives, and the burden and implications of care labour for the adult workers who are their primary caregivers. In contrast to the labour law model, a further distinctive feature of the UNCRC is its centralization and elaboration of the significance of relationships, in particular familial relationships, for the advancement of children’s rights.⁴¹⁰ Feminist relational theorists, including Jennifer Nedelsky and Martha Minow, have critiqued the manner in which law- and rights-based strategies have historically lacked a rich

⁴⁰⁷ *Ibid* at 412.

⁴⁰⁸ *Ibid* at 414.

⁴⁰⁹ See further Nicola Ansell, who goes so far as to argue that, “[s]o long as structural conditions persist which prevent children’s lives from being ameliorated, the right of young people to express a view is arguably irrelevant. Indeed, children’s participation may be a low-cost exercise that makes children appear responsible for removing themselves from a situation of poverty that can be addressed only by those with real political power,” in Nicola Ansell, *Children Youth and Development* (London: Routledge, 2005) at 246.

⁴¹⁰ See White 2002, *supra* note 16 at 1097.

appreciation and understanding of the significance of relationships, including their preconditions, their responsibilities and their consequences, for the advancement of rights.⁴¹¹ While these theorists have not explicitly considered the international human rights framework, and the UNCRC in particular, as Angela Campbell observes,

[t]he immense physical, emotional, and psychological dependence children have on their families, their communities, and the state, makes placing them within the traditional rubric of individual rights impossible. The notion of rights in relationship – a concept formulated and developed by feminists – thus becomes indispensable to a viable framework of rights for children.⁴¹²

A notable and relatively unexplored feature of the UNCRC, when viewed through a relational lens, is the prioritization and elaboration of the role of the family unit which is signalled throughout the Convention as a key vector for the delivery of socio-economic rights and care supports to the child and its relationship with the infrastructure of the State.

3.3.1 Mapping the Secondary Supportive Role of the State

Beginning with the Preamble, the UNCRC describes the family as “the fundamental group of society and the natural environment for the growth and well-being of ...

⁴¹¹ See for e.g. Minow 1986, *supra* note 17; Nedelsky 2011, *supra* note 17. See also Lacey 2004, *supra* note 16 who summarizes the implications for scholarship in international human rights law is as follows: “Nedelsky argues that we should emphasize recognition of the fact that rights inevitably construct, reflect, or express relationships. This simply means that the idea of an atomistic rights-holder makes no sense. ... On this view, rights may be viewed as instituting and fostering relationships of reciprocity and interdependence rather than of competition: the model of rights as relationship attempts to move beyond a subject-object conception of legal relations and its property model of rights. ... All rights, she argues, express a certain view of relationships: all rights affect power relations, and create responsibilities as much as selfish claims. If we put this aspect of rights at the forefront of our thinking, and in particular if we abandon the idea that the paradigm rights are proprietary rights which consist in the power to exclude others, we can gradually reconstruct our rights culture towards a model of democratic dialogue and accountability”, at 52-53. See also Downie & Llewellyn 2012, *supra* note 359 who state, “The relational conception of the self with which we are concerned recognises that we live in relationships with others but also that relationships and connection with others is essential to the existence of the self. The human self in this view is constituted in and through relationship with others ... relationships play a constitutive role because of the inherently social nature of human beings.”

⁴¹² See Campbell 2003, *supra* note 75 at 400.

children.” This echoes the description of the family in the two original Covenants, although the ICCPR and ICESCR do not elaborate in any significant way on the role that familial relationships play for the advancement of rights.⁴¹³ Flowing from its ‘natural’ and ‘fundamental’ role, the UNCRC is clear in delineating the obligations of the family towards its children. Within the context of socio-economic rights, the family has the “primary responsibility for the upbringing and development of the child” and the “primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.”⁴¹⁴ Similarly, while the UNCRC stipulates that the right of the individual child to benefit from social security should be recognized, the nature of the benefits granted shall take into consideration the resources and circumstances of her primary care givers.⁴¹⁵ Therefore, the rights granted to the child within the economic and social spheres are clearly mediated through the primary responsibility and obligations of the family to meet the material and other needs of the child, and the scope of the rights enjoyed by the child circumscribed by that relationship.

As the ‘natural’ and ‘fundamental’ unit group of society, the State is required to respect the privileged and fundamental position of the relationship between the child and her family, by taking account of the rights and duties of parents in seeking to advance the child’s best interests, and by respecting the rights and duties of parents to provide guidance and direction to children in the exercise of their individual

⁴¹³ See Article 23(1) of the International Covenant on Civil and Political Rights, which provides that, “[t]he family is the natural and fundamental group of society and is entitled to protection by society and the State”; Article 18(4) further provides that States shall “respect the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions.” Article 10(1) of the International Covenant on Economic Social and Cultural Rights provides that, “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”

⁴¹⁴ See Article 18 and Article 27 of the UNCRC.

⁴¹⁵ See Article 26 of the UNCRC.

rights.⁴¹⁶ In general, the State is required to respect the integrity of the family and to refrain from separating the child from her parents, except where it is deemed necessary in the child's best interests and, as a measure of last resort, in particular in cases of abuse and neglect.⁴¹⁷

In addition to adopting a stance of respectful distance in relation to the privacy and authority of the family, under the UNCRC the State is required to adopt a stance of supportive benevolence towards the family in order to assist it to fully assume its responsibilities towards children within the community. The family accrues certain secondary entitlements to support and assistance from the State as a result of their relationship with their child. For example, within the realm of care, the State is required to “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities” through the development of institutions, facilities and services for the care of children.⁴¹⁸ The State's obligation is enhanced for children of working parents where the State is required to “take all appropriate measures” to ensure children of working parents have the right to benefit from child-care services.⁴¹⁹ Notably, a direct right to care of a particular quality or a particular kind is not recognized for the child, for example, nor is a direct right for parents to access or engage in care of their choosing provided for. The State therefore is under an *indirect* obligation to render appropriate assistance to support parents in their primary obligations within the field of care.

Within the realm of sustenance and living standards, State parties to the UNCRC are required to “take appropriate measures” to assist parents to ensure the child an

⁴¹⁶ Article 3 and Article 5 of the UNCRC.

⁴¹⁷ Article 9 of the UNCRC.

⁴¹⁸ Article 18 of the UNCRC.

⁴¹⁹ Article 18(2) of the UNCRC.

adequate standard of living.⁴²⁰ The State's obligation is qualified in line with the progressive realization standard that is applied to economic and social rights more generally and therefore should be realized "in accordance with national conditions and within [the State's] means."⁴²¹ This includes an obligation on the State to "provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing" in cases of need.⁴²² These obligations are further qualified by the progressive realization standard stipulating that States should meet their legal obligations in the economic and social field more generally "to the maximum extent of their available resources" and "within the framework of international cooperation."⁴²³ Therefore, the UNCRC replicates the distinction that is made between immediate/justiciable civil and political rights, and programmatic/non-justiciable economic and social rights that runs throughout the body of international human rights law more generally.

In contrast to the indirect and progressive legal obligations placed on the State to support the family unit in the areas of care and some social rights, a clear legal obligation is delineated for the State to intervene to remove the child from the care of the family where intervention is deemed necessary for the best interests of the child, in particular in cases involving abuse and neglect, and where it is accompanied by adequate procedural safeguards, including judicial review.⁴²⁴ In its non-binding General Comment on the best-interests standard, the Committee on the Rights of the Child has elaborated that interventions of this kind should be measures of last resort "when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect

⁴²⁰ Article 27(3) of the UNCRC.

⁴²¹ *Ibid.*

⁴²² *Ibid.*

⁴²³ Article 4 of the UNCRC.

⁴²⁴ Article 9 of the UNCRC.

the child.”⁴²⁵ Notably, the Committee has asserted that conditions of imminent harm to the child do not include conditions of material deprivation such as those that impact families who engage their children in economic exploitation.⁴²⁶ The Committee, citing the *Guidelines for the Alternative Care of Children* issued by the UN General Assembly, points out that,

financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, ... but should be seen as a signal for the need to provide appropriate support to the family.⁴²⁷

In such cases it is clear that the State should primarily pursue its secondary supportive obligations towards families living in poverty, rather than intervening to remove the child from the family.

The socio-economic rights granted to the child, particularly in the areas of access to care, the various elements of an adequate standard of living and social security rights, are clearly structured and mediated through the legal obligations the UNCRC assigns to the family as primary duty holder, with the State playing a secondary supportive role. As feminist relational theorists have argued, not only are rights and law best analyzed in terms of *how* they structure relations because doing so will consistently reveal what is really at stake in the problem (or case) at hand, but rights in fact *currently* construct relationships of power, responsibility, trust and obligation.⁴²⁸ When viewed through the relational lens, the socio-economic rights granted to the child are structured by the relationship that the UNCRC constructs between the family and the State. The family/State relationship is envisaged as

⁴²⁵ See UN Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, CRC/C/GC/14, 29 May 2013, at para 61.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid* para 62. UN General Assembly Resolution, *Guidelines for the Alternative Care of Children*, GA/RES/62/142, 24 Feb 2010.

⁴²⁸ See Nedelsky 2011, *supra* note 17 at 65-66.

simultaneously one of potential conflict, with the Convention seeking to protect the integrity and authority of the family from arbitrary State interference, as well as one of potential mutual benefit, with a supportive State infrastructure seeking to enhance the capacities of the family unit to meet its ‘private’ obligations towards its children. The nature of the State’s legal obligations to engage in its secondary supportive role, in particular in the areas of care, living standards and social security rights, remain weak, indirect and subject to the progressive realization standard that is applied more generally to economic and social rights. While privileging the family as the ‘natural’ and primary duty holder with the assumed capacity to provide for the socio-economic well-being of its children, as the relational lens reveals, the child rights framework paradoxically fails to fully delineate positive and direct legal obligations for the State to support the family to undertake this role. Notably, and in contrast, a positive interventionist legal obligation is placed on the State to intervene in critical situations of abuse and neglect, and this is clearly delineated in the Convention.

Critical theorists from the ethics of care tradition point out that in keeping with the liberal foundation of rights-based frameworks the role of the State in relation to children is constructed as falling between a binary of not intervening in the family structure or private sphere at all, on the one hand, to only intervening to enforce the right to care in emergency circumstances, *after* the fact of an extreme failure of care on the other.⁴²⁹ Certainly, in a context of childhood economic exploitation this approach appears to be typified in the ‘penalty and prohibition’ approach of labour law which primarily seeks to intervene to remove children from hazardous or exploitative labour below the minimum age *after* the fact of the harm occurring, without delineating more clearly correlative legal obligations on the State to actively

⁴²⁹ See Arneil, *supra* note 131 at 87.

support the family in the socio-economic sphere in order to avoid this harm. The disparity between the legal obligations under the UNCRC outlined above would also appear to bear this critique out to some degree in the context of the international human rights law framework. However, it must be recognized that the international human rights framework in relation to children has moved some way towards outlining a secondary supportive role for the State and the recognition of relationships as vectors for the delivery of economic and social rights. Nevertheless, theorists such as Barbara Arneil would argue that “[r]ights *necessarily* construct the state in this role of fallback position” because the concept of rights, which is grounded in liberal understandings of the autonomous subject, emphasizes extending the scope of self-determination *over* nurturance, while simultaneously neglecting the necessity for and the obligation to care.⁴³⁰ Arneil summarizes the argument as follows:

while rights theorists, building upon a liberal framework, ultimately believe that the fight to improve children’s lives is progressing the further we move from ‘nurturance’ to ‘self-determination’ ...it is clear that if one takes children’s need to care seriously, we are moving in the opposite direction, namely from a focus on the right to liberal autonomy (and the conceptualization of the individual, state, and society which accompanies it) to a reconceptualised understanding of the need for (and responsibility to) care.⁴³¹

Flowing from this line of enquiry, Barbara Arneil argues that in the distinctive case of children the application of an *ethic of care* should be the primary emphasis of State intervention. In accordance with the care ethic, the responsibilities and obligations of

⁴³⁰ *Ibid* (emphasis added). Arneil 2002, *supra* note 78 argues that, “while the concept of ‘rights’ has been extraordinarily elastic, it cannot escape its origins. Nor can the theorists who use it to anchor their claims. As such, a rights-based argument is ultimately concerned with a change in status for the individual, a state committed to the principles of both non-interference and enforcement (when necessary) of rights and contracts and a society constituted by associational relationships of mutual self-interest,” at 86-87.

⁴³¹ *Ibid* at 86-87.

individuals to care for their children would be promoted and centralized, rather than an emphasis placed on *individual* children's and parents' rights. Arneil claims a framework that is based in obligations rather than rights, "would not *divide* the care of children between the parents to fulfil, and the state to enforce, as liberal theory does. Rather the orientation of an ethic of care is a proactive problem-solving one in which the activity of care is fundamental."⁴³² This reoriented perspective would construct the relationship between the State and the family as one that is mutually supportive, rather than adversarial.⁴³³ Over and above the need to provide and protect children, the State would centralize the need for care and consideration, and therefore would necessarily support parents from the outset by taking care as the fundamental objective of both families and the States.⁴³⁴

While there is much insight to be gained from the work of theorists from the ethics of care tradition, in particular in their critique of the relegation of care, I do not consider that the child rights framework contained in the UNCRC *necessarily* results in the limitations and paradoxes they have outlined. It is arguable, in my view, that there are risks involved in prioritizing care while relegating questions of rights and justice for children. In theorizing what she terms the 'concrete other' which begins with the assumption that every moral person is a unique individual, with his or her own life history, disposition, needs and limitations, Seyla Benhabib notes that,

.....neither justice nor care are primary; they are *each* essential for the development of the autonomous, adult individual out of the fragile and dependent human child. Not only as children, but also as concrete embodied beings with needs and vulnerabilities, emotions and desires we spend our lives

⁴³² See Arneil, *supra* note 131 at 90.

⁴³³ *Ibid.*

⁴³⁴ *Ibid.*

caught in the ‘web of human affairs’, in Hannah Arendt’s words, or in the networks of ‘care and dependence’ in Carol Gilligan’s words.⁴³⁵

Therefore, while the ethics of care scholarship of theorists such as Barbara Arneil usefully reveals the neglect and relegation of the necessity and implications of care in children’s lives, in my view it is preferable to reconstruct rights as relational and intersubjective in line with feminist relational theory.

3.3.2 The ‘Natural’ and ‘Fundamental’ Role of the Family – Mapping the Boundaries

The boundaries of the rights-based framework relating to care and other socio-economic rights that I have pointed to, also reflect a set of assumptions relating to the capacity and role of the family to provide for the material well-being of their children.⁴³⁶ Absent situations of abuse and neglect giving rise to imminent harm, the relationships within the family environment are assumed to be beneficial and supportive of the best interests and full development of children under the UNCRC. On the face of the Convention there is little acknowledgement of the ways in which internal divisions, conflicts of interest, gendered roles and power relations can structure children’s ability to enjoy their rights.⁴³⁷ The uncritical description of the family structure in the UNCRC contrasts with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which adopts a more critical stance towards the family as a site of potential inequality for women for example.⁴³⁸ Under CEDAW, maternity is described as a “social function,” which contrasts

⁴³⁵ As quoted in Tom Cockburn, “Children and the Feminist Ethic of Care” (2005) 12 *Childhood* 71 at 76. See further Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, (New York: Routledge, 1992).

⁴³⁶ See White 2002, *supra* note 16 at 1097-1098.

⁴³⁷ See further White 2002, *supra* note 16 at 1098.

⁴³⁸ *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, 1249 UNTS 13 (entered into force 3 Sept 1981).

somewhat with the portrayal of the “natural and fundamental” function of the family under the UNCRC and the previous Covenants.⁴³⁹ The common responsibility of both parents for the care and development of their children is reiterated throughout the Convention.⁴⁴⁰ Social and cultural patterns that reflect the idea of the inferiority or superiority of either sex are explicitly criticized in the text of CEDAW.⁴⁴¹ In particular, the State is obliged to promote a normative vision of family life based on full equality for men and women including “a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children.”⁴⁴² The text of CEDAW therefore integrates within its core insights of feminist theory which demonstrate that it is important to go beyond assumptions about the family unit and to explore internal divisions and conflicts of interest, including the power relations that sustain them.⁴⁴³ CEDAW remains subject to extensive and broad reservations by a wide range of States, many of whom clearly dispute the normative vision of family life promoted by CEDAW.⁴⁴⁴

The construction of the ‘natural’ and ‘fundamental’ family unit where child well-being is generally fostered under the UNCRC reflects a series of assumptions about

⁴³⁹ Preamble and Article 5(b) of CEDAW.

⁴⁴⁰ Preamble, Article 5(b), Article 9(2), Article 16(d) of CEDAW.

⁴⁴¹ Preamble and Article 5(a) of CEDAW.

⁴⁴² Article 5(b) of CEDAW.

⁴⁴³ See for e.g. Fineman 2000 *supra* note 16.

⁴⁴⁴ See further, Siobhán Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism* (Oxford: Hart Publishing, 2006). It should be noted that while not subject to the same number of reservations as CEDAW, numerous reservations have been entered in respect of the UNCRC that often focus on the interaction between religious law or the tenets of religious beliefs and the normative vision of the family outlined in the Convention, in particular the primacy of parents to impart their religious beliefs to their children. For example, the Holy See has entered a reservation to the effect that it interprets the Convention in a way that, “safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern education, religion, association with others and privacy.” In addition countries such as Saudi Arabia, the Syrian Arab Republic and Iran have entered reservations to the effect that they will apply the provisions of the Convention insofar as they do not conflict with Islamic Shariah’s principles, see online: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>. See further William Schabas, “Reservations to the Children’s Convention” (1996) 18:2 Human Rights Quarterly 472.

family life that may not fully reflect the contextual and diverse realities of many families, particularly those where children are engaged in economic exploitation. In her critique of the ‘assumed family’ within liberal theory Martha Fineman, for example, describes the framing of the family as,

a specific ideological construct with a particular population and a gendered form that allows us to *privatize individual dependency* and pretend that it is not a public problem. Furthermore, the gendered nature of this assumed family is essential to the maintenance and continuance of our foundational myths of individual independence, autonomy, and self-sufficiency. This assumed family also masks the dependency of society and all its public institutions on the uncompensated and unrecognised dependency work assigned to caretakers within the private family.⁴⁴⁵

Even the most nurturing relationships for children within families can involve some conflicts of interest, and these are particularly compounded in situations of socio-economic deprivation where a child’s engagement in labour in many instances is undertaken to respond to the dependency needs of the family overall.⁴⁴⁶ Family and household forms and the relationships within them have always been closely inter-related with a range of environmental, social, political, legal, life-cycle and economic factors, as well as the particular dynamics among the individuals who constitute them.⁴⁴⁷ For example, as Nedelsky has observed in the context of the girl child in many parts of the world her birth will be greeted with disappointment, she will get less to eat, less protein, and less education than her brothers; she may be married very young, have little choice about her husband, and run a much greater risk of violence in her marital home than will her brothers.⁴⁴⁸ The “significance of gender relations in her society in constituting the adult he becomes seems clear,” therefore,

⁴⁴⁵ See Fineman 2000, *supra* note 16 at 14 (emphasis added).

⁴⁴⁶ See White 2002, *supra* note 16 at 1099.

⁴⁴⁷ *Ibid* 1098.

⁴⁴⁸ See Nedelsky 2011, *supra* note 17 at 20.

the formative relations of parent and child, among siblings, and between husband and wife are all shaped by the wider societal, cultural relations of which they are a part.⁴⁴⁹ In its construction of the ‘natural and fundamental’ role of the family, it could be questioned whether the UNCRC successfully mediates the challenge that Sarah White describes as “recogniz[ing] the genuine mutualities of interest in relationships of love and care, while not denying either their contradictory aspects, or their fundamental implication in power.”⁴⁵⁰

The limits of the conceptual framing of the child within the international human rights law framework that I have explored here, in particular the construction of a somewhat abstracted family, the failure to attend fully to the burden and implications of care for children and their families and the strong emphasis placed on the empowered child, are not *inevitable* limitations that flow from rights based frameworks in my view. The distinctive contribution of feminist relational theory, particularly Nedelsky among others, has been to demonstrate that “rights can be rescued from their long association with individualistic theory and practice” through a realignment of the liberal tradition to recognize that human beings are *both* uniquely individual and essentially social creatures.⁴⁵¹ Relational theory shifts the lens of analysis to foreground the implications of core relationships for the advancement of rights, and to ask important questions about how both familial, societal and institutional structures can facilitate or undermine a child’s autonomy, dignity and equality in the context of the relationships in which they are

⁴⁴⁹ *Ibid.*

⁴⁵⁰ See White 2002, *supra* note 16 1099. See also Arneil 2002, *supra* note 78 who critiques the capability of rights-based frameworks to capture the obligations of care for children in the following terms: “the care of children is limited to providing for and protecting them, without any reference to the need of children to affection, kindness, and attention (a caring disposition) in fulfilling these obligations.” She claims such imperfect obligations are “inexpressible in the language of rights,” at 77-78. For a further development of this critique, see Onora O’Neill, “Children’s Rights and Children’s Lives” (1992) 6 Intl J of L & Fam 24.

⁴⁵¹ Nedelsky 2008, *supra* note 17 at 149.

embedded.⁴⁵² Significantly for the child as legal subject, this theoretical framework takes as its point of departure the social embeddedness of individuals.

3.3.3 Re-situating the Child and Family within a 'Nested Web of Relationships'

A core strength of the relational approach for understanding and theorizing the subject position of the child under the law is that rather than abstracting the child from her contextual reality, as is the tendency of the rights based framework, it situates the child in what is described as the 'nested web of relationships' that she inhabits within her particular context.⁴⁵³ The range of relationships the relational approach encompasses is not limited to personal familial relationships, but extends more broadly to relations between student and teacher, welfare recipient and caseworker, citizen and State, and so on.⁴⁵⁴ To illustrate this analysis within the context of childhood economic exploitation where children are working alongside their parents in home-based piece rated work, for example, the parent-child relationship in this instance is shaped by legal rules that protect the privacy of the family and the family home, as well as by socio-cultural expectations and norms surrounding the role and appropriate training of children.⁴⁵⁵ These structures are shaped by the absence of labour law regulation of homeworkers who are working in the informal economy, or the failure to implement existing legal protections due to the weak nature of enforcement mechanisms, including the labour inspectorate.

⁴⁵² See Lacey 2004, *supra* note 16 who asserts that, "the work of writers like Jennifer Nedelsky to reconceptualise rights as a more fundamental level ... probably represents one of the most promising developments in contemporary feminist and critical legal theory ... In her view, the whole idea of rights as boundaries or constraints must be abandoned: it is equally possible, and much more helpful, to think of rights as threads linking subjects with particular kinds of relationships. A more egalitarian society would be a society of rights, but of rights rethought in particular ways, and through the operation of particular democratic processes." See further Campbell 2003, *supra* note 75.

⁴⁵³ On the subject of 'nested relations,' see further Nedelsky 2011, *supra* note 17 at 20-27.

⁴⁵⁴ See Nedelsky 2011, *supra* note 17 at 30-31.

⁴⁵⁵ See further Biggeri et al. 2009, *supra* note 18; Mehrotra & Biggeri 2002, *supra* note 18; Biggeri & Mehrotra 2007, *supra* note 18 who observe, "[c]hildren ... are often engaged in homeworker activities to respond to low price per piece and in order to generate additional income for the household. This implies that many children do not go to school, with others, such as part time workers, register negative effects on educational attainment" see "The Empirical Context and a Theoretical Framework" at 15.

More generally, the relational context of the family is shaped by the vulnerability of informal economy workers in the homework sector which is typified by low earnings, insecure contracts and a limited capacity for collective organising.⁴⁵⁶ The child's relational context is further structured by the absence of social protection mechanisms, such as social insurance or social assistance, which would protect against the risks of income volatility or the loss or injury of the adult worker within the household.⁴⁵⁷ A further pattern of relations that structures the child's contextual reality is the economic relationship between the home-worker and the chain of subcontractors and intermediaries that makes the ability of the family to bargain for higher wages extremely challenging.⁴⁵⁸ As Nedelsky observes, "[e]ach set of relations is nested in the next, and all interact with each other. Relational selves shape and are shaped by all interactions."⁴⁵⁹

By encompassing a broad range of both personal and institutional relationships within the structure of relational theory, Nedelsky is committed to uncovering the many dimensions of society that foster inequality and insecurity whether arising from State or non-State actors. The relational project extends therefore beyond the obvious intersections of law with a particular problem, to analyze sites where the law, through its presence or absence, is complicit with a range of other relational structures in giving rise to a particular problem of inequality or oppression. As Nedelsky observes, "relations structured by law often serve to hide power and to hide

⁴⁵⁶ See further ILO Informal Economy Policy Resource Guide 2013 *supra* note 180, section 4, "The Regulatory Framework and the Informal Economy".

⁴⁵⁷ See Biggeri & Mehrotra 2007, *supra* note 18, who develop on this point as follows: "In terms of social protection, such workers in the informal sector tend to be by far the most vulnerable. Vulnerability – the probability that a shock will result in a decline in well-being – is largely a function of a household's asset endowment (physical and human capital) and insurance mechanisms. The lack of income mechanisms can have serious consequences for income growth at household, hence at a micro level. Thus, if children are seen as a substitute for old-age security, measures to provide a pension after retirement, and some form of social security in the interim, would greatly reduce the perceived benefit stream from additional children," at 16.

⁴⁵⁸ *Ibid* at 22.

⁴⁵⁹ See Nedelsky 2011, *supra* note 17 at 31.

the role of the State in that power.”⁴⁶⁰ While acknowledging that the law alone cannot transform deeply held socio-cultural patterns, Nedelsky observes “nor are they likely to change without support from law.”⁴⁶¹ Therefore, the relational project is a deeply transformative one that seeks to challenge long-standing structures of relations that impact on the enjoyment of rights.

The relational approach helps to reveal the ways in which the law is complicit with a range of broader non-State relational structures and therefore disrupts the long-critiqued divisions between the public and private spheres, as well as categories such as positive and negative legal obligations. As Nedelsky outlines “[w]hen rights are understood as structuring relations, and relations are seen as essential for rights to be realized, the relational approach to implementing values extends far beyond the State. It helps to recognize that even when rights are at stake, the state is not the only relevant actor.”⁴⁶² Nedelsky has used the example of the gendered division of household care-work to illustrate her analysis. The relational approach invites us to see that existing relational structures prevent full social, economic or political equality for women. In this sense ‘private relations’ interfere with public rights. These relational structures are sustained by a complex mix of deeply internalized gender norms, expectations entrenched in families and workplaces, and legal structures that permit or encourage discrimination flowing from these household relations.

When analyzed through the relational lens it becomes clear that under the UNCRC the child’s right to be free from economic exploitation under Article 32 is framed primarily as the right of the *individual* child, rather than being contextualized within

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid* at 364.

⁴⁶² Nedelsky 2011, *supra* note 17 at 326.

the relational and material well-being of the family unit overall, as well as the family's situatedness within broader conditions of structural inequality. The obligation to provide for an adequate standard of living and for the care needs of children is assigned primarily to the 'private' responsibility of the family, with secondary support being provided progressively by the State. Somewhat analogous to the labour law framework which focuses on the individualized worker, this serves to somewhat abstract the child from the range of structural social processes and inequalities that are shown to underpin childhood economic exploitation, namely, poverty and income volatility, worker vulnerability in the informal economy, and the burdens and implications of care activity and care work.

In contexts of economic exploitation, a relational approach effectively illustrates how in combatting the problem children need to be conceptualized as being nested within the family unit, as well as within the broader institutional relationships that determine her well-being, rather than abstracted as an individualized rights holders. This approach would move beyond a narrow 'penalty and prohibition' approach that seeks to relieve the immediate physical and psychological harms of child labour *after* the fact that it has occurred and to prosecute individual exploitative employers, to a structural approach that would seek to enable and empower families to ensure the economic well-being of the family and the care needs of their family members.⁴⁶³ As Angela Campbell has observed, understanding a child's network of relations enables

⁴⁶³ In the context of her work on discrimination and structural inequality, Colleen Sheppard advocates a broad contextual inquiry that addresses individual stories, institutional relations, systemic practices, and larger structural and societal patterns of inequality and exclusion. Specifically in the context of institutional relations she argues that, "[t]o ensure that inequality will be eradicated in a more sustaining way, remedies cannot consist simply of damage award or isolated individual relief, as important as these remedies may be. Rather remedies need to address the problem of the reproduction of inequality: they need to be directed at restructuring the institutional relations that create and/or perpetuate systemic inequalities. No longer can we simply locate the problem of inequality in the 'victim' or in an isolated act of the perpetrator. We need to look at the relational dynamic of inequality and its institutional expression"; see Sheppard 2011, *supra* note 16 at 73.

the formulation of a broader rubric of rights, including “a web of *interdependent* rights that underscore a connection to and a reliance on the world outside the self [which] is fundamental to children.”⁴⁶⁴ A relational approach that nests the child within her network of relations would integrate access to decent work for the adult workers of the household; more direct legal obligations on the State to enable the provision and distribution of adequate care supports within families; and specific forms of social protection mechanisms that are explicitly linked to laws prohibiting childhood economic exploitation and promoting access to education. Currently, the Convention falls short of granting full recognition of the right to an adequate standard of living to the individual child, believing that it will be mediated in recognition of the core role of the family as a vector for socio-economic well-being. However, in doing so the Convention fails to stipulate the conditions that could begin to address the structural inequality of families, and thereby fails to meet the promise of its turn towards a relational framing of rights in a way that would fully centre the child within the nested web of relationships that have such a critical role in her wellbeing.⁴⁶⁵ As outlined in the critique of the labour law framework, in a context such as childhood economic exploitation, the socio-economic well-being and care needs of the child cannot be fully conceptualized outside of the context of the relationships of dependence and interdependence between the child and their

⁴⁶⁴ See Campbell, *supra* note 128 at 407 and 410 (emphasis added).

⁴⁶⁵ For a critique of the liberal framing of the child more generally, see further Minow 1986, *supra* note 17 at 24. While Minow’s critique pre-dates the UNCRC and therefore does not explicitly consider its provisions, it continues to have some resonance when we map some of the limitations of the UNCRC as outlined above. Specifically, Martha Minow has highlighted the inadequacies of the liberal framing of the child that results from the divisions between the public and private sphere which she asserts fails to “challenge social patterns that permit public neglect, assign[s] private responsibility for children and also perpetuate[s] public failures to develop the preconditions for that private responsibility,” at 7 and 24.

primary caregivers, as well as the child's relationships with the labour market and with the various institutions of the State.⁴⁶⁶

3.3.4 Re-situating the Implications of Care for Children and Families

A further strength of the relational approach when applied to the context of the child as a legal subject is the central value and recognition it places on human dependence and the necessity for care, as well as the implications of caring relationships for the development of autonomy. Nedelsky observes that “[h]uman dependence on others, and the collective interdependence that follows, are central features of ... a relational conception of human selves.”⁴⁶⁷ In accordance with this approach, our fundamentally social, relational nature – and thus dependency – cannot be set to one side when we think of any of the core puzzles of law or politics, such as justice, mutual obligation, or the good life.⁴⁶⁸ Along with feminist theorists from the ethics of care tradition, the relational approach is committed to recognizing care as a central value and to ensuring that society is organized so that those who provide care are not disadvantaged and that they are not relegated to the bottom of hierarchies of relationships.⁴⁶⁹ Through the relational approach, Nedelsky advocates the need to construct just relations with caregivers, and the need for more explicit recognition and protection of the value of intimate relations.

Nevertheless, relational theory remains cognisant of the potential for oppression and inequality that arises from ‘unchosen attachments,’ and committed to the capacity for individuals to revise their life plans and to choose ways of living other than that presented to them by their social contexts.⁴⁷⁰ As highlighted above, while privileged

⁴⁶⁶ See Chapter Two at 88-92.

⁴⁶⁷ See Nedelsky 2011, *supra* note 17 at 27-28.

⁴⁶⁸ For an overview of feminist conceptions of care see further Sheppard, *supra* note 16 at 103-110.

⁴⁶⁹ See Nedelsky 2011, *supra* note 17 at 82-83.

⁴⁷⁰ See Leckey 2008, *supra* note 77 at 10.

under the UNCRC as the ‘natural and fundamental’ group for the development of children, the family cannot be assumed to be necessarily a harmonious structure for children’s well-being. One of the important contributions of feminist legal theory has been to elucidate the reality that not all familial relationships are benign and that the relationships individuals hold within their families frequently reflect public assumptions and norms that are reflective of broader inequalities within society.⁴⁷¹ As distinct from liberal theory, however, for relational theory autonomy is not exercised in isolation; rather, it is formed in the context of constructive relationships which are necessary for autonomy to flourish.⁴⁷² Therefore, “a relational conception of autonomy turns our attention to the kinds of relations that undermine and enhance autonomy, and the forces that structure those relations – from institutional design to gendered division of labour to beliefs about entitlement.”⁴⁷³ This shift in the conceptualization of autonomy is a key insight of relational theory; it recognizes interdependence as a central fact of political life and asks how we can ensure individual autonomy in the face of collective power.⁴⁷⁴ The relational approach moves the focus from protection against others, to structuring relationships so that they foster autonomy, and to the ways in which relationships can develop and sustain both an enriching collective life and the scope for genuine individual autonomy.

The commitment to critically assessing and developing relational autonomy is of core relevance for children because of the inevitable relationships that structure their well-being and access to rights. Rather than assuming individuals automatically hold

⁴⁷¹ See Nedelsky 2011, *supra* note 17 at 32. See further Olsen 1992, *supra* note 16 who states, “[r]ather than an inherently ‘private’ and ‘natural’ institution that exists apart from the polity, the family serves a political function of creating and ordering gender and additionally, childhood. Relational theory retains a keen awareness of the potential for oppression presented by unchosen attachments, which prevents it from fully rejecting the priority afforded to the autonomous individual within liberal theory,” Nedelsky 2011 *supra* note 17 at 32.

⁴⁷² See Nedelsky 2011, *supra* note 17 at 52, 136-137.

⁴⁷³ *Ibid* at 119.

⁴⁷⁴ See Sheppard, *supra* note 16 at 107.

the capacity to act autonomously, the relational approach requires a critical and contextual appraisal of the relationships and power structures that contribute towards the fostering or undermining of autonomy. The form that autonomy takes is recognized as being shaped by the structures of relations, including power relations, with which an individual interacts.⁴⁷⁵ While the capacity for autonomy is not contingent upon and cannot be reduced to those power relations, its nature is a possibility that is considered to be both fragile and tenacious.⁴⁷⁶ Through the concept of relational autonomy, Nedelsky assists us in thinking through how to structure relations, even in circumstances of dependence and hierarchy, in ways that can make autonomy available to all.⁴⁷⁷

When we locate interdependence and the necessity of care as a central fact of political life within the context of childhood economic exploitation, this enables us to integrate more fully the considerable time that children (more often girl children) spend in social reproduction work within their own households, often to the detriment of their right to education, within the concept of childhood economic exploitation. In its centralization of ‘work and employment’ in the productive sphere, I have argued the labour law model has largely excluded the large cohort of ‘out of

⁴⁷⁵ *Ibid* at 170. According to Nedelsky, the form autonomy takes, “varies across many factors: stage of life, such as infancy, adolescence or senility; structures of power relations, such as slavery, incarceration, hierarchies of gender, class and racialization; personal relations, such as abusive or nurturing parents, teachers, or spouses.”

⁴⁷⁶ *Ibid* at 170-171.

⁴⁷⁷ In a critique of the relational approach of Minow (which does not include a theoretical account of the concept of relational autonomy) from a child well-being perspective, Katherine Federle asserts that by placing a central focus on the realisation of rights for children through relationships we foreclose an honest assessment of the power we have over children. In particular she asserts, “feminist concerns about the importance of connection and social relationships actually mask the power (perhaps the only power) that women have. Ignoring our own hierarchical position in relation to children may prevent us from seeing our acceptance of capacity as a prerequisite to the acquisitions of rights.” While this critique may be valid in the context of Minow’s approach, I consider that Nedelsky’s commitment to relational autonomy which requires us to critically appraise the autonomy enhancing potential of diverse relationships overcomes this critique. See Katherine Hunt Federle, “Rights Flow Downhill” (1994) 2 *Intl J of Child Rts* 343 at 355-356. For further engagement with this discussion see Lim and Roche 2000, *supra* note 81 at 236-241.

school' or 'inactive' children and has failed to capture the contextual realities of children's lives which often results in them moving between the productive and reproductive spheres in response to the demands and needs of their household. While the UN Committee on the Rights of the Child has demonstrated an increased awareness of the role of the informal economy in its concluding observations, including the particular problems that arise in the context of child domestic work, it has not to date demonstrated an awareness of the role of social reproduction work in its analysis of Article 32. Centralizing the necessity of care necessarily complicates the binaries between the productive and reproductive spheres in ways that more fully captures the lives of children and that moves beyond the limitations of the 'prohibition and penalty' approach which has been a central focus of the concluding observations of the Committee on the Rights of the Child.

A shift in perspective that centralizes care and interdependence would also focus more fully on the *implications* of the burden of care work and care responsibilities for the household and for children's primary care givers in ways that necessarily broadens the rubric of rights to consider a range of interdependent rights for children and their families. While the UNCRC certainly acknowledges the importance of care for children's lives, and requires to State to 'take all appropriate measures' to ensure children of working parents have the right to benefit from child-care services, the legal obligations it stipulates are indirect and weak when contrasted with other more directive provisions of the Convention to intervene, for example, in cases of serious abuse and neglect of the child. The Convention falls short of recognising a direct right to care of a particular quality or a particular kind, nor is a direct right for parents to access or engage in care of their choosing stipulated under the UNCRC. The Convention continues to rest on the assumed

capacity of the family to absorb the burden of care in light of its ‘natural and fundamental’ role. While the UN Committee on the Rights of the Child has not yet issued a General Comment outlining the types of measures that are required in this field, a General Comment in this area could provide welcome clarification on the type of enabling environment that would foster the right to receive and provide care, particularly in contexts of poverty where economic exploitation in childhood is common. Paradoxically, the UNCRC places central emphasis on the participation rights and developing autonomy and capacity of the child as a central tenet of the UNCRC. However, as relational theory makes clear, autonomy can only begin to unfold within the context of constructive caring relationships between the child and her primary caregivers, as well as the broader range of institutions, such as schools, that play a key role in children’s lives. Put simply, if the Convention is to live up to its promise to recognize the evolving autonomy of the child as a rights holder, this *necessarily* requires a further interrogation and delineation of the crucial role of care in children’s lives.

3.3.5 UNICEF Discourse – Emerging Examples of a Relational Approach in Practice?

Notwithstanding some of the limitations of the legal construction and framing of the child under the UNCRC, emerging examples of the relevance of a relational approach to children’s rights are increasingly evident in the policy discourse of UNICEF in its conceptualization of interventions in the ‘life course’ of the child.⁴⁷⁸ The parallels between relational theory and the life course perspective are in keeping with the observations of Nicola Lacey who has stated that relational theory holds “a rich source of insight for the future development of international human rights, and one

⁴⁷⁸ See for e.g. Dornan & Woodhead 2015, *supra* note 23 at 9.

in which not only legal institutions such as courts and legislatures but also the institutions of global and local civil society may be invoked.”⁴⁷⁹ Through the life-course perspective, UNICEF recognizes childhood and adolescence as a sequence of interconnected life stages that are socially defined and age specific.⁴⁸⁰ In research undertaken on behalf of UNICEF in relation to how inequalities develop through childhood, it has been recognized that “children’s development is nested within household contexts, which are also changing over time, and children are themselves active in shaping their development, according to their capacities, agency and identity.”⁴⁸¹ At the household level, UNICEF has pointed to the role that parents and others typically play in shaping the aspirations of children’s development, as well as the resources, the risks and the protection factors that have varying impacts on children depending partly on their role in the household.⁴⁸² Beyond the singular child and family household, this research has also highlighted that “children’s development through the life course requires a broader framework, not just about children’s development, but also about the social processes effecting households, as these in turn impact children.”⁴⁸³ A ‘family life-cycle approach’ recognizes that it is important to identify patterns of vulnerability in households and the fact that a household’s “capacity to absorb shocks without detriment to children’s well-being is similarly likely to depend on changing household conditions.”⁴⁸⁴

Overall, UNICEF has indicated that it is moving towards a more integrated systematic approach to interventions in childhood, “aiming to shift its focus away

⁴⁷⁹ See Lacey 2004, *supra* note 16 at 52-53.

⁴⁸⁰ See Mary Daly, Rachel Bray, Zlata Bruckanf, Jasmine Byrne, Alice Margaria, Ninoslava Pecnik & Maureen Samms-Vaughan, *Family and Parenting Support Policy and Provision in a Global Context* (Geneva: UNICEF Office of Research Innocenti, 2015) at 34 [Daly et al. 2015].

⁴⁸¹ Dornan & Woodhead 2015, *supra* note 23 at 9-10.

⁴⁸² *Ibid.*

⁴⁸³ *Ibid* at 9.

⁴⁸⁴ *Ibid* at 10-11.

from individual forms of harm – violence, abuse, child labour, trafficking – and towards creating a protective environment that addresses risks and minimizes vulnerabilities of children.” This involves not only a broader focus on child well-being, but also stronger coordination between specialized agencies engaged in child protection and a recognition that child protection strategies are unlikely to be effective if they are unconnected to strategies addressing the causes of poverty and deprivation. Therefore, one of the major advantages of the life-course perspective adopted by UNICEF is the manner in which it provides for more comprehensive, inter-sectoral and integrated approach to programming that moves away from the abstracted, individualized rights holder to a fuller understanding of the family in its ecological context.⁴⁸⁵

However, the life-course perspective is a relatively new development within UNICEF policy analysis and it is not yet clear to what extent it has been integrated within policy and programming initiatives with partner countries.⁴⁸⁶ In recent research analyzing to what extent a life-course perspective underpins family support and parenting support laws and policies across diverse countries, for example, UNICEF has noted a “a general absence of a life course perspective in fields of family support

⁴⁸⁵ See Daly et al. 2015 *supra* 480 at 34.

⁴⁸⁶ The life-course perspective, which originated in the 1960s, has been in existence within other disciplines, in particular in the field of social work for some time. In their commentary on the potential of the life course perspective within the Canadian context, McDaniel and Bernard assert that: “the life course is much more than an individual’s life trajectory, even when the trajectories are summed across multiple realms; the life-course perspective can make visible policy options and interventions previously hidden or eclipsed. The life-course perspective as a policy lens shines light on places and points where policy interventions can have big payoffs for little investment.What is needed is a change in policy paradigm toward life as it is lived by us all as social actors in complex social and policy environments, and in sequence over time. Consistent with the principles of the life-course perspective, actors’ life courses must be observed in shifting social contexts that shape them and that actors themselves shape. The process must see that realms of activity—family, work, society, politics, health care, globalization, and so on—are not separate, not silos, but all impinge on actors’ lives simultaneously as they make strategic choices. Individuals are not atoms moving through space and time, but deeply connected to others in their lives, and whose lives affect theirs”, see Susan McDaniel & Paul Bernard, “Life Course as a Policy Lens: Challenges and Opportunities” (2011) 37 Canadian Public Policy 1 at 10. See further Maria Connolly & Tony Ward, “Navigating Human Rights Across the Life Course” (2008) 13 Child and Family Social Work 348.

and parenting support.”⁴⁸⁷ In particular, it has highlighted that there continues to be a “disjuncture between how lives are lived and policy planned: children’s lives are lived multi-dimensionally even if services are most often delivered sectorally.”⁴⁸⁸ One of the key challenges appears to lie in the *delivery* of an integrated policy approach, which is grounded in the life-course perspective that can respond to children’s lives as lived, in part because different sectors typically involve complex and multi-layered systems of governance and financing from central government policy to programme delivery via community-based services.⁴⁸⁹

To illustrate the disjuncture between the progressive policy discourse of UNICEF and some of its national partners at the domestic level, it is worth noting the recently enacted Bangladesh Children’s Act 2013 which was brought into force with the stated aim of implementing the provisions of the UNCRC.⁴⁹⁰ Rather than providing for a comprehensive engagement with the UNCRC, the primary focus of the 2013 Act is to enact adjustments to the criminal justice system to provide for children who are engaged in juvenile offending, as well as to provide for children who are considered disadvantaged or in need of specific care by the State due to the absence of parental care.⁴⁹¹ As a report commissioned by the Bangladesh National Human Rights Institution notes, “this act essentially deals with the treatment of children who come in conflict with the law and it has no provision on child workers per se.”⁴⁹² The limited provisions in the 2013 Act that are of relevance to children engaged in

⁴⁸⁷ See Daly et al. 2015 *supra* 480 at 33-34.

⁴⁸⁸ See Dornan & Woodhead 2015, *supra* note 23 at 46.

⁴⁸⁹ *Ibid* at 46-47.

⁴⁹⁰ See Hon. Justice M. Imman Ali, “The Children Act 2013 – A Brief Commentary” online: http://www.supremecourt.gov.bd/resources/contents/Children_Act_2013-Brief_Commentary_v4.pdf, [Hon. Justice Ali 2013]

⁴⁹¹ *Ibid*,

⁴⁹² See Dr. Md. Rizwanul Islam. “Study Report on Regulating the Unregulated Domestic Works by Children” Submitted to National Human Rights Commission, Bangladesh, June 2014 at 10 online: <http://www.nhrc.org.bd/PDF/Study%20reports/Children.pdf>

economic exploitation, primarily focus on making it a criminal offence for adults to engage children in begging or other forms of economic exploitation or illicit activities, thereby replicating the ‘prohibition and penalty’ approach that I have critiqued.⁴⁹³ While this Act has been welcomed as an extremely important element in strengthening Bangladesh’s laws for the cohort of children who are engaged with the criminal justice system, it certainly cannot be considered a comprehensive incorporation of the UNCRC. In its primary focus on providing for children in the most extreme situations where they have become involved with the criminal law, *after* the fact of harm has occurred to them, rather than addressing the structural inequalities that surround their lives this Act mirrors trends in child protection policy which have taken a more retrospective rather than proactive approach.

3.4 Exploring the Normative Foundation of Economic and Social Rights through the Lens of Childhood Economic Exploitation

As the analysis above has demonstrated, many of the economic and social rights that could assist in preventing childhood economic exploitation, in particular the right to social security, the right to an adequate standard of living and rights surrounding access to care, are subject to weak and progressive legal obligations. Notwithstanding the discursive or ideological commitment to the ‘indivisibility’ of human rights within human rights discourse, the juridical content of economic and social rights remains contested.⁴⁹⁴ With the splitting of the treaty to give effect to the Universal

⁴⁹³ See Hon. Justice Ali 2013, *supra* note 490.

⁴⁹⁴ See Kerry Rittich, “Social Rights and Social Policy: Transformations on the International Landscape”, in Daphne Barak-Erez & Aeyal M Gross, eds, *Exploring Social Rights: Between Theory and Practice* (Oxford and Portland, OR: Hart Publishing, 2007) [Rittich 2007] who points to a paradox surrounding social rights, “this is the discontinuity between the discursive or ideological commitment to human rights and the actual status of social rights, at least as reflected in institutional and programmatic commitments. Human rights in theory now enjoy unprecedented normative status in the international order ... the claim

Declaration into the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) economic and social rights have been made the subject of programmatic and what is claimed are ‘non-justiciable’ legal obligations.⁴⁹⁵ The difference in the nature of the State obligations imposed by the different types of rights is seen as justifying their distinct juridical status.⁴⁹⁶ More recent treaties, including in this case the UNCRC, have combined the protection of civil and political and economic and social rights. However, the provisions relating to economic and social rights have replicated the programmatic character of these rights more generally. This is a structural feature that runs throughout the body of international human rights law that commentators such as David Kennedy go so far as to claim “seems central to the conditions of political possibility that make human rights an emancipatory strategy in the first place, and to the institutional character of the movement.”⁴⁹⁷

As distinct from international human rights law, the traditional typology of rights has been particularly challenged by labour rights more generally which are often held up as straddling the divide of the spectrum of rights.⁴⁹⁸ As Blackett observes, “[l]abour rights, particularly as they were historically articulated and supported through the

is that human rights are indivisible and interdependent, such that the realisation of one right is dependent on the recognition and protection give to another. Human rights are now increasingly linked to development as well; in one of the most popular contemporary formulations, human rights, including those rights basic to the development of human capabilities, are integral to reconceptualising development as freedom. Yet at the same time, the mechanisms by which social rights have traditionally been advanced are either threatened or are currently being dismantled across a wide variety of states,” at 110-111.

⁴⁹⁵ For a discussion of the background to the separation of the two Covenants, see Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social, and Cultural Rights: Theoretical and Procedural Aspects* (Antwerp: Intersentia/Hart, 1999) at 18.

⁴⁹⁶ See Fudge 2007, *supra* note 221 at 43-44; see further Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Leiden: M. Nijhoff, 2004) at 3.

⁴⁹⁷ See David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, (Princeton: Princeton University Press, 2004).

⁴⁹⁸ See Fudge 2007, *supra* note 221 at 22-27. On the interplay of labour rights and human rights within the framework of European Union and Council of Europe Legal frameworks as they impact domestic workers see generally, Virginia Mantouvalou, “Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Workers” (2012-2013) 34 *Comp Lab L & Poly* 133.

normative framework of the International Labour Organisation, have avoided, in an integral way, the polemic surrounding the argued distinction between enforceable, priority covenants on civil and political rights and programmable, aspirational economic and social rights, imagined as social outcomes.”⁴⁹⁹ By creating ratifiable conventions and non-ratifiable recommendations, the ILO took little account of the civil/political and economic/social divide and reinforced in practice the view that as far as labour rights were concerned, they were indivisible.⁵⁰⁰ In addition, labour rights have distinctive elements, in particular their inclusion of *collective* civil and political rights and their application horizontally to private actors within the market, which challenge the traditional typology of rights.⁵⁰¹ In contrast to the vertical application of the human rights framework between the State and individual citizen, labour rights extend political and social rights into the market, thereby moving beyond the scope of standard civil and political and economic and social rights.⁵⁰² The *effective* abolition of economic exploitation in childhood has been elevated to the status of a fundamental right under the *ILO Declaration*.

Whether viewed through the lens of human rights law or labour law, the phenomenon of childhood economic exploitation, I argue, provides a profound illustration of the artificiality of retaining a sharp distinction between positive/non-justiciable/programmatic economic and social rights on the one hand, and negative/justiciable/immediate civil and political rights on the other and a unique lens through which to explore and deepen the normative grounding of economic and social rights.⁵⁰³ Narrowly, the prohibition of child labour can be conceived as the

⁴⁹⁹ See Blackett 2007, *supra* note 13 at 225.

⁵⁰⁰ *Ibid.*

⁵⁰¹ Fudge 2007, *supra* note 221 at 25-26.

⁵⁰² *Ibid.*

⁵⁰³ On the question of children’s economic and social rights in particular, see Nolan 2011, *supra* note 181. See further Asborn Eide, Caterina Krause & Allan Rosas, eds, *Economic, Social and Cultural Rights: A*

economic right not to be subject to economic exploitation, whether through working at too young an age which is presumptively exploitative, or in conditions that are likely to give rise to physical, psychological or moral harm. However, as we have seen throughout the analysis, the effective advancement of this right requires a broadening of the lens to conceive economic exploitation in childhood as engaging the denial of a further range of economic and social rights, in particular the right to an adequate standard of living, the right to adequate social security, the right to education, the right to the highest attainable standard of health and the right to enjoy and receive care for *both* the individual child *and* for the family, in particular her primary caregivers, in which he or she is inevitably embedded.

In some instances, childhood economic exploitation could be conceived of as coming within the spectrum of traditional civil and political rights, including, for example, freedom from inhuman and degrading treatment where the work engaged in gives rise to treatment that exposes the child to serious physical or psychological suffering or that causes severe humiliation that undermines personal dignity.⁵⁰⁴ Potential interferences with the right to liberty and movement, as well as interferences with the right to enjoy family and private life can also arise in this context, especially where children are engaged in domestic child labour outside of their own family home.⁵⁰⁵ Additionally, the sources of the human rights violation in cases of economic

Textbook, (Boston: M. Nijhoff, 2001, 2nd edition); Katharine G. Young, *Constituting Economic and Social Rights*, (Oxford: Oxford University Press, 2012).

⁵⁰⁴ See for e.g. ILO Hazardous Work 2011, *supra* note 2 at 30. This ILO research states that a 2006 study in Bangladesh showed that almost 70% of child domestic workers experienced physical abuse and systematic beatings, either to ensure compliance or as punishment when perceived to be slow or uncooperative. Nearly half of the physical abuse resulted in bodily injury and very few of the children received medical attention. A survey in Latin America of female child domestic workers found that, on average, more than 66% were physically or psychologically abused and that the threat of sexual advances from their employers was a constant presence.

⁵⁰⁵ Child domestic work in conditions of servitude continue to occur in the Global North as exemplified by the important precedent established by the European Court of Human Rights (ECtHR) in *Siliadin v. France* (2006) 43 EHRR 16. In that case the ECtHR found France in violation of its positive obligations under Article 4 (prohibition of servitude) of the European Convention for the Protection of Human Rights and

exploitation are generally private actors, in particular the family and other employers, who engage children in productive market activities and in some instances non-productive household activities. Therefore, the horizontal scope of labour rights, rather than narrower vertical scope of human rights protections, is of particular relevance. The effective enforcement of freedom from childhood economic exploitation therefore can be seen to challenge both the traditional typology of rights protections as well the traditional scope of their application between the State and citizen.

Numerous academic commentators have been engaged in advancing the normative foundation of economic and social rights and in challenging their lack of a clear basis in law. In general, attempts to increasingly mobilize law for the recognition of economic and social rights are a distinctive feature of contemporary both human rights law discourse and labour law discourse.⁵⁰⁶ This has been explained as part of the movement to recognize the social dimensions of globalization, and as a response to the decline of the traditional vehicles for economic and social rights such as the welfare state and collective bargaining.⁵⁰⁷ One of the key lines of enquiry among academic commentators has been to demonstrate that economic and social rights, even those that are directly redistributive, function in the same way as civil and political rights. Drawing on the capabilities approach of Amartya Sen, Simon Deakin

Fundamental Freedoms for its failure to criminally prosecute a couple who kept the applicant, a minor from Togo, in domestic servitude for some years.

⁵⁰⁶ See Fudge 2007, *supra* note 221 at 31. See further Simon Deakin, "Social Rights in a Globalized Economy" in Philip Alston, ed, *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005) at 25 [Deakin Social Rights 2005].

⁵⁰⁷ See Fudge 2007, *supra* note 221 at 30 who argues that the renewed emphasis on social rights in the mid-1990s is part of the movement to recognize the social dimension of globalization and in particular to re-embed the labour market in society as a further example of Polyani's double movement in that it responds to the need to re-institutionalize the employment relationship in light of economic restructuring, the breakdown of the standard employment relationship, and the challenge to traditional forms of collective representation. See further Rittich 2007, *supra* note 494 at 108; Bob Hepple, "Enforcement: the Law and Politics of Cooperation and Compliance" in Bob Hepple, ed, *Social and Labour Rights in a Global Context* (Cambridge: Cambridge University Press, 2002).

in particular has demonstrated that, “a capabilities oriented perspective helps us to see that social rights are not different in their essence from civil and political rights ... Social, civil and political rights, far from being in fundamental opposition to each other, are to be found at different points along a single continuum.”⁵⁰⁸ For Deakin, social rights should be understood as institutionalized forms of capabilities which *enable* individuals to realize the potential of their resource endowments and thereby achieve a higher level of economic functioning.⁵⁰⁹ He asserts that the capability concept can be understood as an answer, or perhaps the beginning of an answer to the neoliberal critique of labour and social security law which is based on the *market-enabling* function of the rules of social laws.⁵¹⁰ As Blackett observes, the manner in which Deakin maps capabilities onto economic and social rights clearly illustrates the *enabling* character of economic and social rights within the spectrum of rights and freedoms.⁵¹¹ Far from being inimical to the effective functioning of the labour market, economic and social rights are actually at the core of enabling a labour market order in which the resources available to society are fully realized.⁵¹²

When viewed through the lens of the phenomenon of economic exploitation in childhood, the denial of economic and social rights, and its ‘disenabling’ character, is perhaps most starkly illustrated where the allocation of the burdens and risks of economic and care responsibilities fall on the shoulders of children in this context.

⁵⁰⁸ Deakin Social Rights 2005, *supra* note 506 at 59. See further Deakin & Wilkinson 2005, *supra* note 122 at 290-294 and 342-353.

⁵⁰⁹ Deakin & Wilkinson *ibid* at 347.

⁵¹⁰ *Ibid* at 348.

⁵¹¹ See further Blackett 2007, *supra* note 13 at 228. Similarly, Fudge asserts that the appeal of Deakin’s application of the capabilities approach is that it links the normative ground of social rights (human freedom) directly to the welfare goal (market efficiency), see Fudge 2007, *supra* note 221 at 45.

⁵¹² Deakin & Wilkinson *supra* note 126 further state that, “[i]f capabilities are a consequence not simply of the endowments and motivations of individuals but also of the access they have to the processes of socialization, education and training which enable them to exploit their resource endowments, then by providing the conditions under which access to these processes is made generally available, mechanisms of redistribution may not be just compatible with, but become a precondition to, the operation of the labour market. In this way, social rights may play a pivotal role in providing an institutional foundation for individual capabilities,” at 291.

This impact is evident in the physical embodiment of the harm that results to children's bodies from such labour, in the impairment of the child's ability to enjoy the right to education, and in the limitation of a child's opportunities to transition to decent work as an adult among other harms.⁵¹³ The distinctly inter-generational character of the child labour phenomenon further demonstrates the lack of enabling quality of the denial of economic and social rights in its perpetuation of capability deprivation down through the generations. When conceptualized as preconditions that *enable* the development of full human freedom and simultaneously that end the conditions under which various forms of unfreedom can persist, it becomes increasingly clear that economic and social rights can no longer be disparately matched with weak forms of legal obligations on States that designate their realization as 'political' or 'aspirational.'

The strength of the capabilities approach in deepening the normative foundation for social rights as it has been applied by Deakin is that it engages directly with the redistributive role of the State, but demonstrates that mechanisms of redistribution may not be just compatible with, but become a precondition to, the operation of the labour market.⁵¹⁴ Conceiving of economic and social rights as being valuable solely for their market enabling functions may give rise to some risks, however, as noted by Hugh Collins who observes that such an instrumental view of social rights "creates a greater risk that such rights might be traded off against other welfare values and interests since in the welfare calculus rights become valued not in themselves but for their net effects."⁵¹⁵ Fudge similarly notes that Deakin and Wilkinson's approach "cedes a great deal of moral terrain to the market" and asserts that other values, in

⁵¹³ ILO Hazardous Work 2011, *supra* note 2.

⁵¹⁴ See Deakin & Wilkinson 2005, *supra* note 122 at 291.

⁵¹⁵ See Hugh Collins, "Review of Simon Deakin and Frank Wilkinson's *The Law of the Labour Market*" (2006) 35 *Industrial Law Journal* 105 at 109 [Collins 2006].

particular democracy, solidarity and distributive justice should also be considered as providing the normative foundation for social rights.⁵¹⁶

Given the potential limits of the capabilities based grounding for economic and social rights it is useful to consider a further normative grounding for advancing the juridical basis of economic and social rights by looking to the historical roots and genealogy of these rights themselves and assessing the implications of that narrative for children at risk of economic exploitation. During the period after World War II, economic and social rights were instituted, particularly in the industrialized Global North, more robustly within the European context, as part of a wider effort to regulate the labour market and to re-forge the link between family life and the economy.⁵¹⁷ Economic and social rights were part of a broader discourse about citizenship and the market, which is best captured in T.H. Marshall's influential account of the evolution of modern citizenship.⁵¹⁸ The welfare state of the mid- to late-twentieth century gave rise to a specific conception of economic and social rights, one that was based on a model of social citizenship that was built upon the platform of employment.⁵¹⁹ Therefore, economic and social rights fused citizenship rights onto the welfare state form and an ever-widening net of social policies that provided each citizen with a modicum of economic security and opportunities for social mobility.⁵²⁰

A genealogy of these rights reveals that a central rationale for economic and social rights is the decommodification of labour through the existence of social protections and labour standards that ameliorate the harshness of the market and that ensure

⁵¹⁶ See Fudge 2007, *supra* note 221 at 48.

⁵¹⁷ See Fudge 2007, *supra* note 221 at 33.

⁵¹⁸ *Ibid.*

⁵¹⁹ See further Judy Fudge, "After Industrial Citizenship: Market Citizenship or Citizenship at Work?" (2005) 60:4 *Relations Industrielles* 631.

⁵²⁰ See Rittich 2007, *supra* note 494 at 109-111.

welfare and survival for citizens.⁵²¹ The potential negative consequences of market forces are recurring, foreseeable and even predictable.⁵²² They range from the outright exclusion of some groups from markets to the participation of others under disadvantageous terms.⁵²³ For children in particular who are legally prohibited from participating in the market under the minimum age of employment specified by law, and who are largely reliant on the provision of care which can impinge on their caregivers capacity to engage in market activity, economic and social protections are designed to ameliorate the periodic dependency that is unique to this particular phase of the life cycle. The conventional modality for the delivery of economic and social rights has been the redistributive State, with social rights designed to give individuals claims on collective resources.⁵²⁴ As Rittich argues,

social rights remain fundamentally about distributive justice. They are concerned not simply with the provision of basic needs or a safety net for the most destitute: they serve as a proxy for values such as social cohesion, solidarity and inclusion and they operate as a metric of our commitment to relative social equality.⁵²⁵

However, from the perspective of countries of the Global South, the social citizenship model that underpins the redistributive welfare state does not map well onto the realities of a large and growing informal economy where the reach of social insurance

⁵²¹ See Deakin Social Protection 2005, *supra* note 568 at 35-38. See also Fudge 2007, *supra* note 221 at 32-42. As Rittich has observed, social rights were designed to mediate “the inherent contradiction in liberal democracies between the promise of citizenship equality and the harsh inequalities generated by capitalist markets.” See Rittich 2007, *supra* note 494 at 110.

⁵²² See Rittich 2007, *supra* note 494 at 110, who observes, “[s]uch exclusions and disadvantages may result from social or cultural norms and barriers to markets on ascriptive bases such as gender, ethnicity, race and caste; the present of non-market duties or tasks such as obligations of care that impinge on people’s ability to engage in market activity; persistent disparities in bargaining power leading to systematically disadvantageous contract terms for classes for market actors such as workers; or simply unequal access to the resources and capital with which to bargain in the first place. Finally, social rights address the periodic inability of even the relatively well-positioned to insulate themselves from cyclical downturns in markets.”

⁵²³ *Ibid.*

⁵²⁴ See Rittich 2007, *supra* note 494 at 109.

⁵²⁵ *Ibid.*

is extremely limited.⁵²⁶ As UNICEF observes, “[t]he absence of corporatist structures in low and middle income countries as demonstrated by the incidence of informality and the limited reach of social insurance suggests that the expansion of welfare provision in the South will have a different evolution and impact.”⁵²⁷ While the historical origins of social rights and the form in which they were originally instituted do not mirror the development trajectory and socio-economic context of the countries in the Global South, the impetus to protect against the harshness of market forces for countries in the Global South in the context of an ever more integrated global economy has never been more urgent. The concerns that lie behind economic and social rights, including increasing inequality and the more intense commodification of labour, persist and in many instances, have increased in particular regions and particular sectors of the economy in line with trends towards a more globalized economy within the context of child labour. We see this manifested in the increasing displacement of children migrating alone from rural to urban areas in search of domestic labour to fill the shoes of women who have migrated to the Global North as part of a larger ‘global care chain’⁵²⁸; in the intensification of the

⁵²⁶ Despite this reality, the ILO sought to export a social insurance based model that focussed narrowly on workers in the formal economy to the countries of the Global South for most of the 20th century, notwithstanding the more transformative visions of the 1944 Philadelphia Declaration. See further Jeremy Seekings, *The ILO and Social Protection in the Global South 1919-2005*, (International Institute for Labour Studies: Geneva, May 2009), who states, “[e]ven after the war, however, the ILO continued to emphasise social insurance programmes and to downplay social assistance. Insofar as poverty was to be addressed, it would be through ‘development’ programmes that would help the formal economy to grow, leaving fewer and fewer people outside of formal employment and hence contributory coverage. This developmentalism meant that the more expansive vision of 1944 could be side-stepped. ILO policy thus shows marked continuities across the Twentieth Century, despite the radicalism and promise of change of 1944” at 33. See further R. Filali Meknessi, “Extending Social Security in the Developing Countries: Between Universal Entitlements and the Selectiveness of International Standards” (2005-2006) 27 *Comp Lab L & Pol’y* J 207.

⁵²⁷ See UNICEF Social Transfers 2013 *supra* 360 at 9.

⁵²⁸ ILO, *Child Domestic Labour in South East and East Asia: Emerging Good Practices to Combat It* (IPEC: Geneva, 2006). This is particularly the case in Indonesia and the Philippines where the migration of large numbers of adult domestic workers to the Global North has led to a significant increase in the demand for child domestic workers. Also, in Thailand children from neighbouring Myanmar, Lao PDR and Cambodia are increasingly migrating to Thailand to replace Thai children due to their availability, cheaper wages, and willingness to work longer hours.

commodification of labour in the agricultural and fishing sectors in response to the demands of global markets for specific products; and in the large numbers of children working within the informal economy which has expanded in response to the global financial crisis and which is increasingly integrated within global production chains due to the pronounced segmentation of production demanded by the commercial dynamics of global production.⁵²⁹

By returning to the animating idea that inspired the creation of economic and social and also labour rights, and extending it beyond the countries of the Global North, it is important, in line with Blackett's assertion, to probe the *specificity* of labour rights and social rights: that is they are rooted in the resistance to the commodification of the factor of production that is labour, and to explore the significance of this concept for the distinctive subject position of the child.⁵³⁰ Within the idea of the resistance to the commodification of labour lies the recognition that as Fudge outlines, "labour power is 'embodied' in human beings who are born, cared for, and tended in a network of social relations that operate outside the direct discipline of the market."⁵³¹ It is in this *embodied* reality of labour power that the quest for material survival for workers in the Global South, which is inevitably intertwined with their household and dependents, comes more fully into view. An embodied conception of labour power would recognize the necessity/burden of care, and that the individual workers who engage their labour do not do so in an unencumbered way, but with the dependent family members with whom their struggle for material survival is

⁵²⁹ See Philips et al. 2011, *supra* note 4; Nichan Koseleci & Furio Rosati, "Child Labour and the Global Financial Crisis: An Issues Paper" (2009) Working Paper, Understanding Child Work, Rome, at 14-15.

⁵³⁰ Blackett 2011, *supra* note 13. By extending this animating idea beyond the industrialized market economy through the lens of emancipation and workers every day resistant to the commodification of their labour, Blackett asserts that beyond simply a protective role, labour law "recognizes resistance and creates/preserves space (capabilities) for the effective exercise of agency."

⁵³¹ See Judy Fudge, "Gender Equality and Capabilities, Care Work and Sustainable Development" in Novitz Tonia and Mangan David, eds, *The Role of Labour Standards in Development: From Theory to Sustainable Practice?* (Oxford: Oxford University Press, 2011) [Fudge Gender Equality 2011].

intertwined and necessitated. In recognition of the reality of dependency for periodic phases of the life cycle, an embodied understanding of labour power recognizes that workers do not come to the market as a *tabula rasa*, but have been *enabled* for market participation crucially during their childhood through the vital care labour of those who have provided their care. By bringing the subject position of the child from the margins to the centre, and by extending the concept of decommodification of labour to explicitly include the child, we can see that a holistic set of social rights broadly conceived would seek not only to target the *individual* child, but rather to empower families, households and communities to exercise agency over their children's material well-being, over their capacity to provide care and over their ability to access State services, in particular educational services. As Blackett outlines, in addition to its protective role, labour law "recognizes resistance and creates/preserves space (capabilities) for the effective exercise of agency."⁵³² Beyond the agency of the *individual* worker, the phenomenon of childhood economic exploitation crucially highlights that worker agency is materialized in a relational context within the web of relationships that structure her quest for material existence.

To conclude this part, as much of the academic debate surrounding the juridical status of economic and social rights has sought to demonstrate, "there is nothing intrinsic in the legal form or normative content of labour and social rights that makes them incompatible with a market economy." In fact, as Deakin's application of the capabilities approach demonstrates, mechanisms of redistribution by the State may not just be compatible with, but are a precondition for the operation of labour

⁵³² See Blackett 2011, *supra* note 13 at 431.

markets.⁵³³ Through the lens of the unfreedom that flows from childhood economic exploitation, the legal and normative case for juridical economic and social rights can be further deepened, particularly when we centralize the child within the decommodification concept by using an embodied understanding of labour power to bring the significance of the burden as well as the enabling character of care labour to the foreground.

3.5 Conclusion

In this chapter I have sought to illustrate that when we broaden the lens to examine the framing of the child as a rights holder under the UNCRC, particularly in the crucial areas of care and socio-economic rights, some of the limitations of the liberal framing of the individual rights holder begin to emerge. Specifically, I have argued that the international human rights law model does not integrate the full range of interdependent and interconnected rights and rights holders in the manner in which it frames freedom from economic exploitation as a right of the *individual* child. In its reification of the private sphere and in its assumption that the family will provide for the socio-economic and care needs of their children, the human rights law model serves to abstract rather than embed the child with her full relational context. Feminist relational theory, however, enables us to reconstruct children's rights as relational, in ways that necessarily broaden the rubric of rights to integrate a range of interdependent rights that are of relevance to children and their families.

Notwithstanding these limitations, within the context of economic exploitation in childhood, a key strength of the Convention is its integration of educational deprivation within the definition of the harm that flows from violations of Article 32. As distinct from the labour law model, a holistic approach grounded in educational

⁵³³See Fudge 2007, *supra* note 221 at 64-65.

deprivation potentially provides a more practicable and workable regulatory model that can overcome the limitations and binaries of the labour law model. Focussing on educational deprivation as the core harm of childhood economic exploitation would move away from distinctions between economic exploitation in the ‘productive’ and ‘non-productive’ settings, as well as drawing fine lines between ‘hazardous’ labour and ‘non-hazardous’ work, to a structural approach that centralizes a core harm that underpins *all* forms of economic exploitation in childhood. This approach has the potential to capture the larger cohort of so-called ‘out of school’ or ‘inactive’ children which forms a hidden element of the child labour challenge. Nevertheless, without being underpinned by a broader range of socio-economic supports in the form of social protection mechanisms that would effectively empower families to engage their children in education, and that would offset the costs of children’s labour, the application of the educational framework will remain limited.

Chapter Four

The Challenges of the Informal Economy and the Social Reproduction Sphere – Gender, Care Work, and the Relational Child

4.1 Introduction

In this second part of the thesis I move from critical exploration of the dominant labour law and human rights law models of intervention in this field, to analyze the implications of my structural critique – focusing on two key issues – the informal economy and social protection mechanisms.

Critical questions surrounding the challenges that arise for legal and policy interventions that seek to regulate childhood economic exploitation as a result of its prevalence in the informal economy and within the sphere of social reproduction are the central focus of this chapter.⁵³⁴ The analysis is grounded within two sub-sectors where there is a high incidence of children working and engaging in activities that move between the ‘productive’ and ‘socially productive’ spheres – domestic work and home-based work.⁵³⁵ While there is a wealth of scholarship particularly from the field of political economy examining the gendered nature of the informal economy, scholars have not generally adopted a gender-analytic approach to childhood economic exploitation in the informal economy and in the social reproduction

⁵³⁴ As outlined in Chapter One, I use the term ‘informal economy’ here as a useful analytical concept that seeks to capture the reality that the large share of the global workforce remains outside the world of full-time, stable and protected employment, and that this is the part of the economy where childhood economic exploitation is most prevalent and where some of the conditions that allow childhood economic exploitation to occur are reproduced. However, I do not seek to endorse a strict distinction or dualism between the formal and informal economies.

⁵³⁵ For the most recent ILO research exploring child labour within the domestic work context, see ILO CL Domestic Work 2013, *supra* note 18. See also ILO, *Helping Hands or Shackled Lives, Understanding Child Domestic Labour and Responses to It*, (Geneva: International Programme on the Elimination of Child Labour, 2004) [ILO Helping Hands 2004] at 14. For research exploring child labour in home-based work sector, see further Biggeri et al. 2009, *supra* note 18; Mehrotra & Biggeri 2002, *supra* note 18; Biggeri & Mehrotra 2007, *supra* note 18.

sphere.⁵³⁶ There is a lack of scholarship exploring the connections between economic exploitation in childhood and the vulnerability of women workers in informality, as well as the links with women's and children's engagement in social reproduction work, including in fields such as domestic work and home-based work.⁵³⁷ Through my examination of the specific characteristics of work in these particular areas, I seek to illustrate how the disadvantage of women workers in the informal economy and their children are relationally intertwined, not only at the micro level of the family and household unit, but also at the institutional and macro levels that situates their work along the disadvantaged and undervalued segments of the informal economy spectrum. In addition, as the analysis illustrates, the specific challenges of regulating work in these hidden and dispersed sectors underscores the limitations of the mainstream 'penalty and prohibition' approach articulated in Chapter Two.

Following my analysis of the particular challenges pertaining to these sectors, I proceed to situate childhood economic exploitation within emerging efforts to address economic exploitation in the informal economy. First, I explore in a preliminary way the approach of the Self-Employed Women's Association (SEWA), the largest and oldest union of informal economy women workers in India, as an effective illustrative example of an approach that addresses the interface between work in the productive and reproductive spheres as a way to advance the rights and empowerment of the 'whole worker', in particular for women workers in the informal

⁵³⁶ A gender analytic approach to the informal sector more generally has been undertaken by numerous feminist economists, in particular Martha Chen and by the organization called WIEGO (Women in Informal Employment Globalizing and Organising) www.wiego.org. See for example Chen et al. 2004, *supra* note 541; Frances Lund and Smita Srinivas, *A Gendered Approach to Social Protection for Workers in the Informal Economy* (Geneva: International Labour Office, 2000) [Lund & Srinivas]. See also Hill 2010, *supra* note 20. In general, legal scholarship examining the relationship between law and informality is less common. For the more limited legal scholarship in this field, see Trebilcock 2004, *supra* note 52; see also La Hovary, *supra* note 52. See also, ILO Gender Equality 2009, *supra* note 166 at Chapter 4, "A Decent Childhood for Both Boys and Girls," at 59-79.

⁵³⁷ In the political economy field, Naila Kabeer has begun to explore the distinct connections between the gendered informal economy and child labour, see Kabeer 2010, *supra* note 131 at Chapter 4. See also ILO Transitions to Formality 2013, *supra* note 63 Part 6 at 1-15

economy.⁵³⁸ This holistic model, I argue, demonstrates a structural approach to the empowerment of informal economy workers that could point towards future directions for interventions in the child labour context in ways that mitigate the potential tensions between women's increased engagement in work and children's welfare. Second, I explore the ILO's reoriented platform, the Decent Work Agenda, which places advancing decent work as the core aim of the ILO, including through a focus on informal economy workers.⁵³⁹ By mainstreaming childhood economic exploitation within its Decent Work Country programming I argue that, at least at the policy level, the ILO has begun to move away from the somewhat decontextualized 'penalty and prohibition' approach that I have critiqued in Chapter Two. Nevertheless, I argue the Decent Work Agenda retains some important limitations, both in its conceptual framing and in the manner of its implementation, that mirror some of the structural exclusions I have critiqued in the labour law and human rights law models. Specifically, in its policy discourse surrounding decent work, in contrast to the example of SEWA, the ILO has only engaged in a preliminary way with structurally-undervalued, deeply gendered care labour.⁵⁴⁰ While acknowledging the relevance of care work for working women's lives, the ILO has retained a central focus on increasing women's engagement in paid 'productive' work and income generating activities, without fully grappling with the large burden and implications of 'reproductive' work that women and children bear, and the specific implications of this work for interventions in childhood economic exploitation. In a manner that mirrors the relegation of the burden and implications of care work

⁵³⁸ See further [http://www.sewa.org/About Us.asp](http://www.sewa.org/About%20Us.asp). See also Hill 2010, *supra* note 20; Hill 2008, *supra* note 18.

⁵³⁹ The intimate link between child labour and informality has been recognized within ILO policy work since 2002. See further ILO Director General 2002, *supra* note 12 at 52; ILO Director General 2006, *supra* note 12 at 32; ILO Decent Work Report 1999, *supra* note 19.

⁵⁴⁰ See further Blackett & Tsikata *supra* note 20 at 63.

under the labour law model and within the UNCRC, I argue the ongoing failure to grapple with care and social reproduction will have real implications for children's engagement in economic exploitation, in particular for girl children. In addition, I argue that an analysis of the Decent Work country programmes of Bangladesh reveals that policy discourse has not always been meaningfully translated into ILO Decent Work Country Programming in practice, and that there remains a disjuncture between progressive policy development and implementation at domestic levels. The continued focus within Decent Work Country programming on eliminating the worst forms of child labour through social dialogue and community level monitoring through the social partners, I argue, demonstrates the continuing prevalence of an albeit modified 'penalty and prohibition' approach which I have critiqued in Chapter Two.

4.2 Childhood Economic Exploitation in the Domestic and Home-based Sectors – Mapping the Relational Context

4.2.1 Centralizing the Role of the Informal Economy within Childhood Economic Exploitation

According to the most recent global estimates undertaken by the ILO, contrary to the popularized image of the (male) child laborer as a factory or 'sweatshop' worker,, child labour predominates in the informal economy, particularly in the agricultural and domestic sectors, as well as in family-based productive and reproductive activities.⁵⁴¹ Statistics from the ILO demonstrate that worldwide, the agricultural

⁵⁴¹ See ILO Global Estimates 2013, *supra* note 5 at 23. A note on terminology is required here. The various terms 'informal economy,' 'informal sector' and 'informality' are often used interchangeably within legal and development scholarship and their various usages has been debated extensively both in the ILO and academic literature. In a revision of its earlier preference for the term 'informal sector,' in 2002, the ILO asserted that the term 'informal economy' is preferable because it, "accommodates considerable diversity in terms of workers, enterprises and entrepreneurs with identifiable characteristics. They experience specific disadvantages and problems that vary in intensity across national, rural, and urban contexts ... the workers and enterprises in question do not fall within any one sector of economic activity, but cut across many sectors ... The term 'informal economy' refers to all economic activities by workers and

sector currently accounts for for 59 per cent of all those in child labour with this sector consisting primarily of work on smallholder family farms, as well as in activities such as livestock production, fishing and aquaculture.⁵⁴² Followed by agriculture, the services sector, which includes domestic work and various roles in the urban informal economy, (home-based work, street selling, work in hotels and restaurants) amounts to the second most common form of child labour.⁵⁴³ There is considerable variation between countries and between regions within countries. In the context of Bangladesh, for example, among 7-14 year-olds who work and do not attend school, agriculture accounts for 45.5 per cent of children in employment,

economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that – although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs” see ILO, “Conclusions Concerning Decent Work and the Informal Economy” (2002) International Labour Conference 90th Session (Geneva: International Labour Office). I use the terms ‘informal economy’ and ‘informality’ interchangeably here as a useful analytical concept that seeks to capture the reality that the large share of the global workforce remains outside the world of full-time, stable and protected employment and that this is the part of the economy where childhood economic exploitation is most prevalent and where some of the conditions that allow childhood economic exploitation to occur are reproduced. However, I don’t seek to endorse a strict distinction or dualism between the formal and informal economies, which has been subject to critique because in the words of Lund & Srinivas it, “keeps the informal sector ‘below’, ‘out there’, and ‘atypical’. This persists no matter how many qualifiers are used to soften or make less stark the dichotomy – such as pointing out the heterogeneity within the informal sector, the fact that many people move between them, or work in both at the same time, or that in many countries, the ‘atypical’ is in fact now more ‘typical.’ It allows a variety of interest groups to ‘close out’ the informal economy workers as somebody else’s concern, or merely as a different concern”; see further Lund & Srinivas *supra* note 536. For an overview of the various definitions of informality, see Martha Altar Chen, “The Informal Economy: Definitions, Theories and Policy” (August 2012) WIEGO Working Paper No. 1, at 2 [Chen 2012]; Martha Altar Chen, Renana Jhabvala & Frances Lund, “Supporting Workers in the Informal Economy: A Policy Framework” (2002) Working Paper on the Informal Economy 2002/2 (Geneva: International Labour Office); Martha Alter Chen, Joann Vanek and Marilyn Carr, *Mainstreaming Informal Employment and Gender in Poverty Reduction: A Handbook for Policy-Makers and Other Stakeholders* (London: Commonwealth Secretariat and International Development Research Centre, 2004) [Chen et al. 2004]. Various commentators now prefer to conceptualize the economy as a continuum that is more formal on one end or more informal on the other, by foregrounding ‘people at work’ or ‘people being productive.’ See further, Basudeb Guha Khasnobis, Ravi Kanbur & Elinor Ostrom, “Beyond Formality and Informality” in Basudeb Guha Khasnobis, Ravi Kanbur & Elinor Ostrom, eds, *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford: Oxford University Press, 2006); Martha Chen, “Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment” in the same volume. See for e.g., Naila Kabeer who observes that “there are no clear-cut boundaries between formal and informal work ... different activities are located somewhere on a continuum which stretches from highly formalised conditions and relations of work to activities that are not covered by any labour legislation, worker benefits or social protection; and that such activities may be located within enterprises which are classified as formal”, see Kabeer 2010 *supra* note 131 at 33-34.

⁵⁴² ILO Global Estimates 2013, *supra* note 5 at 7.

⁵⁴³ *Ibid* at 7-8.

followed by services (25%), manufacturing (16.1%), commerce (11.2%) and construction (1.9%).⁵⁴⁴ Within the services sector, domestic work forms a large element of the child labour problem. For example, the ILO estimates that worldwide there are 15.5 million children engaged in domestic work, with more than half, 8.1 million, engaged in hazardous domestic work.⁵⁴⁵ In general, statistics in areas such as domestic work are difficult to generate and can be regarded as indicative only, given the often invisible nature of child labour in this part of the informal economy.⁵⁴⁶

Globally, the ILO estimates that unpaid family work accounts for more than two-thirds of child labour (68%), followed by paid employment (23%), and self-employment (8%).⁵⁴⁷ In the context of Bangladesh, for example, for 7-14 year-olds who work and do not go to school, paid employment and unpaid family work predominate, accounting for 37 per cent and 36 per cent, respectively, of children in employment.⁵⁴⁸ In contrast to other countries in the South Asian region, Bangladesh is notable for having a larger cohort of children in paid employment. As in the case of domestic work, statistics relating to family-based work, in particular non-productive activities by children that lie outside the system of national accounts are not generally generated at national levels. Therefore, estimates of children engaged in unpaid reproductive activities undertaken in the home may not provide a full account of the scale of this type of activity by children.⁵⁴⁹

The approach to the informal economy within international labour law and by the ILO traditionally reflected conventional economic orthodoxy which assumed that with the correct mix of economic policies and resources, low-income traditional

⁵⁴⁴ Khan & Lyon 2015, *supra* note 68 at 38.

⁵⁴⁵ ILO Hazardous Work 2011, *supra* note 2 at 28.

⁵⁴⁶ ILO Global Estimates 2013, *supra* note 5 at 27.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Khan & Lyon 2015, *supra* note 68 at 42.

⁵⁴⁹ ILO Domestic Labour 2004, *supra* note 13 at 14.

economies would be transformed into formal modes of industrial-style development leading to the demise of the informal economy and anomalies in labour market composition, such as child labour.⁵⁵⁰ Contrary to orthodox economic expectations, the informal economy has been growing significantly in the countries of the Global South.⁵⁵¹ For example, in India it is estimated that what is called the ‘unorganized sector’ or the informal economy has grown from 60 per cent of workforce in 2000 to 93 per cent of the workforce in 2010.⁵⁵² Increased informality has resulted in part from the processes of globalization, with the pace of informalization increasing in the aftermath of the global financial crisis.⁵⁵³ Therefore, the structural dominance of the existing and growing informal economy has particular significance for the range and potential effectiveness of legal and policy strategies in the context of economic exploitation in childhood.

4.2.2 Connecting the Gendered Informal Economy with Childhood Economic Exploitation

Scholars from the field of political economy and a limited number of legal scholars have explored the central role that gender plays in the predominance of women workers in the informal economy. In particular, they have highlighted the ways in which women represent the vast majority of informal economy workers, especially along the more disadvantaged segments of the informal economy spectrum where

⁵⁵⁰ For a succinct overview of the historical debates relating to approaches to informality, see Chen 2012, *supra* note 541 at 2-6. For a useful overview of the contested position of informalization in the development literature, see Hill 2010 *supra* note 20 at 8-28. See also Kabeer 2010, *supra* note 131 at 33-34.

⁵⁵¹ See Mehrotra & Biggeri 2007, *supra* note 18, who outline that in most developing countries “[t]he employment growth in the formal sector is insufficient to absorb even the growth in the labour force. In fact, as population has grown and the agriculture sector sheds its surplus labour, the slow growth of manufacturing employment has contributed to a growth of employment in the informal economy in urban areas. This result is not what Lewis (1954) had anticipated: that the formal, modern, industrial economy will absorb the labour in the traditional, rural, agricultural economy (the ‘dual economy’), but there has been the emergence of a differentiated informal economy,” at 4.

⁵⁵² See Philips et al. 2011, *supra* note 4 at 14.

⁵⁵³ *Ibid.* For an overview of statistical information relating to the growth of the informal economy, see Hill 2010, *supra* note 20 at 2-3. As Hill observes, “these figures not only demonstrate the erroneous expectation by economists such as Lewis (1954) that the informal sector would wither away over time, but also show that in many cases, it has become the dominant model,” at 3.

their working conditions are poor and their pay is low.⁵⁵⁴ There is a strong correlation between women's involvement in informal employment and their high incidence of poverty.⁵⁵⁵ In many instances, women may not be recognized as workers as such because they engage in work as unpaid family workers, notwithstanding that they may be undertaking or contributing to work in the 'productive' sphere.⁵⁵⁶

The gendered nature of the informal economy, in part, results from the flexibility provided by diverse forms of informal economy activities that enable women to balance both their necessity to engage in productive work, with the burden of unpaid reproductive work which they doubly shoulder.⁵⁵⁷ As Kabeer observes, while women are participating in greater numbers in productive activities globally, "[w]omen have emerged as the flexible labour form par excellence in the highly competitive labour intensive sectors of the global economy."⁵⁵⁸ A woman's socially ascribed responsibility for domestic work and childcare act as specific gender constraints on her labour market behaviour.⁵⁵⁹ It is the social relations of reproduction that largely account for the majority of the female labour force being located at the most

⁵⁵⁴ See Kabeer 2010, *supra* note 131 at 29-46. See further Mehrotra & Biggeri 2007, *supra* note 18 at 7 who observe, "[i]nformal employment is normally a larger source of employment for women than men in the developing world; 60 per cent or more of women workers are in informal employment outside of agriculture." See also Anne Trebilcock, who outlines how Chen et al. use "a pyramid that illustrates [the labour markets] gender-related segmentation. In terms of earnings, employers and own account operator – who are predominantly men – come out on top. Then, in descending order are unpaid family members (both men and women), followed by employees of informal enterprises and other informal wage workers. At the bottom of the heap are industrial outworkers/homeworkers – categories where women are in the vast majority ... these authors recall that the vast majority of the poor work and that the vast majority of the working poor, especially women, are engaged in the informal economy"; see Trebilcock 2006, *supra* note 163 at 66-67.

⁵⁵⁵ Hill, *supra* note 8 at 26-27. See further Sethuraman, *supra* note 138.

⁵⁵⁶ See further Chen et al. 2004, *supra* note 541 at 25-25, 29-31 and 39-44, who assert that "the majority of all economically active women in most developing countries work in the informal economy. And we can safely assume that an even higher percentage of economically active poor women are in the informal economy," at 38. The gender segmentation of the informal sector is statistics cited by Chen et al. for Bangladesh which demonstrates that a far higher percentage of women own account workers (64%) than male own account workers (4%) are concentrated in the lowest income group. This study also found that men in Bangladesh were more likely than women to be in the top income group within the informal sector, representing 93% of this group, at 44-45.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ See Kabeer 2010 *supra* note 131 at 34.

⁵⁵⁹ *Ibid* at 45.

marginal end of the informal economy spectrum where they earn the lowest and least secure incomes.⁵⁶⁰ Specifically, as Elizabeth Hill states,

[a]s most societies deem women to be the household member primarily responsible for domestic reproductive tasks such as cooking, cleaning and childcare, most women find themselves unable to offer their labour power in the market under the same conditions as men. Burdened by an inequitable division of household labour, women are often only able to exchange their labour power for the particularly low wages associated with causal and home-based work. Where the social relations of reproduction privilege men and boys over women and girls the informal economy remains highly sexually segmented, with women effectively cut off from access to more productive employment.⁵⁶¹

Within informality, women often work at the boundary of the public sphere of paid employment and the household sphere of reproduction, in particular in their engagement in sectors such as home-based and domestic work.⁵⁶²

In addition to the gendered nature of the informal economy, as the statistical evidence above demonstrates, *children* form a large cohort of those working within the informal economy and childhood economic exploitation is very much linked with the persistence and growth of informality.⁵⁶³ While the connections between the gendered informal economy and child labour have not been extensively explored within the legal academic literature, in my view, there are some distinctive links between the vulnerability of workers in the informal economy work, in particular women workers, and the high prevalence of child labour in informality that require further exploration and analysis.⁵⁶⁴

⁵⁶⁰ See Hill 2010, *supra* note 20 at 43.

⁵⁶¹ See Hill 2010, *ibid* at 43.

⁵⁶² *Ibid* at 24.

⁵⁶³ See ILO Director General 2002, *supra* note 12 at 52; ILO Director General 2006, *supra* note 12 at 24; ILO Decent Work Report 1999, *supra* note 19.

⁵⁶⁴ In the political economy field, see however Kabeer 2010, *supra* note 131 at Chapter 4.

First, childhood economic exploitation arises where children directly engage in productive activities in order to supplement the earnings of their parents. Informal economy workers, in particular women workers who work in the most vulnerable segments of the informal economy, are often engaged in unsustainable or exploitative livelihoods.⁵⁶⁵ In the context of home-based work, for example, Mehrotra and Biggeri have demonstrated in their empirical work in this field that children are often engaged in homemaker activities to respond to low price per piece available in the market, and in order to generate additional income for the household.⁵⁶⁶ In this context, children's earnings or productivity has been shown to play an important role in household survival strategies among low-income families.⁵⁶⁷ Similarly, in the context of research on domestic work and child labour, the ILO has demonstrated that the large majority of child domestic workers are sent to work to supplement their family's income or simply to lessen the financial strain at home.⁵⁶⁸ Children are directly engaged in work in order to provide a sustainable income for the household, or to relieve the financial and care burden of the household, with their labour linked with the exploitative working conditions of their parents in the informal economy.

Second, childhood economic exploitation can arise indirectly in the form of an adult releasing activity where older children remain at home to provide care to their younger siblings while their mother engages in work. Due to their parent's lack of available care alternatives, children often accompany their parent to their work site,

⁵⁶⁵ See for eg. UCW Bangladesh 2011 *supra* note 118 which finds "economic considerations play a major role in parents' decision to involve their children in work or send them to school. Simple correlations point to a strong inverse relationship between household income, on the one hand, and children's employment, on the other ... These results ... point to the need for some form of compensatory income or earnings schemes as part of a broader effort for encouraging school attendance and discouraging children's work among poor households," at 41.

⁵⁶⁶ See Biggeri & Mehrotra 2007, *supra* note 18 at 15. See also Philips et al. 2011, *supra* note 4.

⁵⁶⁷ Biggeri & Mehrotra *ibid*.

⁵⁶⁸ In the context of child domestic work, see ILO Domestic CL 2013, *supra* note 7 which states, "the large majority of child domestic workers come from poor families and, particularly in societies lacking social protection safety nets, are sent to work to supplement their family's income or simply to lessen the financial strain at home."

where they may also engage in work.⁵⁶⁹ As outlined, the flexibility that promotes women's engagement in the informal economy often flows from the constraints of their caring responsibilities. This often has spill-over impacts on children, in particular girl children, who absorb the costs of the social reproduction burden of the household. Therefore, it is in the complex interface between women's productive capacity and the social conditions of reproductive care work where, in part, the determinants of childhood economic exploitation lie. Third, childhood economic exploitation can arise indirectly as a form of adult replacement where children replace their working parent who may no longer be able to work due to injury, illness, death or increasingly because of immigration for work.⁵⁷⁰ As Hill observes, for many poor working women, their body is their tool, and in this sense the health of a marginal worker is very much their *only* wealth. Without a healthy body they cannot work in a productive and efficient way.⁵⁷¹ In the context of informality, where social protection mechanisms are not in place and occupational health and safety standards are extremely low, the potential for injury and ill-health is high and the implications for families are very serious, particularly where the result is child labour. A number of ILO studies have demonstrated death or illness of adult family members often result in older children being required to work to become providers for themselves and their siblings.⁵⁷² By replacing the adult worker in the household, children are absorbing the costs of poor occupational and health and safety standards in the informal economy, as well as the lack of any form of social protection mechanisms.

⁵⁶⁹ See Philips et al. 2011, *supra* note 4.

⁵⁷⁰ See ILO CL Domestic Work 2013, *supra* note 18 at 10.

⁵⁷¹ See Hill 2010, *supra* note 20 at 86.

⁵⁷² In the context of domestic work, ILO studies demonstrate that death or illness of adult family members from AIDS can often result in children being sent away to live with relatives, or forces the oldest to become providers for themselves and their siblings, see further IPEC, *Give Girls a Chance, Tackling Child Labour, A Key to the Future*, (Geneva: ILO, 2009).

Fourth, child labour predominates in this part of the economy due to the lack of enforcement of minimum labour standards arising, in part, from the logistical challenges of enforcing labour standards in a large, dispersed and highly diverse sectors and, in part, from exclusions under domestic laws of the remit of the labour inspector in certain areas, particularly in private homes where domestic work and home-based work take place.⁵⁷³ In the context of domestic work and home-based work in particular, labour inspectors confront huge logistical challenges regulating the myriad of dispersed sites of work in these sectors in the urban informal economy. In rural areas the sheer geographical scale of regulating dispersed sites of work presents a further challenge.⁵⁷⁴ Invisible forms of work in female dominated sectors such as domestic work and homework that take place in private homes are particularly challenging for labour law regulation.⁵⁷⁵ As the ILO CEACR has observed, at the national levels the legislation implementing the child labour conventions often only covers formal labour relationships, thereby excluding children working in the informal economy from any legal protection.⁵⁷⁶ The absence of legislative protection is exacerbated by the fact that, without a legislative basis to proceed, labour inspectors in many countries are unable to monitor children working in this sector.⁵⁷⁷

Finally, where labour inspection has been effective in the formal economy, the legal prohibition on child labour has had some negative consequential impacts in the

⁵⁷³ See ILO Informal Economy Policy Resource Guide 2013 *supra* note 180 at section 4.c2 “Labour Inspection and the Informal Economy,” at 1-4

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid* section 4.b.1 “Domestic Workers” at 2-3; section 4.b.2. “Homeworkers” at 2-3.

⁵⁷⁶ ILO CEACR 2012, *supra* note 62.

⁵⁷⁷ *Ibid.* In this context, the ILO CEACR has issued the following recommendation: “Recalling that the Convention applies to all sectors of the economy and all forms of work, the Committee encourages governments to take the necessary measures to ensure that the protection afforded by the Convention is enjoyed by children working in the informal economy, including through taking legislative measures to address these gaps.”

growing prevalence of child labour in the informal economy.⁵⁷⁸ For example, in the garment production sector, empirical studies from India have demonstrated that child labour has moved from the factory floor to home-based or other forms of subcontracted production settings often located in the private household sphere where women work in high numbers.⁵⁷⁹ The enforcement of labour standards in the formal economy, as well as the growing trend towards informal subcontracted work settings, has in some instances led to the problem being displaced to the informal economy where working conditions may be more exploitative for the children concerned.

Therefore, the working and caring lives of vulnerable workers in the informal economy, particularly women workers and children who engage in work, are relationally intertwined. This is evident not only at the micro level of the family and household unit where children absorb the costs and burdens of their parents' engagement in exploitative labour, but more broadly at the institutional level which situates particular forms of work, largely undertaken by women in the informal economy, in many instances beyond the regulatory framework of law. An examination of child labour in the domestic and home-based sectors in particular illustrates more clearly some of the core challenges for legal and policy interventions in informality, and the continuity that exists between women's role and prevalence within these specific segments of informality, and childhood economic exploitation.

⁵⁷⁸ See further Biggeri & Mehrotra 2007, *supra* note 18. See also Philips et al. 2011, *supra* note 4.

⁵⁷⁹ Philips et al., *supra* note 4 at 6, who observe in the context of a micro-study of child labour in the Delhi garments sector that, "[t]here has been a visible decline in the incidence of child labour in factory settings, in reaction to growing public and political pressure within India and beyond. Yet this decline represents merely a displacement of the problem: child labour has shifted out of factory-based production into the arena of household activity, as the restructuring of garments production to reduce costs and evade regulation has dramatically increased the importance of home-based work and the numbers of (particularly women) workers in the burgeoning household sector."

4.2.3 Child Labour in the Domestic Sector – Regulatory and Definitional Challenges

Domestic work is distinctly gendered with domestic workers comprising some of the most vulnerable workers engaged in the informal economy.⁵⁸⁰ Domestic work occurs in the so-called ‘private sphere,’ furthest removed from the paradigmatic employment relationship that is so central to the regulatory framework of labour law and, as a result, it has proved challenging to legally regulate, in particular through the labour inspection mechanism in the case of both adults and children. Domestic work is often linked to status-based distinctions that arise from gender, age, ethnicity and caste-based discrimination.⁵⁸¹ These distinctive elements of domestic work are described by Blackett as follows:

domestic work as a status (‘slave,’ ‘servant,’ ‘foreigner’/racialized/‘illegal’ other) sits alongside persistent ideologies (domestic workers as ‘one of the family,’ the household as a private place to which labour law should not venture; and ... the work as other than market activity that is legitimately conceptualized as such to ensure that ‘the family’ is not commoditized).⁵⁸²

Within the context of childhood economic exploitation, the gendered and undervalued nature of domestic work by children is also linked with societal expectations relating to the future labour market participation of girls and boys. As the ILO outlines, evidence shows that childhood economic exploitation in this sector is highly feminized, in large part due to deep-rooted societal beliefs that domestic work is fundamentally the domain of women and girls, and that it is less worthwhile to invest in girls’ education on the assumption that educated boys will have better

⁵⁸⁰ See for e.g. Adelle Blackett, “Introduction: Regulating Decent Work for Domestic Workers” (2011) 23:1 CJWL 1, who asserts: “Domestic work ... has unmistakable roots in older status-based forms most notably domestic slavery. The master servant relationship at the origin of modern employment law evokes most starkly the domestic work relationship, and private law rules regulating the contract of employment have applied to domestic workers in many jurisdictions.” See further Blackett 2011, *supra* note 13 at 429.

⁵⁸¹ See ILO Gender 2009 at 36 which observes, “domestic work is often regarded as an extension of women’s traditional household and family responsibilities, it is still mostly invisible, undervalued and unprotected,” at 36-37.

⁵⁸² See Blackett 2011, *supra* note 13 at 429.

labour market opportunities, while for girls time is better spent taking care of domestic chores in preparation for marriage and motherhood.⁵⁸³ Adult domestic workers often involve their girls in domestic work by taking them to work, in part because they have no viable care alternatives, and also in order to train them into domestic service.⁵⁸⁴

Increasing levels of child labour in domestic work are associated with the ‘care vacuum’ that flows from increasing levels of female participation in the labour market at the domestic level, and is increasingly part of the larger ‘global care chain’ with children in some instances taking up domestic work to fill the shoes of women who have migrated from the Global South to the Global North.⁵⁸⁵ Rural to urban migration and displacement are further factors that contribute to the availability of children to engage in domestic work.⁵⁸⁶ For example, a baseline survey of child domestic labour in Bangladesh discovered that most children found in domestic work were from very poor households lacking in cultivable land, with ‘family poverty/hunger’ cited as the most common reason by children for migrating from their places of origin to become domestic workers.⁵⁸⁷ Children are also migrating between countries in the Global South to fill the shoes of children who have successfully exited or been prevented from undertaking domestic work.⁵⁸⁸

⁵⁸³ See ILO CL Domestic Work 2013, *supra* note 18 at 16-17.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *Ibid.* The ILO studies that have been undertaken, which are not comprehensive, demonstrates this is particularly the case in Indonesia and the Philippines where the migration of large numbers of adult domestic workers to the Global North has led to a significant increase in the demand for child domestic workers, see ILO 2006 *Ibid* at 12.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ See UCW Bangladesh 2011, *supra* note 118 at 32.

⁵⁸⁸ See further Stewart, *supra* note 16 who juxtaposes the global governance debates surrounding global value chains where we “... increasingly ‘see’ the distant workers, large numbers of whom are women, involved in the production of commodities for export partly because of high profile events such as the death of textile workers in Bangladesh,” with the proximate women involved in global care chains who we do not ‘see’ in these global debates. She argues that in regulating the work of domestic workers, we are

In 2010, the Director-General's global report on the follow-up to the ILO Declaration, identified child domestic labour as a neglected 'worst form of child labour' where key gaps remain in terms of policy and effective action.⁵⁸⁹ In 2011, the ILO undertook research in order to identify the evidence base for classifying certain forms of work as hazardous, in which it includes domestic work.⁵⁹⁰ The most common hazards identified arising from domestic work include: long working hours, which create fatigue; lack of public scrutiny, which provide opportunities for exploitation; and isolation, inhibiting normal social and intellectual development.⁵⁹¹ While the ILO acknowledges there is a lack of hard data assessing the negative health impacts of domestic work, it does cite a number of studies that demonstrate some of the potential negative health impacts, including lack of sleep which gives rise to developmental disorders.⁵⁹² Child domestic workers often report working from 12 to 16 hours per day, seven days per week, particularly those living in the houses of their employers.⁵⁹³ In a study in Bangladesh, almost all (94%) of domestic workers were found to be working full-time without a weekly day off (99%); the average working day extended from seven o' clock in the morning until well into the evening.⁵⁹⁴ This study showed that almost 70 per cent of child domestic workers experienced physical abuse and systematic beatings, either to ensure compliance or as punishment when

avoiding an essential political debate on how societies are able to socially reproduce themselves in ways that do not involve profound inequalities and injustices, at 14.

⁵⁸⁹ ILO Director General 2010 *supra* note 12 at para 254. In a recent report to the 15th Session of the Human Rights Council the Special Rapporteur on Contemporary Forms of Slavery states that, "[i]n most contexts, domestic work outside the family by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children and falls within the ambit of [Convention No. 182]. No child regardless of the child's age or 'consent' must be engaged in the worst forms of child labor." See "Report of the Special Rapporteur on Contemporary Forms of Slavery, Its Causes and Consequences" (28 June 2010) A/HRC/15/20 at para 36.

⁵⁹⁰ ILO Hazardous Work 2011 *supra* note 2.

⁵⁹¹ *Ibid* at 28-29. In addition, domestic service often involves carrying heavy loads, being exposed to fires and hot stoves, handling household chemicals and using sharp knives, as well as deprivation of education.

⁵⁹² *Ibid* at 29-30.

⁵⁹³ *Ibid*.

⁵⁹⁴ See UCW Bangladesh 2011, *supra* note 118 at 32.

perceived to be slow and uncooperative.⁵⁹⁵ Nearly half of the physical abuse resulted in injury and very few of the children received medical attention.⁵⁹⁶ The lack of public scrutiny and isolation that characterizes domestic work appears to be one of its most problematic elements as it gives rise to vulnerability to abuse and exploitation.

In light of the emerging evidence base in relation to the serious harms occurring to children in domestic work, some States are explicitly including child domestic labour in their legal frameworks designating categories of 'hazardous work.' However, the coverage of domestic work remains partial at the domestic level.⁵⁹⁷ In India, for example, in 2006, the Child Labour (Prohibition and Regulation) Act 1986 was extended to include domestic work as a hazardous form of work which should not be engaged in by children under 14 years.⁵⁹⁸ This does not fully comply with the international labour law framework which prohibits all forms of hazardous work for children under 18 years. However, it does extend an automatic protection to all younger children prohibiting their engagement in domestic work.⁵⁹⁹ In Bangladesh, in contrast, within the 38 sectors listed as hazardous for children, domestic work has

⁵⁹⁵ *Ibid* at 30.

⁵⁹⁶ *Ibid*.

⁵⁹⁷ In a 2002 study of the legal protection of child domestic workers in the Asia-Pacific which may no longer be fully up-to-date it was found that legal protection frameworks generally fail to recognize child domestic work as a specific category requiring distinct legal protection, see Amparita S. Sta. Maria, "Study on the Legal Protection of Domestic Workers in the Asia Pacific (Geneva: ILO, 2001) at 141. This study concludes that, "[t]he lack or absence of laws and policies addressing child domestic workers shows that there is little recognition at all that children in domestic work need to be addressed separately either through laws or policies. As a group these children are not seen as vulnerable to the worst forms of child labour. On the contrary, there is a general belief that children engaged in domestic work are cared for and somehow treated as one of the members of the family. Hence, there seems to be no urgency to prioritise their case." In Vietnam for example, a highly detailed list of hazardous work does not explicitly include domestic work, however it does describe the weight of loads that children of various ages can carry and it prohibits children working with certain harmful chemicals, both of which may arise in domestic work. In contrast, in the Philippines, laws for the protection of domestic workers generally contain specific legal protections for child domestic workers.

⁵⁹⁸ See List of Hazardous Occupation and Processes in Schedule to the Child Labour (Prohibition and Regulation) Act 1986, as updated 8th Oct 2010, online: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=27803

⁵⁹⁹ *Ibid*.

not been included, despite the high numbers of children engaged in this sector.⁶⁰⁰ Exclusions of domestic work in this context are made further problematic by the provisions of the Labour Act 2006, which explicitly removes domestic work from the protections of labour law more generally, including from the ambit of the labour inspection mechanism.⁶⁰¹ In contrast to their legislative frameworks, States have demonstrated more willingness to prioritize child domestic work as a potentially hazardous form of work in their National Programmes of Action, formulated in the context of technical cooperation assistance with the International Program for the Elimination of Child Labour (IPEC).⁶⁰² Notably, governments have focussed on the youngest age groups of domestic workers for targeted measures to benefit from the ‘penalty and prohibition’ approach, adopting an incremental approach, rather than one that puts in place an overall legal prohibition of child domestic work as being necessarily hazardous.

The challenges for regulating child domestic labour through a ‘penalty and prohibition’ approach are in part logistical, similar to the challenges for adult domestic workers.⁶⁰³ Due to its dispersed and often hidden nature in the private home, domestic work can be extremely challenging to regulate through labour inspection, in particular in contexts where labour inspectorates are under-resourced

⁶⁰⁰ See ILO, *Compendium of Hazardous Child Labour Lists and Related Legislation for Select Countries: Bangladesh*, online: http://www.ilo.org/ipec/Informationresources/WCMS_382487/lang--en/index.htm

⁶⁰¹ See Dr. Md. Rizwanul Islam, “Study Report on Regulating the Unregulated Domestic Works by Children” (June 2014) submitted to National Human Rights Commission, Bangladesh, online: <http://www.nhrc.org.bd/PDF/Study%20reports/Children.pdf> at 11. Section 6(25) of the Labour Act includes only those engaged in establishments or industries within the ambit of the Act. Section 1(4)(o) unequivocally provides that domestic workers do not come within the ambit of the Act.

⁶⁰² ILO Director General 2006, *supra* note 12. For example, the Time Bound Programme of Cambodia covers child domestic workers as a priority target group setting specific targets for the removal of children working from ages 6-14 and for preventing children from becoming engaged in domestic work from the ages of 5-10 through awareness raising and providing educational and non-educational services. Similarly, in the national programmes of Indonesia, Mongolia and the Philippines child domestic labour is recognized as a worst form of child labour with specific targets set for the removal and prevention of children from this sector.

⁶⁰³ See ILO Informal Economy Policy Resource Guide 2013 *supra* note 180, at section 4b. 1 “Domestic Worker: Strategies for Overcoming Poor Regulation” at 4.

and understaffed.⁶⁰⁴ In addition to logistical challenges, as the ILO has acknowledged, “[l]abour inspection is particularly difficult when the workplace is private – which is the case for domestic work or home work - because it conflicts with the right to privacy” often enshrined in national constitutions.⁶⁰⁵ The challenges of being shielded behind the private sphere are often greater in the context of child domestic work where there is considerable diversity between the different types of relationships that are involved and there is often no clear dividing line between paid ‘productive’ domestic work and unpaid work.⁶⁰⁶ First, children can be found working in the home of extended family or other person in an ‘adoption’ or ‘fosterage’ arrangement where the child, in some instances, is legally recognized as a child of the family.⁶⁰⁷ Under these systems the child is entrusted to the care of (often distant) relatives. However, they may not enjoy the same privileges as the other children in the family and they may be required to work as a domestic helper without being remunerated directly for their work.⁶⁰⁸ A second situation in which children can be found working in the domestic sector is as ‘hired help’ in the household of a third party who may or may not be a family member in situations where the child is recruited by an ‘agent’ or ‘guardian.’⁶⁰⁹ In some cases these children are not directly

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Ibid.*

⁶⁰⁶ See ILO CL Domestic Work 2013, *supra* note 18 at 27-28.

⁶⁰⁷ See for e.g. Jonathan Blagbrough & Edmund Glynn, “Child Domestic Workers: Characteristics of the Modern Slave and Approaches to Ending Such Exploitation” (1999) 6 *Childhood* 51 at 52. See further Jacquemin 2006, *supra* note 268; Jacquemin Mélanie, “Children’s Domestic Work in Abidjan, Cote D’Ivoire: The Petites Bonnes take the Floor” (2004) 11:3 *Childhood* 383.

⁶⁰⁸ *Ibid.* In the Cote D’Ivoire, Jacquemin *supra* note 272 at 392 observes, “the local ideal of fosterage all too often serves to cloak with the language of kinship, situations in which uneducated live-ins hands are on call for 11 or more hours a day to perform menial and repetitive tasks from which they acquire no skills at all”. Similarly in the context of Haiti, the ILO’s Committee of Experts on the Application of the Conventions and Recommendations (CEACR) has highlighted and criticized the *restavek* system in Haiti which has led children into forced domestic labour.

⁶⁰⁹ See Jacquemin 2006, *supra* note 268. In the study in the Philippines, Camacho Agnes Zenaida 1999 *supra* note 272 at 63 found 34% of the children were referred to their first job by relatives, 26% by people from their town, 14% by their siblings and only 8% were placed by an agency.

remunerated for their work, however their ‘guardian’ may receive remuneration.⁶¹⁰ Third, children can be found working as ‘waged’ domestic workers where they are lodged and fed in the household and are paid directly by their employer.⁶¹¹ While a formal contract of employment may exist, its enforcement possibilities may be fragile as is generally the case with domestic work.⁶¹² Fourth, children can be found working as domestic workers where they receive remuneration but they do not live in the household of their employer. Finally, in some cases children may work alongside their mother or other adult member of their family, although the work that they engage in may not be recognized. The diversity of arrangements and relationships for children in the domestic sector, even where legitimately undertaken in accordance with the minimum-age standards, complicates the idea of an ‘employment relationship’ which is so central to the labour law frame. Also, this type of work complicates the boundaries between ‘productive’ paid domestic work and reproductive unpaid domestic work in ways that compound the regulatory challenges for labour law. As the analysis below will show, through the prism of the Decent Work Agenda the ILO is demonstrating a stronger cognisance of the limitations of the labour inspection model for monitoring this distinctive sector. Specifically, the ILO acknowledges that “labour inspection alone will not suffice to ensure compliance,” and it has begun to adjust the regulatory framework of the labour law inspection model in an effort to meet some of the challenges outlined, although ongoing exclusions, in particular in relation to socially reproductive work remain.⁶¹³

⁶¹⁰ For example, in an ethnographic study of child domestic workers in Abidjan, Cote D’Ivoire Jacquemin found that from the late 1970s ‘guardians’ have been engaging in what has become a lucrative business of hiring domestic workers to meet the demands of women who are increasingly working outside the home; see Jacquemin 2006, *supra* note 268 at 393.

⁶¹¹ *Ibid* at 394.

⁶¹² *Ibid*.

⁶¹³ ILO CL Domestic Work 2013 *supra* note 18 at 77.

4.2.4 Child Labour in the Home-based Sector – Challenging the Binary between the Productive and Reproductive Spheres

Home-based workers, whether they are own-account workers or unpaid family members working in a family business, similar to those located in domestic work, are far removed from the paradigmatic employment relationship that is so central to the regulatory framework of labour law.⁶¹⁴ Women are found in greater numbers as home-based workers, in part, because this type of work involves the blurring of lines between public/private and market/home-based activities in a manner that facilitates women to shoulder both their necessity to engage in productive work and their socially ascribed roles in engaging in care work.⁶¹⁵ Specifically, women are found in far larger number as unpaid family workers, where they may not be recognized as engaging in work or employment as such, although they are often engaging in ‘productive activities.’⁶¹⁶

The relative vulnerability and invisibility of home-based workers, as well as their dispersed nature, often results in low earnings, insecure contracts and a limited capacity for collective organising, all of which encourage the conditions in which childhood economic exploitation flourish.⁶¹⁷ Long hours of work and the unregulated

⁶¹⁴ See for example WIEGO, “Supporting Women Home-Based Workers: The Approach of the Self-Employed Women’s Association in India” (March 2013) WIEGO Policy Briefing No. 13. As SEWA outlines, “[w]orking from home, isolated from others in their sector, home-based workers have traditionally had few opportunities to make their needs known to employers or public authorities ... Home-based workers lack worker rights, in large part, due to the absence of a clear or ongoing employment relationship. Combined with the non-existence of a common workplace, a high incidence of under employment, multiple employers and the absence of protective laws, there has been a failure of government, business and other to acknowledge the home-based worker as a ‘worker.’”

⁶¹⁵ See ILO & WIEGO, *Women and Men in the Informal Economy: A Statistical Picture*, (Geneva: International Labour Office: 2013) at 45-46, which indicates that in India 18% of the urban informal economy is comprised of home-workers and this sector provides for 23% of urban informal employment. Also, in India in 2009–2010, nearly two-thirds (62%) of all home-based workers – 65% of men and 40% of women – were own-account workers.

⁶¹⁶ *Ibid.* In India, for example studies have found that a far larger percentage of women (39%) than men (19%) were unpaid, contributing family workers.

⁶¹⁷ For empirical studies in this field see for example Mehrotra & Biggeri 2002, *supra* note 18; Biggeri & Mehrotra 2007, *supra* note 18.

nature of informal work engender significant occupational health and safety risks which can have spill-over impacts for the children of the household.⁶¹⁸ As Hill outlines, formal invisibility and non-recognition have often had negative implications for female workers, many of whom do not even recognize themselves as workers with specific entitlements, rights and responsibilities.⁶¹⁹ Through their work in the home-based sector in particular, women and children challenge the binary between ‘productive’ and ‘reproductive’ spheres by integrating their working and caring activities within the home. Children often replace adults in the provision of care while their parents engage in productive activities, or assist their parents to respond to the low price per piece available in the market.⁶²⁰

The incidence of child labour in homemaker households is generally higher than for children in non-homeworkers households.⁶²¹ In their empirical work in this field Mehrotra and Biggeri have found that home-based work in manufacturing can easily lead to the use of child labour, especially when the head of the household procures the raw materials from the contractor or the employer and performs the work at his home with family members.⁶²² In particular, the authors found that home-based work is a survival activity where children are often engaged in homemaker activities to respond to low price per piece and in order to generate additional income for the household.⁶²³ In a further empirical study which analyzes the garment production sector in Delhi, Philips et al. demonstrate that home-based workers’ piece-rate income is considerably lower than the minimum wage for Delhi, on average 23 per

⁶¹⁸ *Ibid.*

⁶¹⁹ Hill 2010, *supra* note 20 at 61.

⁶²⁰ See Biggeri & Mehrotra 2007, *supra* note 18 at 15. See also Philips et al. 2011, *supra* note 4.

⁶²¹ See for e.g. Mehrotra & Biggeri 2002, *supra* note 18; Biggeri & Mehrotra 2007, *supra* note 18.

⁶²² See Mehrotra & Biggeri 2002, *supra* note 18 at 2.

⁶²³ See Biggeri & Mehrotra 2007, *ibid* at 15. See also Philips et al. 2011, *supra* note 4.

cent of the minimum wage.⁶²⁴ In this study, the use of child labour is attributed primarily (by 61 per cent of households) to the need to supplement the household income.⁶²⁵ Nearly 85 per cent of the child workers identified fell into this category, even though the contribution of child workers to household income was calculated at only 10 per cent.⁶²⁶ Of the 201 home-based worker households sampled, 69 per cent reported some form of child labour, while 83 per cent of the children of such households from ages 5-14 years were reported to be engaged in some form of income-generating activity, whether they were paid directly or otherwise.⁶²⁷ In 17 per cent of cases, children were obliged to abandon schooling in order to work, while 40 per cent of young children in the 5-11 bracket gave caring for siblings as the reason for their non-attendance at school.⁶²⁸

With the integration of the economies in the Global South into global markets, sub-contracted informal settings are also increasingly integrated within complex global production chains resulting from the economic dynamics of increased competition and globalization.⁶²⁹ In their micro-study on child labour within the global production networks of the garment sector in the urban informal economy of Delhi for example, Philips et al. distinguish between different types of firms and enterprises that fall along the informal economy spectrum and that are linked to

⁶²⁴ Biggeri & Mehrotra *ibid* at 22.

⁶²⁵ *Ibid.*

⁶²⁶ *Ibid* at 23.

⁶²⁷ *Ibid.*

⁶²⁸ *Ibid.*

⁶²⁹ See Philips et al. 2011, *supra* note 4 at 5. See further Hill 2010, *supra* note 20 at 3. Also Kabeer *supra* note 185, who observes, “[t]he search for flexible labour in an increasingly competitive global environment has given processes of relocation and subcontracting an international form. Production have come to be increasingly organised through ‘global value chains’ through which multinational firms have been able to source their good from all over the world using different networks of suppliers often based in developing countries,” at 33.

complex global production networks stretching from factories to non-factory unregistered microenterprises and home-based work.⁶³⁰ As the authors observe,

the process of informalisation is of central importance, as regulatory structures, both private and public, are designed in the main to cover registered workers employed in registered enterprises, who represent only a tiny part of the workforce. The layers of outsourcing thus enable employers and producers to disclaim obligations to workers, and specifically evade responsibility for child labour.⁶³¹

The outsourcing model, combined with large-scale informalization, is designed to “rupture the obligations of capital to labour.”⁶³² The unequal relationship between the home-based worker and the chain of subcontractors and intermediaries makes the ability of the home-based worker to bargain for higher wages extremely challenging.⁶³³ In locating child labour within the global production chains in the garment industry, the authors argue that the commercial dynamics of global production networks, and the informalization process more generally, function precisely to favour and reinforce the use of child work and child labour, both directly (by fostering the integration of children as workers, whether paid or unpaid, in productive activity) and indirectly (by favouring the use of children in the reproductive household economy so that adult workers are made available for wage labour).⁶³⁴ As these authors assert, child labour emerges as an “inequality-generating mechanism which reproduces and institutionalizes the dynamics of adverse

⁶³⁰ Philips et al. 2011 *ibid* at 10, Table 1. The authors assert that the typology of firms in garment production, stretching from large factories to unregistered home-based workers working on a piece rated basis “indicates the very blurred lines that exist between production for domestic markets and that which is integrated in ‘global’ market ... [global production networks] are deeply rooted, in both their commercial dynamics and their social foundations, in the informal economy,” at 12.

⁶³¹ *Ibid* at 20.

⁶³² *Ibid*.

⁶³³ *Ibid* at 22.

⁶³⁴ *Ibid* at 8-9.

incorporation, and constitutes a key mechanism for the intergenerational transmission of poverty.”⁶³⁵

Given its location within the private sphere, home-based work has proved challenging to regulate legally, in particular through the mechanisms of labour inspection.⁶³⁶ In the context of the regulation of homework the ILO asserts that “the problem is not that home work is unregulated or under-regulated – indeed, in some instances, it is highly regulated – but rather the fact that legislation is not applied in practice, which is what makes homework informal.”⁶³⁷ However, within domestic legal frameworks there are ongoing exclusions of child labour occurring in the family context. Perhaps the clearest illustration is the example of India, where Clause 3 of the Child Labour (Prohibition and Regulation) Act of 1986 prohibits the employment of children in certain occupations and processes with the proviso that “nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family.”⁶³⁸ The problematic nature of these exclusions is compounded by the trend towards informal subcontracted work settings. As a result of the aggressive efforts in the 1990s to eliminate the visible use of child labour in the formal economy, Philips et al. have demonstrated that the problem has simply been displaced into diverse types of informal enterprises, most especially within home-based worker households.⁶³⁹

4.2.5 Mapping the Common Challenges of Homebased and Domestic Work

In unpacking some of the common challenges specific to these two sectors where children work in large numbers we can see a number of common themes begin to

⁶³⁵ *Ibid* at 22.

⁶³⁶ See generally, ILO Informal Economy Policy Resource Guide 2013, *supra* note 180, section 4.2b “Homeworkers” at 2.

⁶³⁷ *Ibid*.

⁶³⁸ Child Labour (Prohibition and Regulation) Act 1986. For the implications of these legal exclusions within the area of homework see Philips et al., *supra* note 4 at 8.

⁶³⁹ *Ibid* at 16.

emerge, many of which reinforce and illustrate the relational framing of the child that I have been advancing throughout the previous chapters and the challenges and limitations of the ‘prohibition and penalty’ approach for these sectors. First, child labour in the home-based and domestic sectors challenges the boundaries between the public and the private spheres and the idea of what comprises the ‘employment relationship.’ As the ILO preparatory report for Convention No. 189 observes, “[t]here is no fundamental distinction between work in the home and work beyond it, and no simple definition of public-private, home-workplace and employer-employee.”⁶⁴⁰ Children engage in work directly in the private sphere in the case of domestic work. In the case of home-work, children in this sector disrupt the ideal of the family as a necessarily beneficial location for the child existing in the ‘private sphere’ as protected under the UNCRC which I have critiqued in Chapter Three. Second, children working in the home-based and domestic sectors challenge the boundaries between ‘productive’ and ‘reproductive’ work. In the case of homework in particular, rather than existing ‘beyond the market’ the home becomes quite literally integrated within productive market-based activity, as well as remaining a site of reproduction and care work. Women homeworkers in a direct way evoke the concept of the ‘working and caring citizens’ that I have argued should be integrated within the conceptual framework of labour law rather than the individualized singular worker engaged in the labour market absent their caring responsibilities. Their work in this sector is very often undertaken to meet their socially-ascribed caring roles. However, there is continuity between their often exploitative working lives and the integration of their children’s labour into ‘productive’ and ‘reproductive’ work processes. In the case of domestic work, the unique relationships that often exist for children in this sector confuse the boundary between ‘productive’ and ‘reproductive’ work and are

⁶⁴⁰ See ILO Decent Work for Domestic Workers *supra* note 19 at 11, para. 38.

linked back to status-based distinctions that are distinctly gendered.⁶⁴¹ Third, children's work in both sectors, in particular in domestic work, underscores the serious challenges in drawing distinctions between 'hazardous' and 'non-hazardous' work which is a core element of the 'prohibition and penalty' approach. This is in part because these forms of work take place within the private sphere where isolation and lack of public scrutiny increase the potential for harmful work. In such cases it is extremely difficult to monitor where work moves from being 'non-hazardous' to 'hazardous' and harmful, further undermining the efficacy of a regulatory approach grounded in these categories.

4.3 Addressing the Informal Economy - Lessons from SEWA

One of the clearest examples of an approach that fully grapples with the burden and implications of care and social reproduction in women's lives is that of the Self Employed Women's Association of India (SEWA), the largest and oldest trade union of women-only informal economy workers in India. SEWA describes itself as an organization of poor, self-employed women workers who earn a living through their own labour or small business.⁶⁴² Their work is grounded in a grassroots approach that centralizes the working lives of women in the informal economy who are dispersed across different trades and regions in India. The work-life experience of these women demonstrates how the social and institutional relations of production, exchange and reproduction produce deeply entrenched forms of social, economic and political insecurity and exclusion. The main goals of the organization are to organize women workers for full employment which SEWA defines as worker security, income security, food security and social security including healthcare, childcare, insurance

⁶⁴¹ See Blackett 2011, *supra* note 13 at 429.

⁶⁴² See further online: http://www.sewa.org/About_Us.asp. See also Hill 2010, *supra* note 20; Hill 2008 *supra* note 18 120.

and shelter at a minimum.⁶⁴³ SEWA organizes women to ensure that every family obtains full employment and self-reliance, both individually and collectively, to enhance their economic security and their capability to make decisions in their lives.⁶⁴⁴

In her work on SEWA, Elizabeth Hill has observed that as distinct from other traditional trade unions in India, SEWA reconceptualized the relationship between the private sphere of reproduction and the public sphere of productive paid work, thereby broadening their understanding of the ‘worker’ to take a whole-person approach defined by their social, political and cultural context.⁶⁴⁵ Grounded in the lived experience of women workers in the informal economy, it became clear to SEWA that workers who experience deprivation in the private sphere were not able to be productive workers and that there is a close relationship between a woman’s reproductive needs and her productive capacity. By reconceptualizing the relationship between the private sphere of reproduction and the public sphere of productive paid work, the union was compelled to broaden their understanding of ‘worker’ to take account of the ‘whole’ person, defined by their social, political and cultural context. Traditional union concerns in relation to low wages and poor working conditions became understood to be perpetuated by exploitative production relations *and* inadequate conditions of reproduction.⁶⁴⁶ Childcare and healthcare in particular are reconceptualised as productive resources with the potential to promote higher wages and economic security for members.

The lived experience of SEWA members demonstrates that the public/private spheres of working women’s lives are not as separate as they are typically treated by

⁶⁴³ *Ibid.* Hill 2008 at 120.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ Hill 2008, *supra* note 18 at 124-125.

⁶⁴⁶ *Ibid* at 125.

trade unions, and that there is a complex interface between the conditions of reproduction and women's productive capacity, as well as the conditions of social and economic security.⁶⁴⁷ Such a holistic understanding of worker identity blurs the analytical division often made between the public and private sphere, between production and reproduction and between economic and social security.⁶⁴⁸ The interplay between women's multiple roles, responsibilities and needs therefore forms a core element of SEWA's approach.

The impact of SEWA's approach for the specific context of preventing or addressing childhood economic exploitation has not been evaluated to date and their advocacy activities do not specifically identify the problem as a core area of activity. However, the positive impact of childcare facilities for members' working lives has been assessed. For example, where children are cared for away from the work site of their mother engaging in construction work, women's productivity is reported to have improved as much as 50 per cent.⁶⁴⁹ The childcare facilities have also provided a positive impact on the quality and quantity of care children are able to receive during the work day, and have had positive longer term education outcomes with children that go to child care centres more likely than other children to continue onto school.⁶⁵⁰ In their empirical work on child labour in homebased work, Mehrotra and Biggeri have found that membership of a home -worker in a home-based work organization increases the probability of children of the household studying and working, rather than being in full time work, with the marginal effect as high as 24.7

⁶⁴⁷ *Ibid* at 126.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

per cent.⁶⁵¹ This preliminary evidence suggests that in contexts of informality supportive membership based organisations can form an important element of challenging the circumstances surrounding childhood economic exploitation. SEWA's distinctive approach in particular centralizes the necessity of care as an economic and social policy issue for women that impacts their ability to engage in 'productive' work. In light of the continuity between women's and children's exploitative labour which I have argued are relationally intertwined, in particular in sectors such as home-based work and domestic work, an approach that recognizes the interplay between women's caring role and their productive lives and that is grounded in the lived experience of women informal economy workers points towards future promising directions for the development of policy strategies in this area.

4.4. Addressing the Informal Economy – Lessons from the ILO's Decent Work for All Agenda

A second State centred example of efforts to address the exploitation and vulnerability of workers in the informal economy by the international community is the ILO Decent Work Agenda. The Agenda was initiated in 1999 by ILO Director-General Juan Somavia, the first Director-General from the Global South, and is the product of a major organizational review by the ILO of its core priorities.⁶⁵² Faced with growing criticism of the effectiveness of the large body of ILO normative standards within a context of accelerating globalization and the stark contrast between international standards and the actual experience of workers in national contexts, the Decent Work Agenda emerged as an attempt by the ILO to begin to re-orientate labour law in order to position it to respond more effectively to the negative

⁶⁵¹ Mehrotra & Biggeri 2002 *supra* note 18 at 50.

⁶⁵² See further Hepple 2005, *supra* note 40 at 63-67. See also Vosko 2002, *supra* note 305 at 25.

impacts of globalization and to respond to the actual workplace conditions of workers.⁶⁵³ In accordance with the Agenda, the primary goal of the ILO is “to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity,” through: 1. the promotion of the fundamental principles and rights at work; 2. the creation of greater opportunities for decent employment and income; 3. the enhancement of the coverage and effectiveness of social protection for all; and 4. the strengthening of tripartism and social dialogue.⁶⁵⁴

Anchored in the concept of human dignity, the Decent Work Agenda, at least at the level of policy direction, has the potential to constitute a significant revitalization of the social justice commitments of the ILO, and contains a number of innovative developments for labour law that challenge and go beyond many of the boundaries and exclusions of the dominant paradigm critiqued in Chapter Two.⁶⁵⁵ First, in an acknowledgement of the limitations of the traditional labour law framework, the Decent Work Agenda notes that because of its origins the ILO has paid most attention to the needs of waged workers – the majority of whom are men – to the neglect of the much broader spectrum of workers working beyond the formal labour market, including unregulated wage workers, self-employed workers and homeworkers.⁶⁵⁶ Through the concept of decent work, the ILO has begun to expand its normativity to “people on the periphery of formal systems of employment.”⁶⁵⁷ As Blackett and Tsikata have observed, the power of the extension of decent work to *all* lies in its unequivocal inclusiveness and fundamental equality, and in the space that

⁶⁵³ See Blackett & Tsikata, *supra* note 20 at 62.

⁶⁵⁴ See ILO Decent Work Report 1999, *supra* note 19.

⁶⁵⁵ See further Blackett & Tsikata, *supra* note 20 at 62.

⁶⁵⁶ ILO 1999, *supra* note 190 at 3-4.

⁶⁵⁷ See further Vosko 2002, *supra* note 305 at 26.

it promises for subaltern voices.⁶⁵⁸ Second, the ILO has mainstreamed gender equality at work as a cross-cutting issue within the Decent Work Agenda and has therefore begun to acknowledge and challenge international standard setting to grapple with the structurally-undervalued, deeply-gendered nature of care labour.⁶⁵⁹ Third, in centralizing the advancement of social protection mechanisms for all workers, the Decent Work Agenda has the potential to challenge the poverty and income volatility that has characterized the working lives of informal economy workers in particular and which serves to reproduce the conditions under which children become engaged in economic exploitation, explored further in Chapter Five.⁶⁶⁰ These conditions have served to reproduce the conditions under which children become engaged in economic exploitation.⁶⁶¹ Fourth, the Decent Work Agenda adopts what is termed a ‘life cycle’ approach, to conceptualize “decent work across the life cycle.” Through the ‘life cycle’ approach, the ILO has moved to focus on the varying degrees of vulnerability that people encounter as a result of their varying ages and genders.⁶⁶² This approach appears to provide a more fulsome and expansive account of the individual as a subject of labour law that moves beyond the constraints of the ‘paradigmatic worker’ explored in Chapter Two.

While the decent work concept has been described as ‘elusive’ by some scholars, it has also been recognized to have created potentially ‘counter-hegemonic’ spaces for

⁶⁵⁸ See Blackett & Tsikata, *supra* note 20 at 62.

⁶⁵⁹ See Blackett & Tsikata, *supra* note 20 at 62. See further ILO Gender Equality 2009, *supra* note 166.

⁶⁶⁰ ILO Social Protection 2003, *supra* note 33. In Chapter Five, I explore the specific role of social protection mechanisms in this context.

⁶⁶¹ ILO Social Protection 2003, *supra* note 33. In Chapter Five, I explore the specific role of social protection mechanisms in this context.

⁶⁶² See further, ILO Social Protection 2003, *supra* note 33; ILO, *Report of the Secretary General, Working Out of Poverty, International Labour Conference, 91st Session* (Geneva: 2003). See also ILO, *The Strategy of the ILO Social Security for All, Building Social Protection Floors and Comprehensive Social Security Systems* (Geneva: ILO, 2012), which refers to the importance of the life cycle approach in the context of designing social protection systems.

traditionally marginalized workers by other commentators.⁶⁶³ Numerous scholars have expressed a view in relation to the rationale and as well as the ‘promotional’ nature of the Decent Work Agenda, and its relationship with the ILO Declaration of core labour standards.⁶⁶⁴ For example, Vosko observes that the Decent Work platform reflects the ILO’s attempt to mediate a compromise between the demands of global capital and the growing demands of informal economy workers and their representative organizations within the ILO structures.⁶⁶⁵ On the other hand, Philip Alston has been critical of the minimal role of law in the Decent Work Agenda and critiques the decent work approach as a “range of objectives which could have been promoted in terms of rights, and defined in terms of specific standards, [and] are instead being pursued in a relatively non-legal, non-normative framework.”⁶⁶⁶ The implementation of the Decent Work Agenda is undoubtedly reliant on a ‘promotional’ approach that takes place through national level dialogue in the compilation of Decent Work Country Programmes.⁶⁶⁷ The idea underlying this promotional approach is to move the debate away from the international standard-setting arena to examine the national level where program and policies can be

⁶⁶³ *Ibid* at 20. Adelle Blackett, “The Space between Us: Migrant Domestic Work as a Nexus between International Labour Standards and Trade Policy” in Daniel Drache & Lesley A. Jacobs, eds, *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times* (Cambridge: Cambridge University Press, 2014) at 259.

⁶⁶⁴ See for e.g. Vosko 2002, *supra* note 305; Alston 2004, *supra* note 40.

⁶⁶⁵ See Vosko 2002, *supra* note 305 at 25.

⁶⁶⁶ See Alston 2004, *supra* note 40. This critique forms part of Alston’s overall critique of the ILO Declaration and what he terms the ILO’s acceptance of ‘soft promotionalism’ in place of international labour standards which he argues will downgrade the role of the ILO’s traditional enforcement mechanism. Specifically he argues that the rise of the decent work concept is actually an attempt to compensate for the shortcomings of the ILO’s focus on four core standards in the Fundamental Declaration, at 488-489. Although Novitz has concluded that the Decent Work Program ensures that, “‘social justice’ in the form of ‘decent work’ remains at the heart of ILO objectives,” it is not clear that the traditional ILO vision of social justice embodied in the Declaration of Philadelphia can so easily be satisfied by a focus in which normative standards are of relatively minor importance in practice.

⁶⁶⁷ See further John D.R. Craig & Sonia Regenbogen Luciw, “Decent Work and International Labour Law: A Diversion or a New Direction?” (2006) Draft Working Paper presented to the 2006 International Labour Conference, online: http://www.ceim.uqam.ca/ggt/IMG/pdf/Decent_Work_PaperCraig.pdf at 12-14.

developed based on nationally-identified priorities.⁶⁶⁸ However, the ILO does not have any means of enforcement at its disposal within the Decent Work Agenda apart from ‘naming and shaming’ those in breach of the specific ILO Conventions.

Despite the critique of this approach, which represents a trend within international labour law that is beyond the scope of this research, the Decent Work Agenda does provide a very valuable entry point for discussions relating to the implementation of labour standards at national levels among the tripartite partners and a pragmatic response to the gulf that exists between international labour standards and the actual experience of workers in national context. As Craig et al. observe, “[w]hat has been missing, at least until the Decent Work Agenda, is a strategy for reforming local systems so that implementation of international labour standards becomes viable and broader compliance with those standards can be achieved” in a manner that takes individual levels of national development into account.⁶⁶⁹ The key question for this research is to what extent do the distinctive developments in the Decent Work platform advance a structural approach for children engaged in economic exploitation?

4.4.1 Centralizing the Advancement of a ‘Decent Childhood’ in Strategies on the Informal Economy

In each of the Director General Reports on child labour since 2002, the ILO has resituated the policy analysis of child labour by placing the Decent Work Agenda at the centre of its analysis.⁶⁷⁰ Child labour is now being described as an important indicator of ‘decent work deficits’ and therefore an important entry point for ILO

⁶⁶⁸ *Ibid.*

⁶⁶⁹ See Craig & Regenbogen, *supra* note 663 at 30-31.

⁶⁷⁰ See ILO Director General 2002, *supra* note 12 at 117; ILO Director General 2006, *supra* note 12 at paras 316 and 322; ILO Director General 2010, *supra* note 5 at 41.

Decent Work Country Programming at national levels.⁶⁷¹ Most recently, in the 2010 Report of the Director General, decent work country programmes are now identified as the ILO's main vehicle for child labour programming in the coming years.⁶⁷² The first significant element of the Decent Work Agenda for children lies in the move towards a focus on what it terms the 'life-cycle approach.' Focussing on a 'decent childhood' as a key developmental stage facilitating the ability to enjoy "decent work in the life cycle," the ILO has become more attentive to the distinctive vulnerabilities of individuals at different points along the continuum of the life cycle.⁶⁷³ Conceptually, this moves the labour law framework away from the 'paradigmatic adult worker' that has marginalized diverse subjects, including young and dependent children who cannot be classified as workers, such as I have critiqued in Chapter Two. The crucial role of childhood in enabling decent work later in the life cycle and the surrounding support structures that entails, not only for children but also the workers who are their primary caregivers, has thus become a core concern of labour law.⁶⁷⁴ Rather than being premised on the simple exclusion of the child from the labour market as outlined in Chapter Two, the labour law framework has been recalibrated at the policy level to recognize the key formative role that childhood plays for workers more generally in their overall access to decent work across the life cycle.

A second important element of the Agenda lies in its commitment to protect the marginalized worker, with the ILO centralizing the role of the informal economy in child labour and focussing on the essential links between child labour and advancing

⁶⁷¹ *Ibid.*

⁶⁷² See ILO Director General 2010, *supra* note 12 at 41.

⁶⁷³ For further information on the 'life cycle' concept see ILO Social Protection 2003 *supra* note 33.

⁶⁷⁴ See for eg. ILO WR Decent Work Young People 2015 *supra* note 3 at 15.

decent work for adult workers. As I have outlined in Chapter Two, beginning with the preparatory work that preceded the ILO Worst Forms of Child Labour Convention No. 182, in 1998, the ILO began to demonstrate an increased awareness of the challenges presented by the predominance of child labour within the informal economy.⁶⁷⁵ However, in line with the dominant labour law paradigm, the challenge of informality was conceived of at this stage as primarily as one of inadequate coverage of law, legal exclusions and the limited capacity of the labour inspectorate.⁶⁷⁶ This was evident during the drafting negotiations of Convention No. 182 where the drafters of the Convention retained a central focus on formal labour inspection regulation and the inadequacies of legal frameworks in their coverage of the locations where informal work takes place.⁶⁷⁷ In an evolution of that position, in 2002, the first Director General's Global Report on child labour recognized that almost by definition child labour is associated closely with the unregulated informal economy, which is largely beyond the reach of formal institutions, including labour inspection services.⁶⁷⁸ Highlighting the high degree of vulnerability of informal workers who work in small and micro enterprises, the report observes that "[t]he preponderance of child labour in the informal economy beyond the reach of most formal institutions in countries at all levels of income, *represents one of the principal challenges to its effective abolition.*"⁶⁷⁹

The 2006 Director General Report demonstrates a further evolution in ILO policy analysis in relation to the links between child labour and informality, particularly in the context of monitoring and enforcement. As distinct from the formal sector, the

⁶⁷⁵ See ILO 1998, *supra* note 4 at 44.

⁶⁷⁶ *Ibid* at 24-25

⁶⁷⁷ See ILO Targeting the Intolerable 1998, *supra* note 175 at 24-27. See further Chapter Two at 121-122.

⁶⁷⁸ See ILO Director General 2002, *supra* note 12 at ix.

⁶⁷⁹ *Ibid* at 24 (emphasis added).

ILO notes that the informal economy requires a different form of monitoring and enforcement strategy which moves away from sector-specific and workplace-centred interventions through the labour inspectorate, to centralizing the role of social dialogue through a wider range of actors and the community in preventing and increasing awareness of the harms of child labour.⁶⁸⁰ Noting the distinctive characteristics of child labour, the ILO asserts that monitoring mechanisms should use a wide range of partners, such as civil society organizations and NGOs, with much of the emphasis placed on prevention and raising awareness within the community.⁶⁸¹ This type of community-based monitoring is often carried out in rural areas and those child labour sectors where the physical withdrawal of children from the worksite is not possible, as is the case where the children live with their families on smallholder farms, small-scale mining sites or fishing boats, the ILO recommends that this approach should be expanded.⁶⁸² Therefore, according to the ILO the task of child labour monitoring should be adjusted to engage the *community* to monitor child labour through social mobilization, training and provision of tools, and to link the monitoring activity to local government and official enforcement systems so that the information on child labour can be used effectively.⁶⁸³ The report observes that “[m]uch of this work involves *attitude change* rather than law enforcement.”⁶⁸⁴ The ILO envisages that where this form of child labour monitoring is mainstreamed into the regular work of local government, it can promote a permanent response mechanism to child labour that can be shared among all the many actors in society working towards the elimination of child labour.⁶⁸⁵

⁶⁸⁰ ILO Director General 2006, *supra* note 12 at paras 316 and 322.

⁶⁸¹ *Ibid.*

⁶⁸² *Ibid.*

⁶⁸³ *Ibid* at para 270.

⁶⁸⁴ *Ibid* at para 208.

⁶⁸⁵ *Ibid.*

In the most recent 2010 report, the Director General once again places central emphasis on the social dialogue strategy in the elimination of child labour, as well as on the role of the social partners in promoting dialogue towards the elimination of child labour.⁶⁸⁶ As with other fundamental rights at work, the report asserts that child labour elimination “will not be achieved solely by the development of law but requires action by the social partners in the sectoral, enterprise and workplace levels.”⁶⁸⁷ In particular, the social partners now recognize that child labour can be an entry point for dialogue with employers, including in the informal economy, and that trade unions and employers through their activities in the informal economy contribute towards momentum in taking steps towards child labour eradication.⁶⁸⁸ The report concludes that “[a] *major focus over the next four years should be on how to meet the challenge of the informal economy.*”⁶⁸⁹

At a policy level, the Decent Work Agenda represents a significant step forward beyond the narrow ‘prohibition and penalty’ approach critiqued in Chapter Two. In particular, the Agenda opens up the theoretical space to integrate more fully the diverse range of recurring social processes that give rise to child labour, in particular the central role played by the informal economy. Significantly for children, the language of decent work is particularly attentive to the distinctive vulnerabilities of individuals at different points along the continuum of the life cycle, including within it the concept of a ‘decent childhood’ as one step in the continuum towards ‘decent work in the life cycle.’ At least conceptually, the Agenda integrates more fully the distinctive subject position of the child within the labour law arena. In centralizing the informal economy, the ILO has moved to re-adjust its model of labour inspection

⁶⁸⁶ ILO Director General 2010, *supra* note 12 at 32 at para 139.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *Ibid* at 80 emphasis added.

to garner the support of a range of civil society organizations and community based organizations, recognizing the inherent limitations of the formal labour inspectorate. This may be a particularly effective strategy in sectors such as domestic and homebased work if effective partnerships can be forged between membership organizations for informal economy workers and the relevant State authorities.

4.4.2 Linking Decent Work for Adults and Gender Equality to Childhood Economic Exploitation

In addition to focussing on the challenge of the informal economy, the ILO has explicitly linked deprivations in decent work among men and women to the elimination of child labour. Therefore, in 1999, in its conclusions on decent work and informality, the ILO explicitly recognizes for the first time that “[t]he goal of decent work for all women and men cannot be achieved unless child labour is abolished.”⁶⁹⁰ In particular, gender equality has been placed at the heart of the Decent Work Agenda which has led to an explicit acknowledgement of the linkages between gender equality and the enjoyment of a decent childhood free of child labour. In its 2009 report titled *Gender Equality at the Heart of Decent Work*, the ILO clearly acknowledges the impacts on women workers in the informal economy who “struggle to balance their productive and reproductive roles” and as a result are engaged in the most precarious and poorly-paid work within informality.⁶⁹¹ This includes a commitment by the ILO to mainstream gender equality throughout the Decent Work Agenda, in recognition of the specifically gendered nature of informality and its impacts on poverty and deprivation.⁶⁹² Moving towards a more holistic approach to the problem of child labour, the ILO signals that it now recognizes that providing

⁶⁹⁰ *Ibid.*

⁶⁹¹ ILO Gender Equality 2009, *supra* note 166 at 10.

⁶⁹² See ILO Gender Equality 2009, *supra* note 166.

decent work for adults is crucial to eliminating the numerous forms of child labour.⁶⁹³ Specifically, it asserts child labour,

represents a double problem of labour market efficiency: first, it deprives adult women and men of jobs they could perform more satisfactorily than children; and second, it prevents the development of sound employment policies and programmes, since children are often hired instead of young people or adults simply because they work for lower wages.⁶⁹⁴

Therefore, the ILO now acknowledges that strategies to combat child labour need to take account of the decent work prospects of their parents, in particular the female members of the household.⁶⁹⁵ It points to diverse strategies that it claims have had positive impacts, including economic empowerment for women, increased social-protection measures and social-dialogue strategies.⁶⁹⁶ In what appears to be a move away from a decontextualized ‘penalty and prohibition’ approach, the ILO has signalled that it aims to apply a systematic gender-sensitive approach to all of its various interventions in child labour.⁶⁹⁷ This involves taking into account the policy and programming links between the “elimination of child labour,” “education for all” and “gender equality.”⁶⁹⁸ The ILO goes on to note that “a comprehensive gender perspective when fighting child labour is still lacking in many areas and a thorough gender analysis needs to be built into all initiatives combating child labour.”⁶⁹⁹ The range of policies, programmes and activities where the ILO considers it can have an impact in this field include: developing employment-creation and income-generation strategies for parents, including through increasing a mother’s income; and improving the availability of affordable, quality childcare for young children to

⁶⁹³ ILO Gender Equality 2009, *supra* note 166 at 69.

⁶⁹⁴ *Ibid* at 69.

⁶⁹⁵ *Ibid*.

⁶⁹⁶ *Ibid* at 69-70.

⁶⁹⁷ *Ibid* at 74.

⁶⁹⁸ *Ibid*.

⁶⁹⁹ *Ibid*.

prevent parents, mainly women, from taking their children to work or engaging their older siblings in childcare work.⁷⁰⁰

As the ILO has acknowledged, the links between child labour and gender inequality, particularly within the informal economy are at a relatively early stage.⁷⁰¹ It has recognized the role that reproductive responsibilities play in the gender segmentation of the informal economy. However, the ILO does not develop in any great detail on the implications of taking a ‘comprehensive gender perspective’ in the field of child labour and what this would specifically mean for current legal and policy interventions. In particular, to date the ILO has not fully centralized the role of care and social reproductive responsibilities in its analysis of the child labour phenomenon, nor has it fully explored some of the tensions that can arise from women’s increased participation in the labour force or in ‘productive’ activities for the child labour context. In contrast to the approach of an organization such as SEWA, the role of care in the equation of childhood economic exploitation continues to be relegated in a manner that mirrors the structural inadequacies of the labour law and human rights models critiqued in the previous chapters. However, care and social reproduction play a core role in women’s engagement in the informal economy and the emerging statistical data on the large number of so called ‘inactive’ children, demonstrates that there are large cohorts of children also engaging in social reproduction work within the household.

Within the context of increasing women’s and men’s access to decent work, in part as a mechanism to prevent childhood economic exploitation, the implications of social

⁷⁰⁰ *Ibid.*

⁷⁰¹ *Ibid* at 74.

reproduction and care work, and the potential tensions that can arise for child labour prevalence have not been fully acknowledged by the ILO. Child labour policy frameworks, particularly those intervening in the context of informality to increase women's labour force participation, should place a central emphasis on the necessity of care as a serious economic and social policy issue, rather than assume that there is an unlimited supply of care arising from the 'natural' role of the family in the private sphere. Commentators examining the political and social economy of care have argued that to overcome the gender bias that is deeply entrenched in labour force participation and to have positive impacts inter-generationally, care must become a dimension of citizenship with rights that are *equal* to those that are attached to employment.⁷⁰² Ideally, society should recognize and value the importance of different forms of care, but without reinforcing care work as something that only women and girls can or should do, given the well-known and adverse consequences of such gendering, women's financial precariousness and their exclusion from the public domain. Care therefore must become a dimension of citizenship with rights that are equal to those that are attached to employment.⁷⁰³ As the analysis above has sought to demonstrate, this is not solely a question of increasing women's access to decent work opportunities, but in addition has serious implications for children, in particular girl children, who are often integrated into social reproduction work to the detriment of their well-being as a result of their parent's engagement in 'productive' activities.

⁷⁰² See UNRISD 2007, *supra* note 712 at 2. See further Guy Standing, *Global Labour Flexibility: Seeking Distributive Justice* (Basingstoke: Palgrave MacMillan, 1999).

⁷⁰³ *Ibid.* UNRISD 2007.

4.4.3 Progressive Standard Setting – The ILO Decent Work for Domestic Workers Convention No. 189

In addition to its policy work, the ILO Decent Work agenda has contributed towards the ILO refocussing its norm creation role to more ‘atypical’ forms of work that exist on the margins of the standard employment relationship, in particular domestic work. The ILO had recognized for some years that there is a lack of explicit legal protection for domestic workers and that in light of the nature of their work, particularly its occurrence in the ‘private sphere,’ domestic workers can be vulnerable to exploitative working relationships.⁷⁰⁴ Convention No. 189 has been broadly welcomed as a long-overdue international standard setting initiative for all domestic workers, including for child domestic workers who have been less visible in the discourse on child labour than other groups of working children. The Preamble of the 2011 Convention explicitly recognizes the gendered and undervalued nature of domestic work which is “mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights.”⁷⁰⁵

⁷⁰⁴ For an overview of ILO involvement in the field of domestic work see also ILO Decent Work for Domestic Workers *supra* note 19. International labour standards are generally considered to apply to domestic workers. However, many labour standards, including those applicable to child labour, either exclude domestic workers from their scope, or include ‘flexibility clauses’ allowing Member States to exclude domestic workers upon ratification. For example, under Article 4(1) of Convention No. 138 it is possible to exclude from the application of the Convention limited categories of employment or work in which “special and substantial problems of application arise,” excluding hazardous work. For example, Egypt has used Article 4 to exclude domestic workers, on the grounds that the nature of the work makes it virtually impossible to ensure that hazardous work is not covered by the exclusion. Under Article 5(1) States “whose economy and administrative facilities are insufficiently developed” may, after consultation with the organizations of employers and workers concerned, initially limit the scope of the application of the Convention. Article 5(3) lists the sectors to which Convention No. 138 must apply as a minimum and does not include domestic work. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) had been active in calling for labour standards to be extended to domestic workers in their examination of State compliance.

⁷⁰⁵ The inclusion of the term ‘girls,’ which was proposed by the Worker Vice-Chairperson to supplement the term women, gave rise to debate during the 99th Session of the International Labor Conference.

During the negotiation of Convention No. 189, there was a general consensus among the tripartite partners that any instrument relating to domestic work should address the issue of child labour which is reflected in Article 3 of the Convention.⁷⁰⁶ The Recommendation accompanying Convention No. 189 provides that, taking into consideration the ILO Worst Forms of Child Labour Convention No. 182 and Recommendation No. 190, States should identify the types of domestic work that by their nature or the circumstances in which they are carried out, are likely to harm the health, safety or morals of the child and should prohibit and eliminate such forms of work.⁷⁰⁷ Notably, rather than designate all forms of domestic work as hazardous, Convention No. 189 defers to States the task of defining the hazardous elements of the domestic working relationship for children. This appears to diverge from the policy position of the ILO which had increasingly included domestic work among children generally within its definition of hazardous work in both research it has undertaken in the area and within the context of its development cooperation assistance in the formulation of national action plans within IPEC.⁷⁰⁸ Also, Recommendation 190 requires States to prioritize younger working children in their

Following some discussion, with States such as Bangladesh, the United States and Uruguay preferring the non-gendered form 'children,' the amendment to include the term 'girls' which was supported by the EU, the Governments of Argentina and Indonesia and the Workers' delegation among others was finally accepted. The Worker Vice-Chairperson outlined that the amendment "was not an issue of ideology, but of purely descriptive nature and aimed at ensuring that the preamble aimed at the right groups." In light of the statistics that demonstrate that in many jurisdictions over 90% of children engaged in domestic work are girls, and that more girls under 16 years are in domestic service than any other category of child work or labour, the inclusion of girls in the Preamble can be considered an important recognition of the gender and age dimensions of domestic work. See further, ILO, Provisional Record of the 99th Session, 2010, Report of the Committee on Domestic Workers, at paras 186-203, ILC99-PR12-2010-06-0348.

⁷⁰⁶ See for eg ILO, Provisional Record of the 99th Session 2010 *ibid* at paras 19, 28 and 30. This view was shared by countries of the Global North and the Global South, as well as the Worker and Employer delegations. Countries in Sub-Saharan Africa in particular noted, "the increasing incidence of child labor and human trafficking, especially in Sub-Saharan Africa, has to some degree found its roots in domestic work," and called for special attention to be paid to this phenomenon. Of particular note, a statement by a former child domestic worker highlighted the role of economic necessity in giving rise to domestic work stating, "domestic work was often the only way children could feed themselves and support their families. While not always detrimental to children, domestic work needed to be regulated in order to avoid exploitation and abuse," see ILO Provisional Record 100th Session, Report of the Committee on Domestic Workers, June 2011 at para 52, ILC100-PR15-2011-06-0245-1EN.docx.

⁷⁰⁷ ILO Recommendation 201 para 5.

⁷⁰⁸ ILO Hazardous Work 2011 *supra* note 2 at 28-29; ILO Director General 2010 *supra* 12 at para 254.

national programs of action relating to the worst forms of child labour, which has been occurring in practice in the context of domestic work where national programs of action are most often agreed in collaboration with IPEC.

Domestic work is defined as work performed in or for a household or households by a domestic worker who is a person engaged in domestic work within an ‘employment relationship’.⁷⁰⁹ The definition of domestic worker does not include persons who perform domestic work occasionally or sporadically, or not on an occupational basis.⁷¹⁰ The Convention goes on to state that it is required to apply to all domestic workers.⁷¹¹ However, limited categories of workers in respect of which “special problems of a substantial nature arise” can be excluded from the protective remit of the Convention.⁷¹² The meaning of the term ‘employment relationship’ was subject to extensive debate during the 99th and 100th International Labour Conferences, as it was considered a core article that would determine the scope and relevance of the Convention to a range of domestic working relationships.⁷¹³ There was no discussion during this part of the debate on the particular situation of domestic workers who are children and of the diverse forms of relationships that can arise in the specific situation of child domestic work. The law and practice *Decent Work for Domestic Workers* report recognized that in some countries child domestic workers tend to work for employers who are distant relatives, who are entrusted by the child’s

⁷⁰⁹ Articles 1(a) and (b) of Convention No. 189.

⁷¹⁰ Article 1(c) of Convention No. 189.

⁷¹¹ Article 2(1) of Convention No. 189.

⁷¹² Article 2(1)(b) of Convention No. 189.

⁷¹³ The worker delegation and many State delegations were concerned to ensure that the definition of the term should be wide enough to cover all forms of domestic work, see ILO Provisional Record of the 99th Session, at para 115. Countries in the Global South in particular were concerned to ensure that the term covered all forms of domestic work in the informal economy that can often occur on an *ad hoc* basis outside of what is generally considered to be an employment relationship. On the other hand, the employer delegation was concerned to ensure that the parties to the employment relationship should be clearly delineated. See further ILO Provisional Record of the 99th Session, at para 115.

parents to ideally ensure education and care in the hope of a better life.⁷¹⁴ However, during the drafting negotiations there was a lack of in-depth discussion of the specific characteristics of child domestic work, including the extent to which kinship or extended family relationships come within the definition ‘employment relationship.’ In the implementation of the Convention, therefore, it will be critical to ensure that the protections in the Convention apply to all categories of child domestic workers to ensure that child domestic workers that do not conform to an ‘employment relationship’ are not excluded from the Convention’s protections.⁷¹⁵

In light of the Convention’s focus on domestic work, States will be required to explicitly engage with the question from a legislative perspective of what forms of domestic work can be considered ‘hazardous’ for children, and what specific elements of this ‘employment relationship’ are most problematic. This may serve to increase political engagement and awareness of the situation of child domestic workers at national levels, and will provide an important platform for non-governmental organizations and organizations for working children to engage in advocacy to advance their respective positions relating to domestic work. Subject to State ratification,⁷¹⁶ the decent work for domestic workers paradigm has potential to raise political awareness and prioritization of child domestic work at national levels.

⁷¹⁴ ILO Decent Work Report 1999 *supra* note 19 at para 45.

⁷¹⁵ For example Jacquemin *supra* note 272 asserts that in the Cote D’Ivoire an NGO program that targeted children working in the domestic sector failed to adequately address the needs of child domestic workers who were working in the household of a family member on the basis of the ancient practice of child fosterage and who were not receiving remuneration for their work. Through both their definition of child domestic workers as a target group and their strict application of the minimum age the NGO did not include within their target group what were termed ‘little nieces’ who are working for distant family relatives..

⁷¹⁶ To date there have been 22 ratifications of Convention No. 189, see further http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460 .

Nevertheless, Convention No. 189 does not add anything further to existing ILO Conventions that specifically prohibit child labour apart from providing an explicit focus on child domestic labour. In the regulatory mechanism that it proposes and in allowing Member States to define what types of domestic work are ‘hazardous’ for children, it does not move significantly beyond the ‘prohibition and penalty’ approach that I have critiqued in Chapter Two. In particular, by allowing Member States to determine what types of domestic work for children can be regarded as ‘hazardous’, the Convention appears to undermine the policy position that had been emerging from the ILO that recognized domestic work as a particularly hazardous form of labour for children in light of their potential exposure to abuse within private homes. This could be considered a missed opportunity and demonstrates a disjuncture between the progressive policy work of the ILO and its international legal standard setting. Replicating the inadequacies of earlier child labour Conventions outlined in Chapter Two, Convention No. 189 does not explicitly address the range of socio-economic supports that would be required for children to effectively exit exploitative domestic labour.

4.4.4 The Challenges of Translating the Decent Work Concept into Practice – The Case of Bangladesh

A second challenge for the Decent Work Agenda lies in the extent to which it has led to a change in approach at domestic levels in relation to the legal and policy framework surrounding childhood economic exploitation in practice. While the decent work lens within the child labour context has led to a re-orientation of legal and policy initiatives to focus on informality, the role of social dialogue as a monitoring mechanism and the links with gender equality, it is important to assess to what extent these conceptual developments have been effectively translated into legal

and policy interventions in practice. Drawing on the previous analysis, in this part, I will consider the Decent Work Country Programme (DWCP) of Bangladesh as an illustrative example of the ways in which the decent work concept has been translated into policy programming.⁷¹⁷

The advancement of decent work in Bangladesh is undoubtedly a challenging task in a context where informal employment in Bangladesh is estimated at 87.5 per cent of the total number of jobs on the labour market.⁷¹⁸ Almost 77 per cent of the jobs available in labour markets in Bangladesh in 2010 were undertaken in informal production units composed mainly of unpaid family workers and daily wage workers, both in the agricultural and non-agricultural sectors.⁷¹⁹ While women's labour market participation is somewhat lower in Bangladesh than other countries in the region, standing at only 36 per cent, women are more likely to be in informal employment relationships.⁷²⁰ Studies demonstrate that constraints such as the lack of formal childcare facilities and the burden of other domestic work are key explanatory factors for why women predominate in informality.⁷²¹ Against this backdrop, the Decent Country Work Programme (DWCP) for Bangladesh was developed and implemented from 2006-2009 and has been renewed for 2012-2015

⁷¹⁷ ILO, *Bangladesh Decent Work Country Programme 2006-2009* (Geneva: ILO: 2006) [DWCP 2006]; ILO, *Bangladesh Decent Work Country Programme 2012-2015*, (Geneva: ILO, Nov. 2012) [DWCP 2012].) [DWCP 2012].

⁷¹⁸ See Asia Development Bank, *The Informal Sector and Informal Employment in Bangladesh*, Country Report 2010 at 1 [ADB 2010]; DWCP 2012, *ibid* at 3.

⁷¹⁹ ADB 2010 *ibid* at 2. Notably, the growth rate of the female labour force is much higher than that of men – 8.69% compared to 1.40% for men. The entry of women into the labour force is mainly due to the ready-made garment sector, which employs approximately 3.5 million workers, of which an estimated 80% are women. The proportion of women working in informality stands at 92.3%, compared with 85.5 per cent of men, see DWCP 2012, *supra* note 717 at 3-4.

⁷²⁰ See further Rushidan I. Rahman & Rizwanul Islam, "Female Labour Force Participation in Bangladesh: Trends, Drivers and Barriers" (October, 2013) International Labour Organization Asia Pacific, Working Paper Series [Rahman and Islam].

⁷²¹ DWCP 2012, *supra* note 728 at 4; Rahman and Islam *ibid* at 42.

as a core element of the ILO's strategy to reduce poverty and to foster equitable, inclusive and sustainable development.⁷²²

In accordance with the re-oriented policy framework of the ILO, combatting child labour, with a priority focus on the worst forms of child labour, has been mainstreamed within both of the Bangladesh DWCPs. Therefore, in the DWCP 2006-2009 it was acknowledged that the "vast majority of [children] are found in informal sectors, relegating workers in general and child labourers in particular to hazardous and exploitative working conditions."⁷²³ The measures identified in the 2006 plan included the development of a national time-bound programme to combat the worst forms of child labour in compliance with the requirements of ILO Convention No. 182.⁷²⁴ Also, the development and implementation of regulatory and monitoring mechanisms; the provision of non-formal education; skills development for children in the worst forms of child labour and socio-economic empowerment programmes for their families and workplace improvement programmes were further identified.⁷²⁵ While gender equality was mainstreamed within the 2006 plan as a priority in recognition of the persistent gender gap in labour force participation and the fact that employment opportunities for women cluster around occupations that are often difficult and unacceptable, there were no specific links made between gender equality or the empowerment of informal sector workers and the issue of child labour.⁷²⁶

⁷²² See further Karen Dunn & Abdul Hye Mondal, *Report on the Review of the Decent Work Country Programme: Bangladesh 2006-2009* (Bangkok: International Labour Office, 2011) [Dunn & Mondal, 2011]; Abdul Hye Mondal, *Monitoring and Assessing Progress on Decent Work in Bangladesh* (Dhaka and Geneva: International Labour Office, June 2010) [Mondal 2010].

⁷²³ DWCP 2006, *supra* note 717 at 4.

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid* at 4.

In an assessment of the DWCP for Bangladesh 2006-2009, the ILO found that while the DWCP was successful in expanding the knowledge base on the worst forms of child labour, the project was not able to generate the political commitment needed to ensure a reasonable pace of progress towards the fulfillment of the time bound programme objectives.⁷²⁷ Specifically, the review observes that “[c]hild labour appears not to have been a high priority of the Government during the DWCP period,” as there were significant delays in approving and developing a child labour policy, in endorsing the time-bound programme and a lack of significant financial commitment to child labour in Government initiatives.⁷²⁸ Noting some of the challenges in this field, the report states that “the high levels of underemployment, large numbers of workers living in poverty, dominance of the informal economy in employment, prevalence of child labour in hard to reach rural areas and the country’s low productivity, wage rates and skills base made promoting decent work difficult.”⁷²⁹ In particular, the low economic status of women and the social acceptance of child labour were observed to present a challenge as these are deep-rooted social norms.

The review cites some specific positive pilot projects undertaken by non-governmental organizations in conjunction with a wide range of social partners that specifically focussed on raising awareness in accordance with the social dialogue model around the harms of the worst forms of child labour in the urban informal economy in Dhaka.⁷³⁰ These provided children who had been removed from this type of work with various rehabilitative supports, as well as income support in the form of social transfers to their parents. However, these were small-scale pilot projects that

⁷²⁷ Dunn & Mondal, 2011 *supra* note 722 at 21.

⁷²⁸ *Ibid* at 11.

⁷²⁹ *Ibid* at 34.

⁷³⁰ *Ibid* at 21-22.

have not been rolled out extensively outside of the project on the urban informal economy. The review noted that enhanced synergies across the different forms of interventions could be tapped into, for example, the review observed, “a successful strategy of addressing the worst forms of child labour requires social mobilization, awareness raising and a regulatory mechanism, in addition to service delivery.”⁷³¹ Despite the awareness of the crucial role of gender equality and access to decent work for parents demonstrated by the ILO within its policy on decent work, in the DWCP there was no explicit link made between policy strategies to eliminate child labour and issues such as gender equality. Therefore, issues such as the empowerment of women informal sector workers and the enhancement of sustainable livelihoods were not explicitly linked to child labour strategies, illustrating the ongoing disjuncture between progressive policy discourse and the practice of formulating DWCPs.

The Bangladesh DWCP 2012-2015 centralizes the challenges of the informal economy for the achievement of decent work in Bangladesh, noting that a “large proportion of the total labour force remains engaged in marginal and low productivity occupations where they are often joined by working children.”⁷³² In mainstreaming gender equality within the plan, the DWCP notes the gendered segmentation of labour force participation and asserts that it is necessary to increase women’s employment in order to move women “away from the care economy to the market economy.”⁷³³ For this to happen, the DWCP notes there is a need for policies that will address women’s unpaid care workload that constrains their employment options and challenge stereotypes about women’s weaker labour force

⁷³¹ *Ibid* at 36.

⁷³² DWCP 2012, *supra* note 717 at 3.

⁷³³ *Ibid* at 4.

commitment.⁷³⁴ Once again there are no explicit linkages made between policy strategies to eliminate child labour and issues such as gender equality, the empowerment of women informal-sector workers or the enhancement of sustainable livelihoods.

In the context of child labour, the DWCP 2012 reiterates its commitment to eliminating the worst forms of child labour which will be primarily undertaken through the 2010 *National Action Plan for the Elimination of Child Labour*. Bangladesh's *National Action Plan for the Elimination of Child* 2010 identifies as its main objective the withdrawal of children from all forms of child labour, including hazardous work and the worst forms of child labour.⁷³⁵ A number of diverse specific objectives are outlined, namely, the withdrawal of working children from different forms of occupations, including hazardous work and the worst forms of child labour; the involvement of parents of working children in income-generating activities with a view to getting children out of vicious circles of poverty; the provision of stipends and grants in order to bring working children back to school; the enactment of 'pragmatic' laws and the strengthening of institutional capacity for their enforcement; and the raising of awareness among parents, civil society organizations etc. about the harmful consequences of child labour.⁷³⁶ While the role of the informal economy and lack of sustainable livelihoods is mentioned within the action plan, there is no explicit link made with the Decent Work Agenda, nor with the DWCP initiative. Involving parents in income-generating activities is mentioned as an overall objective. However, there is no elaboration of the links between women workers in informality or to their empowerment as informal sector workers and the

⁷³⁴ *Ibid.*

⁷³⁵ Minister of Labour and Employment of the Government of the People's Republic of Bangladesh, "National Child Labour Elimination Policy" (March 2010).

⁷³⁶ *Ibid* at 5.

problem of child labour. In fact, the specific labour-activation projects that are focussed on in the action plan involve creating adequate employment opportunities for skilled children who have availed of trade-based training, rather than for adult workers. The overall tone of the action plan, while acknowledging that the informal economy needs to be incorporated within the legal framework, focuses on what are termed ‘pragmatic’ legal and policy interventions. These focus on the withdrawal of children who are already engaged in the worst forms of child labour. In contrast, preventative strategies that would reduce the risk of children’s entry to economic exploitation and harness the wider range of interventions in the informal economy to create positive impacts in this field are not identified.

From this analyzes it is clear that the conceptual developments that are encapsulated in the decent work concept have not been fully translated at the national level into policy strategies that focus on child labour, at least in the case of Bangladesh. In its assessment of the legal and policy situation surrounding child labour in Bangladesh, the US Labour Department progress report reveals what it describes as ‘modest’ progress in eliminating the worst forms of child labour with several core shortcomings.⁷³⁷ Despite its focus on informality, the Labour Code in Bangladesh continues to exclude many sectors of the economy in which children work, including small farms, family enterprises, street work and domestic service.⁷³⁸ In 2013, the Government identified 38 occupations considered hazardous for children ages 14 to 18 years and is in the process of increasing the capacity of the labour inspectorate which is empowered to undertake unannounced inspections in both factories and

⁷³⁷ US Department of Labor, *supra* note 74.

⁷³⁸ *Ibid* at 4. See further UCW Bangladesh 2011, *supra* note 118 at 49 which states, “[t]he enforcement of child labour legislation outside the export-oriented garment sector remains a major challenge ... informal sector of the economy where the largest proportions of the children are found to be working in largely outside formal inspection regimes.”

small businesses to investigate issues including child labour.⁷³⁹ However, the US Labour Department notes, “[w]hile reports indicate that child labour inspections occurred in export garment factories and shrimp processing, child labour inspections were infrequent, with no oversight of children working in the informal sector, including unregistered subcontractors in the garment sector.”⁷⁴⁰ Finally, while the report lists some of the social-protection mechanisms engaged in by Government that are linked with child labour, these appear to be *ad hoc* rather than permanent, with the report concluding that “the scope of these programs is insufficient to address the extent of the problem in the informal sector.”⁷⁴¹

As the analysis of the Bangladesh DWCPs reveals, while there have been important policy and conceptual developments in recognizing the central challenge that informality plays in compounding the child labour problem, and an opening up of the different types of employment relationships to encompass atypical employment that more women than men are engaged in within informality, these conceptual and policy development have not been adequately translated into practice in a manner that moves us away from the dominant ‘prohibition and penalty’ approach encapsulated in Convention No. 182. It is increasingly recognized that, “the formal inspection system alone is unlikely to be effective in protecting children from workplace violations, even with more training and a clear legal framework.”⁷⁴² Not only is it unrealistic for the labour inspectorate to be in a position to inspect all places of work, including informal units and work undertaken within unpaid family settings; in fact, this approach may be counterproductive in leading to a displacement of child labour from the formal to the informal sphere. In a context of

⁷³⁹ US Department of Labor Report, *supra* note 74 at 3.

⁷⁴⁰ *Ibid* at 4.

⁷⁴¹ *Ibid* at 6.

⁷⁴² See UCW Bangladesh 2011, *supra* note 118 at 72.

growing informality and the globalization of markets that is pushing towards increasingly informal workplace settings, the role of the labour inspectorate is increasingly limited. The primary thrust of both the Decent Work Country Programme of Bangladesh and other national strategies focusses on the role of formal regulatory frameworks and labour inspection as an effective mechanism in this context. In contrast, the role of social protection mechanisms remains *ad hoc* and insufficient, while the linkages between the empowerment of informal economy workers and reducing the prevalence of child labour have not been explicitly made.

4.5 Conclusion

As the analysis of childhood economic exploitation in both domestic work and home-based work reveals, the dynamics of the problem, as well as the legal and policy solutions, need to be understood within the personal, social and institutional relationships and patterns that reproduce it over time. The specific vulnerability and ‘situatedness’ of the child within the household underscores that the relational matrix within which children become engaged in childhood economic exploitation is of central importance and inevitably structures their exploitation. A key part of that relational matrix is the manner in which child labour is embedded within the informal economy, and in particular, is linked with the lives of the most marginalized workers in the informal economy, the majority of whom are women and mothers attempting to negotiate their productive and reproductive work burdens. The future labour of child workers is locked into the lowest-earning segments of the informal economy spectrum, in particular in areas such as domestic work and home-based work. In many ways, child labour is intertwined with the gendered forms of structural inequality and economic exploitation that characterizes women’s participation in informality.

The Decent Work Agenda has moved the ILO policy discourse in relation to child labour significantly in the right direction towards an approach that contextualizes the problem within a broader range of interdependent rights holders and interrelated structural processes. However, as a result of its promotional rather than mandatory approach, it has proved challenging to translate the vision of the Decent Work Agenda into specific legal and policy interventions that move beyond the ‘prohibition and penalty’ approach, particularly within Decent Work country programming. For example, the political will that would lead to an embedding of childhood economic exploitation within a more structural and integrated approach is not evidenced in national policies at a domestic level, particularly in the case of Bangladesh, which impedes the promise of the Decent Work Agenda for children.

While demonstrating a cognisance of the relationship between child labour and gender inequality within the informal economy which is at an early stage, to date the ILO has failed to fully centralize implications of care labour for families. However, as feminist scholars such as Joan Tronto have argued,

[c]are is not a parochial concern of women, a type of secondary moral question, or the work of the least well-off in society. Care is a central concern of human life. It is time we began to change our political and social institutions to reflect this truth.⁷⁴³

As the analysis in the previous chapters has illustrated, periods of dependence, such as those that arise during childhood illustrate the embodied reality for the necessity

⁷⁴³ See Joan C Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993) at 180. For an overview of the literature on political and social economy of care in a development context, see Shahra Razavi, “The Political and Social Economy of Care in a Development Context Conceptual Issues, Research Questions and Policy Options” (June 2007) UN Research Institute for Social Development: Gender and Development Programme Paper No. 3, June 2007) [UNRISD 2007]. See further Fineman 2008, *supra* note 16; Fineman 2000, *supra* note 16.

of care that is engaged throughout different phases of the life cycle.⁷⁴⁴ However, the critique of the framing of the individualized worker under the labour law model and the family under the UNCRC illustrates that periods of care are generally relegated to the ‘private’ sphere of the family and are considered beyond the scope of State concern, absent extraordinary family failures such as abuse and neglect.⁷⁴⁵ In a manner that mirrors the structural exclusions of the labour law and human rights law models, the Decent Work Agenda has not to date fully grappled with the importance and implications of care work for children who are often engaged in social reproduction work to replace the adult in the household. In contrast, the approach of a grassroots organization such as SEWA, which is grounded in the lived experience of women informal economic workers, demonstrates that the public/private spheres of working women’s lives are not as separate as they are typically treated by current interventions. There is a complex interface between the conditions of reproduction and women’s productive capacity, as well as the conditions of social and economic security, that have implications in the child labour context. This approach points towards a promising holistic framework that could also be used to combat childhood economic exploitation in the informal economy given the continuity that exists between children’s and women’s working lives. Successful interventions such as that of SEWA, I contend, are key elements of unlocking the problem, rather than a ‘penalty and prohibition’ approach that seeks to remove children from highly dispersed and isolated sectors often beyond the reach of an effective regulatory framework.

⁷⁴⁴ See Fineman 2008, *supra* note 16; Fineman 2000, *supra* note 16.

⁷⁴⁵ See Fineman 2008, *supra* note 16 at 11.

Chapter Five

Social Protection and Childhood Economic Exploitation – The Emergence of a Structural Approach?

5.1 Introduction

The role of social-protection mechanisms as one element of an emerging re-situated legal and policy response to economic exploitation in childhood is the central focus of this chapter. With the potential to challenge structural disadvantage and to give practical effect to socio-economic rights, including for workers in the informal economy, which I have argued have been neglected or absent within the labour law and human rights law models to date, the extension of social protection mechanisms appears to offer a crucial and potentially transformative complement to current legal strategies in this field. Drawing on the relational framing of the child developed throughout the previous chapters, I probe and complicate the linkages between childhood economic exploitation and the various types of social protection mechanisms that are being used more generally to combat child labour. By analyzing some of the mixed results that can flow for the prevalence of economic exploitation in childhood, from conditional and unconditional cash transfers, public employment schemes and micro-finance interventions, I demonstrate that the available evidence from these projects shows that desirable outcomes in terms of childhood economic exploitation are not necessarily guaranteed, even when social protection instruments succeed in achieving their broader social goals.

Broadly, the available evidence demonstrates that social protection mechanisms that are explicitly linked to supply side interventions focussing on the provision of socio-economic rights, such as the right to health or the right education, appear to deliver the most effective results; whereas public employment schemes and income-

generation projects that focus solely on increasing incomes for households in poverty without correlative supports for socio-economic rights and care responsibilities have led to more equivocal impacts. In particular, the evidence shows that social-protection mechanisms that neglect the burden and implications of social reproduction and care work for families and children can give rise to more limited positive results for children in economic exploitation and can lead to increased child labour in some instances. Reinforcing the strength and relevance of the relational framing of the child, I argue, the mixed results from social protection mechanisms illustrate that these mechanisms should be designed and implemented in a manner that is cognisant of the relational and gendered dimensions of the family as a site of both productive work and social reproductive work, and should be explicitly linked to a broader range of socio-economic rights that are of relevance to children in economic exploitation, in particular the right to education. The evidence presented provides an empirical illustration of the implications that flow from the theoretical critiques advanced in relation to the relegation of care and social reproduction in both the labour law and human rights law models in the previous chapters.

In exploring these themes, I draw on the social protection initiatives of the World Bank and the ILO. The approaches of these organisations illustrate different and, in some instances, similar understandings of the role of the market, the family and the State in allocating the burdens and risks of economic responsibility and care labour. These particular examples are chosen to reveal the contours of differing approaches among diverse international organizations and to begin to assess the implications of these diverse approaches for the children who are engaged in economic exploitation in a way that situates the problem within the broader agenda of development agencies.

5.2 Tracing the Emergence of the Social Protection Systems Debate

In the wake of the financial crisis in 2008, the role of social protection systems has emerged to the forefront of the development agenda as a key element of international and national strategies to promote human development, political stability and inclusive growth.⁷⁴⁶ Generally, social protection measures refer to mechanisms that are designed to insure against lack of work-related income (or insufficient income) caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; lack of access or unaffordable access to health care; insufficient family support, particularly for children and adult dependents; and general poverty and social exclusion.⁷⁴⁷ Social protection mechanisms can encompass cash-transfer schemes (both conditional and unconditional), public work programmes, school stipends, unemployment or disability benefits, social pensions, food transfers, user-fee exemptions for health care or education and subsidized services.⁷⁴⁸

Within the international labour law framework, the ILO initiated the debate relating to the extension of social protection systems in 2001 at the ILO General Conference. In particular, the ILO referred to the original vision of its Constitution, namely, the “extension of social security measures to provide a basic income to *all* in need of such protection and comprehensive medical care,” while simultaneously affirming social security as a basic human right.⁷⁴⁹ The significance of the recognition of social security for *all* by the ILO can be appreciated when it is borne in mind that for much

⁷⁴⁶ See for example ILO World Social Protection Report 2014/15, *supra* note 21 at xxii; WB 2012 *supra* note 109.

⁷⁴⁷ See ILO WR Social Protection and Child Labour 2013, *supra* note 21 Annex 1.

⁷⁴⁸ *Ibid.*

⁷⁴⁹ See *Resolution and Conclusions Concerning Social Security, International Labour Conference*, 89th Session (2001) (emphasis added). See also, Magdalena Sepúlveda & Carly Nyst, “A Human Rights Approach to Social Protection” (Ministry of Foreign Affairs of Finland: 2012) [Sepúlveda & Nyst 2012] at 20-25.

of its history in line with the dominant approach of labour law that I have critiqued in Chapter Two, the work of the ILO had focused on social security for workers and their families in the *formal* economy. Social security coverage was considered a long-term process determined by the pace of formalization of labour markets.⁷⁵⁰ For decades, ILO technical cooperation and advisory services to countries in the Global South sought to emulate the European social protection patterns, by extending social insurance in line with what was assumed would be an increasingly formalized labour market, with the benefits of growth to quasi-automatically trickle down to the poor and underprivileged.⁷⁵¹ As Gerry Rodgers describes ILO thinking in those years, “developing countries were expected to evolve through a progressive process of industrialization in which workers gradually became wage earners and corresponding forms of social protection were introduced – just as had occurred in the industrialized welfare states.”⁷⁵²

Beginning in the late 1990s, the ILO moved its focus to attempt to expand the limited coverage of the social insurance system, by attempting to re-orientate the political agenda towards a more broad-based coverage of the population beyond the formal employment relationship to encompass workers in the informal economy.⁷⁵³ Crucially, the ILO engaged in important research to debunk the myth that low-income countries could not afford social security for all with a series of ILO papers

⁷⁵⁰ See Cichon 2013, *supra* note 137 at 23; Deacon 2013, *supra* note 137. See further Rodgers 2009, *supra* note 138 at 170, who observes that, “[l]ooking back at the past 90 years as a whole, the influence of the ILO seems to have been greater when viewed from the industrialized world than from the Global South. Its long-standing institutional preference for social insurance, tripartite-based and focusing on workers in formal employment, explains why the ILO was not always able to successfully promote ‘social protection for all,’ although it has been successful in promoting social protection for some.” See also Peter Townsend, *Building Decent Societies: Rethinking the Role of Social Security in Development* (New York: Palgrave MacMillan, 2009) who builds the case for a comprehensive social security system to be developed in all countries to eliminate poverty, reverse growing inequality and sustain economic growth.

⁷⁵¹ See ILO Social Protection 2003, *supra* note 33; see further Cichon 2013, *supra* note 137 at 24; see further Kabeer 2010, *supra* note 131.

⁷⁵² See Rodgers 2009, *supra* note 138 at 159.

⁷⁵³ See Cichon 2013 *supra* note 137 at 26-27; ILO Social Protection 2003 *supra* note 33 at 20-21.

demonstrating that with an investment of between two to six per cent of GDP even low-income countries could probably afford universal income security, including universal child benefit.⁷⁵⁴ This debate continued quietly for many years. However, it took the financial crisis which shook the certainties and agreed wisdom of economics and economic policies more generally, and a “fleeting attack of conscience among policy makers” to trigger the international wave of support that has emerged among diverse international organizations for the role of social protection.⁷⁵⁵ As Cichon observes, following on from the financial crisis “[i]t was suddenly widely accepted that social and economic development could be at risk without sound social policies and strong social protection systems that could act as economic and social stabilizers.”⁷⁵⁶

Within the broader human rights law framework at the UN, political support for the idea of a ‘social protection floor’ crystallized in 2009 when the heads of the UN agencies launched the UN Social Protection Floor Initiative building on the ILO’s concept of a ‘social minimum’ which comprises social pensions, child benefits, access to healthcare and unemployment provisions.⁷⁵⁷ This was followed in September 2010 by an acknowledgement by States at the UN Millennium Development Summit of the value of social protection in consolidating and achieving further progress towards the Millennium Development Goals.⁷⁵⁸ Further momentum was added to the debate in

⁷⁵⁴ See Cichon 2013, *supra* note 137 at 28. See for example ILO, Can Low Income Countries afford basic social security? (Social security policy briefing, No. 3). Geneva, International Labour Office, 2008 where the ILO found that the projected costs for a basic universal child benefit for the year 2010 would vary in selected developing countries in Africa and Asia between 1.2% of GDP in India and 3.6% of GDP in the United Republic of Tanzania. See also Pal K., et al., “Can Low Income Countries Afford Basic Social Protection? First Results of a Modelling Exercise” (2005) Issues in social protection discussion paper, No. 13, Geneva: International Labour Office.

⁷⁵⁵ See Cichon 2013, *supra* note 137 at 29.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ See Sepúlveda & Nyst 2012, *supra* note 749 at 9.

⁷⁵⁸ UN General Assembly, *Keeping the Promise: United to Achieve the Millennium Development Goals*, GA Res 65/1 (19 October 2010) at para 51.

November 2011 with the publication of the Bachelet report convened by the ILO and the World Health Organisation.⁷⁵⁹ Aiming to consolidate global activities around social protection, the Bachelet report recommended that, “the social protection floor approach be fully integrated into the World Bank’s Social Protection Strategy 2012-2020.”⁷⁶⁰ At the political level, the G20 States expressly declared their support for social protection in 2011 emphasizing the importance of investing in *nationally-determined* social-protection floors and calling on a diverse range of international institutions to establish mechanisms of coordination and coherence towards supporting countries in designing and implementing national social protection systems⁷⁶¹

The World Bank, one of the most influential development players, endorsed the importance of the role of social-protection systems as a central part of its core development mission to reduce poverty through sustainable, inclusive growth, with the publication of its *Social Protection and Labour Strategy 2012-2022*.⁷⁶² The Bank asserts that the 2012 Strategy is consistent with the UN Social Protection Floor Initiative, particularly through the strategy’s emphasis on building inclusive, productive, responsive social-protection and labour programmes and systems tailored to country circumstances.⁷⁶³ Most recently, the Sustainable Development Goals have identified the extension of nationally-appropriate social-protection systems and measures for all by 2030 as a key global goal, illustrating the important

⁷⁵⁹ See Report by the Advisory Group chaired by Michelle Bachelet, convened by the ILO in collaboration with the WHO, *Social Protection Floor for a Fair and Inclusive Globalisation* (ILO: Geneva, 2011).

⁷⁶⁰ *Ibid* at 95.

⁷⁶¹ G20, “Cannes Summit Final Declaration: Building our Common Future, Renewed Collective Action for the Benefit of All” (3-4 Nov. 2011).

⁷⁶² See WB 2012, *supra* note 109.

⁷⁶³ *Ibid* at 14. The Bank asserts that it “has been a strategic partner in the One-UN Social Protection Floor initiative ... and has an important role to play both in helping countries who sign on to the SPF-I to operationalize it and in knowledge sharing.”

international consensus that has coalesced around social protection systems.⁷⁶⁴ Therefore, at least to the extent that they recognize an important role for social protection systems in national development policy the agendas of these diverse international organizations appear to have converged to some degree, although the scope and role of social protection mechanisms remains contested as the analysis below will illustrate.⁷⁶⁵

Attempting to capture the emerging global social-protection consensus in a legal form, in June 2012 the International Labour Conference unanimously adopted Recommendation No. 202 concerning national floors of social protection.⁷⁶⁶ This confirms through a soft law instrument that nationally-defined social-protection systems should form part of national and global development strategies and has been described as symbolising the “moral authority of a global consensus.”⁷⁶⁷ In the absence of the political appetite among Member States to negotiate a binding Convention that may subsequently enjoy a very low level of ratification, the ILO forged ahead with a non-binding Recommendation fearing that, “the fragile and perhaps short-lived political reaction to a specific economic and financial crisis and

⁷⁶⁴ See for example ILO World Social Protection Report 2014/15 *supra* note 21 calling for the prioritization of social protection in the post-2015 development agenda at p. xxiii. See also Joint Special Rapporteur Statement Social Protection at 1-2, “in the ongoing discussion about the shape and content of the post-2015 development agenda, the United Nations Special Rapporteur on Extreme Poverty and Human Rights and the Special Rapporteur on the Right to Food add their voice to those who are calling for the inclusion of social protection as a core priority. Social protection can play a fundamental role in addressing the needs of people living in extreme poverty, tackling inequality and realizing human rights – all indisputable and necessary overarching goals of any future development agenda” available online: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---nylo/documents/genericdocument/wcms_227152.pdf

⁷⁶⁵ See Cichon 2013, *supra* note 137 at 29.

⁷⁶⁶ ILO, Social Protection Floors Recommendation, 2012 (No. 202) Adopted in Geneva, 101st ILO session (14 June 2012) [ILO Social Protection Recommendation 2012].

⁷⁶⁷ Cichon 2013, *supra* note 137 at 38.

its social fallout might fade away too quickly without leaving behind a trace in the global governance system.”⁷⁶⁸

The resulting Recommendation No. 202 provides important guidance to States on how to build or maintain social-protection systems through the horizontal extension of a national basic social-protection floor for all, and the vertical extension of a more comprehensive national social-security system that should progressively provide a higher level of protection in accordance with the fiscal capacities of Member States.⁷⁶⁹ The most important element of the Recommendation for the present analysis is that it confirms a number of core principles that should inform the design and extension of social protection systems more generally. These principles reflect the position of the ILO tripartite structure relating to the “primary responsibility of the State” to establish and maintain social protection floors in accordance with the principle of universality of protection based on social solidarity; entitlement to benefits *prescribed by law*; adequacy and predictability; non-discrimination, gender equality and responsiveness to special needs; and respect for the rights and dignity of people covered by social security guarantees among other principles.⁷⁷⁰ While the Recommendation is a soft law instrument, Cichon has observed that, “it is the most concrete consensual social protection charter that global society has ever given itself”

⁷⁶⁸ *Ibid* at 31.

⁷⁶⁹ *Ibid* who observes that bringing together the horizontal dimension and the vertical dimension of the social protection system was key to generating the political consensus surrounding the Recommendation, particularly among the trade union movement. Cichon states, “[c]ombining the two elements permitted to promote the idea of a new international standard for a basic level of security in tandem with the promotion of the ratification of higher level ILO social security standards...Marrying two dimensions of extending social security coverage into one internally coherent, comprehensive and non-contradictory approach helped to defuse the reservation of those who feared that promoting the SPF would lead to a lowering of ILO social security standards to social assistance levels,” at 30.

⁷⁷⁰ See ILO Social Protection Recommendation 2012, *supra* note 766 at para 3 (a), (b), (c), (d) and (f).

and given this consensus it may be capable of acting as a political shield for national demands.⁷⁷¹

Notwithstanding the apparent consensus surrounding advancing national social protection systems, the scope, ideological basis, and role of social-protection systems and in particular their legal status remain highly contested.⁷⁷² Major players such as the World Bank have generally adopted a narrower discourse in relation to the scope and role of social protection systems than organizations such as the ILO, UNICEF and other UN institutions. The latter ground their justification for social protection in universal human rights norms defined under the Universal Declaration of Human Rights and ICESCR, affirming the principles of universality, solidarity and redistribution.⁷⁷³ The World Bank, on the other hand, does not generally refer to a human rights-based framework, but rather defines social protection to include both social assistance or ‘social safety nets’ that integrate targeted cash transfers or food assistance programmes, for example, and social insurance mechanisms, such as old-age and disability pensions.⁷⁷⁴ The linguistic diversity that surrounds the social-protection concept mirrors the contested nature of their scope, and ideological basis, and in particular considerations relating to their legal status among different international institutions.⁷⁷⁵ Nevertheless, the momentum enjoyed by social

⁷⁷¹ See Cichon 2013, *supra* note 137 at 37.

⁷⁷² For an overview of the distinctive approaches of the ILO and the World Bank in relation to the scope, ideological basis and role of social protection measures, see Kabeer 2010, *supra* note 131.

⁷⁷³ See ILO 2014/15, *supra* note 57 at 2 and Annex I for a comprehensive overview and definition of the different forms of social protection mechanisms. For an overview of the human rights obligations of States in relation to social protection, generally see Sepúlveda and Nyst 2012, *supra* note 762 at 20-25.

⁷⁷⁴ WB 2012, *supra* note 109 at xiii.

⁷⁷⁵ See further Guy Standing, “Globalisation: Eight Crises of Social Protection” in Lourdes Benería & Savitri Bisnath, eds, *Global Tensions: Challenges and Opportunities in the World Economy* (New York: Routledge, 2004) [Standing 2004] who describes the developments associated with globalization (privatization of economic activity and social policy, informalization, the spread of flexible labour practices and the new globalized socioeconomic stratification) as a series of eight crises in social protection. In particular, Standing critiques what he terms the linguistic crisis surrounding the terminology used in the social protection field as follows: “[p]erhaps the most influential terms in the sphere of social protection in this era have been the social safety net and active labor market policy. In both cases the images conveyed to

protection as a development strategy in the wake of the financial crisis, coupled with their integration as a priority within the Sustainable Development Goals, may present a unique political opportunity to advance their standing at national and international levels, in particular as a response to specific issues such as childhood economic exploitation.⁷⁷⁶

5.3 Contextualizing Childhood Economic Exploitation within the Social Protection Systems Debate

5.3.1 Centralising Poverty, Income Volatility and Lack of Social Protection Mechanisms

Numerous studies have confirmed that poverty, disadvantage and income volatility generally underpins the decision of many families to engage their children in economic exploitation, and/or the decision of children themselves to become engaged in work.⁷⁷⁷ Inadequate income and livelihood opportunities, whether permanent or temporarily resulting from external shocks, lead to coping strategies for families who are constrained in their ability to postpone children's work and to

the unwary are quite different from what they usually mean in reality. Who could possibly be against having a social safety net to catch all those poor victims falling off the globalizing economy? The reality is that this is a disembedded notion that amounts to giving conditional crumbs to the poor. Instead of a safety net, which suggests something broad and comforting, what is meant is a highly targeted, selective scheme, usually based on means-testing. The notion of targeting may sound sensible – directing scarce resources to the poorest of the poor – but, in fact, empirical evidence show that means tested and other selective benefits rarely reach those most in need, due to low take-up rates, stigma, administrative inefficiencies, and so on.” See also Guy Standing, “Social Protection”, in Andrea Cornwall & Deborah Eade, eds, *Deconstructing Development Discourse: Buzzwords and Fuzzwords* (Practical Action Publishing: 2010) at 53.

⁷⁷⁶ Sepúlveda & Nyst 2012, *supra* note 749 at 10 who asserts that, “[t]he current political momentum around social protection provides a unique opportunity to reinvigorate the development agenda, which, despite the looming deadline for the achievement of the MDGs in 2015, has clearly stagnated. At the same time, there remains a pressing need to further evolve the concept of social protection to ensure that its full potential and impact on poverty reduction and development is both understood and realised. One pressing omission to date is the complete absence from the discussion of the human rights implications and outcomes of social protection programmes.” See also Cichon who observes that “[n]ever before – perhaps since the period of the Great Depression or the period of economic and social reconstruction after the Second World War – has there been so much international and public support for social protection and recognition of its role in national development strategies as well as in the management of economic, social and political crises”, *supra* note 137 at 37.

⁷⁷⁷ See for eg. ILO WR Social Protection and Child Labour 2013 *supra* note 21 at 11-26 for an analysis of the role of economic vulnerability and income volatility; see ILO Microfinance 2011 *supra* note 82 at 4-8.

invest in their education.⁷⁷⁸ In order to meet their basic needs, poor households are more likely to have to send their children to work, thereby forgoing the higher future benefits to be gained from investing in children's education.⁷⁷⁹ In addition to poverty, income volatility that results from unforeseen events such as a sudden death or serious illness, or the unemployment of an adult earner, can have serious implications for child labour in the household.⁷⁸⁰ For example, empirical evidence from a study undertaken in Brazil demonstrates that adult job loss had a sizeable effect on the likelihood of children working and dropping out of education with adult unemployment increasing the likelihood of child labour from 33 to 65 per cent in the lower income quintiles.⁷⁸¹ As outlined in Chapter Four, within the large and growing informal economy, sustainable livelihoods for families are limited by the low levels of decent work opportunities in particular for women workers. The vulnerability of informal economy workers and their family members more generally is compounded by a lack of coverage by social protection systems that could smooth the impacts of income volatility, or mitigate the negative outcomes of work related accidents and sickness for family members, both of which directly contribute to child labour.⁷⁸²

5.3.2 *The ILO Policy Discourse Surrounding Child Labour and Social Protection*

The role of social protection mechanisms in addressing the structural disadvantage that underpins child labour is potentially significant, given that social protection can

⁷⁷⁸ See ILO WR Social Protection and Child Labour 2013 *ibid* at 24. In a micro study of marginalised poor populations in Kolkata in both squatter settlements and recognised slum settlements the author found that 71% of families were substantially dependent, 25% were nominally dependent and 5% were not dependent on the earnings of their children, see Sankar Bagchi Subrata, *Child Labor and the Urban Third World, Toward a New Understanding of the Problem*, (New York and Plymouth: University Press of America, 2010) at 43.

⁷⁷⁹ ILO WR Social Protection and Child Labour 2013 *ibid.* at 24

⁷⁸⁰ *Ibid* at 22-24.

⁷⁸¹ *Ibid* at 23.

⁷⁸² Research on children in domestic labour in Sub-Saharan Africa demonstrates that most children in domestic service have no or only one parent alive. In communities decimated by HIV/AIDs there has been an increase in child-headed families, particularly in Sub-Saharan Africa where 12 million children have lost a mother or both parents to HIV/AIDs. See further ILO Helping Hands 2004 *supra* note 535 at p. 24.

play a key role in smoothing the impacts of economic shocks, in increasing household income thereby compensating for the loss of earnings where children are disengaged from work, in encouraging attendance in education and in providing compensation for injuries or fatalities at work that affect the earning potential of primary breadwinners and have negative knock on impacts for child labour.⁷⁸³ The potential role of social protection systems in the context of child labour was first highlighted by the ILO in 2002 in the first Director General follow-up report under the ILO *Declaration on Fundamental Principles and Rights at Work*.⁷⁸⁴ The importance of having social protection mechanisms on stream in order to provide viable alternatives for children withdrawn from work became particularly obvious to the ILO during the well-known example of the failure of labour law inspection and removal strategies, namely the Bangladesh garment production industry project described in Chapter Two.⁷⁸⁵ As outlined, children who were removed from child labour without adequate alternative provisions in place were shown, in some instances, to return to work in more hazardous industries and sectors as a result of the lack of viable alternatives in the form of alternative income or State services.⁷⁸⁶ Following on from examples such as this, the International Programme for the Elimination of Child Labour began to gather experience and evidence on the role of social-protection mechanisms as important policy interventions in the child labour context. In the 2006 *Global Action Plan* and in the 2010 *Roadmap for Achieving the Elimination of the Worst Forms of Child Labour* the ILO identifies supporting families' capacity to protect their children from engaging in work by extending

⁷⁸³ For the theoretical and evidence base linking economic vulnerability ILO WR Social Protection and Child Labour 2013, see *supra* note 21 at 15-25.

⁷⁸⁴ ILO Director General 2002, *supra* note 12 at 52.

⁷⁸⁵ ILO, Director General 2006, *supra* note 11 at 44-45. See further ILO & UNICEF, *Addressing Child Labour in the Bangladesh Garment Industry 1995-2001, A Synthesis of UNICEF and ILO Evaluation Studies of the Bangladesh Garment Sector Projects* (New York; Geneva: August 2004).

⁷⁸⁶ For an extended discussion of this set of events, see Bourdillon et al. 2010, *supra* note 258 at 181-190.

systems of social protection as a key policy aim.⁷⁸⁷ Most recently, in 2013, the ILO has now moved to foreground the role of social-protection mechanisms in its policy discourse and research concerning child labour, including by releasing its first *World Report on Child Labour* which examines existing evidence about how social-protection mechanisms can be used to mitigate the economic vulnerabilities associated with child labour.⁷⁸⁸

There are a number of noteworthy features about the discourse of the ILO contained in both its policy work and in Recommendation No. 202 that require further contextualization. First, the ILO clearly endorses an approach to social protection that is grounded in international labour law and human rights law, conceiving of social security and social protection as a matter of legal right, rather than the *ad hoc* outcome of development policy.⁷⁸⁹ The extension of social security coverage should be given high priority the ILO asserts because it leads not only to equitable economic growth, social cohesion and decent work for women and men, but also because it is a fundamental human right.⁷⁹⁰ The ILO is very clear that the *ad hoc* development programmes that have emerged in recent years while welcome cannot be considered as offering the same quantity and extent of protection as programmes grounded in law, as they do not establish legal entitlements or enforceable rights.⁷⁹¹ Therefore, the ILO concludes its *World Report* on child labour and social protection by asserting that “[t]he challenge is to transfer *ad hoc* and short-term approaches into integrated elements of national social protection strategies and policies that are rooted in

⁷⁸⁷ See further ILO Roadmap 2010 *supra* note 12 at para 8.3. ILO WR Social Protection and Child Labour 2013, *supra* note 21.

⁷⁸⁸ ILO Press Release, “Social Protection Essential to help Eradicate Child Labour”, 12 June 2014, on the occasion of the World Day Against Child Labour, available online: http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_246244/lang--en/index.htm.

⁷⁸⁹ *Ibid* at 7-8; see ILO World Social Protection Report 2014/15 *supra* note 21 at 5.

⁷⁹⁰ *Ibid*.

⁷⁹¹ See ILO World Social Protection Report 2014/15, *supra* note 21 at 4.

national legal, fiscal and institutional frameworks and are able to respond to the complex challenges of child labour in a more systematic and integrated way.”⁷⁹² Within ILO Recommendation No. 202, this is given a concrete form through the recommendation that within national circumstances a social protection floor should be established as quickly as possible that should include at a minimum “basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services.”⁷⁹³

Second, the ILO endorses a ‘life-cycle’ approach to social protection systems, drawing on the concept of the ‘life cycle’ which is interwoven throughout the *Decent Work for All Agenda*.⁷⁹⁴ As outlined in Chapter One, the life-cycle approach highlights the importance of understanding the transition through ‘critical periods’ during an individual’s life cycle, aiming to connect directly with the interconnectedness of people’s needs and the fact that people experience life in an integrated way.⁷⁹⁵ Based on the premise that for certain identifiable periods in the life cycle, including childhood, individuals are exposed to different degrees of risk and enjoy different abilities to cope with risk, this approach focuses on how the transition for individuals from one stage of the life cycle to another can impact his or her vulnerability.⁷⁹⁶ Childhood under the life cycle-approach is conceived of as the full spectrum of 0-18 years and is considered a period for learning and physical, emotional and social development that lays the foundation for transition to youth and decent work in

⁷⁹² See ILO WR Social Protection and Child Labour 2013 *supra* note 21 at 63.

⁷⁹³ See ILO Recommendation No. 202 at para.5.

⁷⁹⁴ ILO Social Protection 2003, *supra* note 33 at 2-6.

⁷⁹⁵ *Ibid* at 2 (in Preface by Juan Somavia). See further Colleen Sheppard, “Systemic Discrimination and Gender Inequality, A Life Cycle Approach to Girls’ and Women’s Rights”, in Errol P. Mendes & Sakunthala Srighanthan, *Confronting Discrimination and Inequality in China, Chinese and Canadian Perspectives*, (Ottawa: University of Ottawa Press, 2009) who explores the conceptual linkages between the life cycle concept within development policy and the legal interpretation of systemic discrimination under Canadian constitutional law. In particular Sheppard notes that, “[a]n approach that connects different spheres of activity in an individual’s life also resonates with the longstanding concerns of feminist scholars of linking the public and the private domains,” at 238.

⁷⁹⁶ ILO Social Protection 2003, *supra* note 33 at 32-38.

adulthood.⁷⁹⁷ Through a set of social protection measures that are focussed, deliberate and adapted to specific phases of the life cycle, the ILO asserts that countries can ensure that the majority of the population transits through successive life cycles in a manner that lowers vulnerability to risk.⁷⁹⁸ Given the specific vulnerabilities faced by children in the life cycle, under Recommendation No. 202, national social-protection floors should guarantee “basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services.”⁷⁹⁹

A third noteworthy feature of the ILO discourse, which is reflected in the Recommendation, is that it endorses a universal approach to basic income security and to the design of social-protection systems more generally which is founded on social solidarity.⁸⁰⁰ Social protection throughout the full spectrum of the life cycle therefore is conceptualized by the ILO as a “life course investment *by all and for all*” that is grounded in solidarity rather than individualized risk.⁸⁰¹ A universal, rather than a targeted approach to income security is reminiscent of the European social model and mirrors some of the elements of the welfare state that developed in the middle decades of the 20th century which were based on the pooling of risks so that the middle classes effectively subsidized those living in poverty, and so that consumption and incomes were smoothed over the life cycle.⁸⁰² In research on a

⁷⁹⁷ ILO WR Social Protection and Child Labour 2013 *supra* note 21 at 40; ILO Social Protection 2003, *supra* note 33 at 40.

⁷⁹⁸ See ILO Social Protection 2003, *supra* note 33 at 38.

⁷⁹⁹ See ILO Recommendation No. 202, *supra* note 18 at para 5(b).

⁸⁰⁰ *Ibid* para 3(a).

⁸⁰¹ See ILO Social Protection 2003, *supra* note 33 at 32.

⁸⁰² See Standing 2004, *supra* note 775. See however the work of feminist scholars who have demonstrated that the model of citizenship underpinning the welfare state was determinant of its universal or selective nature. For example, Judy Fudge asserts the welfare state was premised on a male-breadwinner female caregiver model linked to the standard employment relationship and industrial citizenship in ways that did not extend to women who performed socially necessary, but unpaid work in the household, Judy Fudge, “After Industrial Citizenship: Market Citizenship or Citizenship at Work?” (2005) 60:4 Relations Industrielles 631 [Fudge 2005].

human-rights approach to social protection, the UN Special Rapporteur on Extreme Poverty and Human Rights notes that while simple targeting mechanisms such as categorical targeting selecting a specific age group such as children does not pose many human rights challenges, targeting on the basis of income, poverty levels or geographical area, for example, can be problematic from a human rights perspective.⁸⁰³ Universal programmes on the other hand have the advantage of avoiding the stigmatization of recipients, providing better coverage of vulnerable populations by avoiding costly and technical problems in the design of targeted programmes, and contributing to social solidarity, thereby reducing the risks of intra-community conflicts or the possibilities for political manipulation of targeted programmes.⁸⁰⁴

A fourth feature of the ILO discourse relating to social protection in line with the analysis of the Decent Work Agenda in Chapter Four is that it demonstrates a cognisance of the relevance of gender concerns and the burdens of care labour in contributing towards both the reduction of child labour and towards its prevalence in certain instances.⁸⁰⁵ As the ILO observes, a particular area of inequality is to be found in the private home where women's work in the home has been undervalued and considered invisible, with a heavy burden placed on girls to the detriment of their enjoyment of the right to education.⁸⁰⁶ The ILO cites evidence that women's economic empowerment brings considerable benefits for women and their families, and that increased power and decision-making within the household has led to decreases in child labour.⁸⁰⁷ Among the range of policies, programmes and activities where the ILO considers it can have an impact in this field include: developing

⁸⁰³ See Sepúlveda & Nyst 2012, *supra* note 749 at 37-41.

⁸⁰⁴ *Ibid* at 38-40.

⁸⁰⁵ See for e.g. ILO Gender Equality 2009, *supra* note 166 at 61-77.

⁸⁰⁶ *Ibid* at 61.

⁸⁰⁷ *Ibid* at 69.

employment creation and income-generation strategies for parents, including through increasing a mother's income; and improving the availability of affordable, quality childcare for young children to prevent parents, mainly women, from taking their children to work or engaging their older siblings in childcare work.⁸⁰⁸ The ILO does acknowledge counterintuitive examples where increased income targeted towards women in the context of social protection has not necessarily led to a reduction of child labour where these programs have added to women's unpaid care burdens and where gender stereotypes are strengthened.⁸⁰⁹ However, in line with the analysis of the Decent Work Agenda in Chapter Four, the linkages between gender equality and social reproduction work, and the implications for the design of social protection systems appear to be at an early stage in ILO thinking. For example, in its analysis of women's inequality in the informal economy and child labour, the ILO does not distinguish between different types of social protection mechanisms that may provide more favourable outcomes in the child labour context. In fact, the ILO focusses on increasing employment opportunities for women, and income-generation projects through microfinance. In doing so the ILO does not explore the tensions that can arise from women's increased participation in the labour force and in productive activities where the care deficit that results is not adequately addressed and is often absorbed by children, particularly girl children.

5.3.3 Juxtaposing the World Bank Policy Discourse Surrounding Childhood and Social Protection Systems

In parallel to the ILO, the World Bank has centralized the child as a subject of development policy and has substantially increased its investment in childhood development, in particular, from approximately US\$ 126 million in 1990 to a total of

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Ibid* at 70-71.

about US\$ 1.6 billion in 2006.⁸¹⁰ The incorporation of social concerns into the mainstream development agenda by the international financial institutions more generally has complexified the singular focus on economic growth that marked the first phase of global market integration which has been widely criticized for its failure to mitigate the negative impacts of neo-liberal structural adjustment policies, and for its neglect of social justice concerns.⁸¹¹ Partly as a response to critiques of the ‘Washington consensus,’ with the incorporation of what has been termed ‘second generation’ dimensions into mainstream development policy, the World Bank in particular has turned its attention to human-rights concerns.⁸¹² In that endeavour, selected human-rights norms have been re-cast in the service of market-centred economic growth with economic and the social concerns being portrayed as converging and capable of co-existing, rather than extraneous to economic growth or even in conflict with it.⁸¹³ First, gender equality was identified and operationalized as a key development strategy on the basis that resources directly targeted at women tend to be an especially efficient way to generate improvements in the well-being of children and families overall.⁸¹⁴ This was followed by the World Bank’s explicit focus on early childhood as a foundational phase in which to invest important resources in order to increase human capital and the productivity of future workers, thereby, generating long-term benefits for the economy as a whole.⁸¹⁵ As a result of these

⁸¹⁰ See World Bank website at: <http://web.worldbank.org>

⁸¹¹ See Rittich 2007, *supra* note 494 at 108. See also Mahon 2010, *supra* note 139.

⁸¹² See Rittich 2004/2005, *supra* note 106 at 200.

⁸¹³ *Ibid* at 200.

⁸¹⁴ World Bank, *Engendering Development: Through Rights, Resources and Voice* (World Bank, 2009). For a critique of the Bank’s approach to gender equality, see Kerry Rittich, “Engendering Development/Marketing Equality” (2003-2004) 67 Albany Law Review 575 [Rittich 2003-2004]. See further Rittich 2010, *supra* note 106; Kerry Rittich, “Families on the Edge: Governing Home and Work in a Globalized Economy” (2009-2010) 88 North Carolina Law Review 1527.

⁸¹⁵ See WB, *Investing in Children* 1995, *supra* note 30; WB *Early Childhood Counts*, *supra* note 31.

diverse policy strategies, the role and significance of early childhood development and well-being has become part of the mainstream development lexicon.⁸¹⁶

In contrast to the ILO's holistic 'life cycle' approach, the World Bank has placed central focus on investing in *early* childhood from 0-8 years as a fundamental and worthwhile stage for investment in human capital formation more generally in order to enable greater participation in the liberalizing global economy.⁸¹⁷ Drawing heavily on US-based research in neuro-science, behavioural science and developmental psychology which demonstrates the scientific case for intervention in the early years of child development, reports commissioned by the Bank such as *Investing in Children* and *Early Childhood Counts*, sought to enhance awareness of why investment in early childhood was worthwhile to human capital formation.⁸¹⁸ There are a number of core claims advanced in World Bank research on the rationale for focussing specifically on *early* childhood as a crucial phase in the life cycle. First, the research claims that given the rapid mental growth that occurs during infancy and early childhood on the whole, the early years are critical in the formation and development of intelligence, personality and social behaviour.⁸¹⁹ As a result,

⁸¹⁶ For a critique of the World Bank's conceptualisation of childhood more generally, see Helen Penn, "The World Bank's View of Early Childhood" (2002) 9 *Childhood* 118 [Penn 2002]. For a further critique of the divergent discourses on early childhood development adopted by the World Bank and the OECD as diverse strains of neo-liberal policy, see Mahon 2010, *supra* 139.

⁸¹⁷ Early childhood care for development is defined by the Bank as "all the supports necessary for every child to realize his/her right to survival, to protection, and to care that will ensure optimal development from birth to age eight," in WB *Early Childhood Counts* 2000, *supra* note 32 at 2. The reformulation of the World Bank's social policy discourse relating to children was in part prompted by UNICEF's campaign for 'adjustment with a human face' beginning in 1985 as a response to the negative impacts that neo-liberal structural adjustment policies were having on young children who were described as the 'most vulnerable' sections of the population. As a result of an inter-institutional dialogue between the World Bank and agencies such as UNICEF and UNESCO, the Bank's agenda began to be reframed from child survival and the reduction of child mortality, to a broader concern with child development more generally. This was given further impetus by the widespread ratification of the UN Convention on the Rights of the Child and by the 1990 World Summit for Children, see further Mahon 2010, *supra* note 139 at 174-177.

⁸¹⁸ See WB *Investing in Children* 1995, *supra* note 32 at 3. See further Penn 2002, *supra* note 825 at 123 who observes that the author "draws on evidence exclusively from US programmes." See also Mahon 2010, *supra* note 139.

⁸¹⁹ WB *Investing in Children* 1995, *ibid* at 3-4; WB *Early Childhood Counts* 2000, *supra* note 32 at 5-11.

according to the Bank, such investments increase efficiency by increasing the returns on primary and secondary education, contributing to future productivity and income, and reducing costs of health and other public services.⁸²⁰ From a social equity perspective, the Bank claims such interventions help reduce societal inequalities rooted in poverty by helping to provide young children from disadvantaged backgrounds with a more equitable start in life.⁸²¹ The benefits of such programmes are particularly important for girls the Bank claims because women's schooling is often a better predictor of health and reproductive outcomes than other household variables such as family income and husband's occupation.⁸²² Additionally, according to the Bank, the indirect benefits of such programmes can reduce gender inequities, by increasing female participation in the labour force which is a further central pillar of the Bank's human capital formation strategy.⁸²³ Given the increase in female participation in the labour force more generally, the Bank notes, there is a major need for safe childcare within the community.⁸²⁴ In particular, the World Bank commends informal, community-based programmes and public-private partnerships as methods of providing local women with employment opportunities in childcare within their community as well as meeting the increased demand for childcare resulting from women's increased labour-market participation.⁸²⁵ In *Investing in Children* the World Bank notes, mothers can be effective early childhood development providers in home-based programs where they can receive training and minimum assistance, on credit, to meet facility standards.⁸²⁶ In this sense we see two strands of the Bank's human-capital discourse, increased female participation in the

⁸²⁰ WB *Investing in Children* 1995 *ibid*.

⁸²¹ *Ibid* at 5.

⁸²² *Ibid*.

⁸²³ *Ibid* at 5-6.

⁸²⁴ *Ibid*.

⁸²⁵ *Ibid*.

⁸²⁶ *Ibid*.

market/labour force and investment in early childhood, being portrayed within the Bank's discourse as beneficial and supportive of one another without any acknowledgement of the potential tensions that can flow from increased female participation in 'productive' activities and children's engagement in economic exploitation.

A more recent and potentially positive development within the World Bank development policy that may have implications for child labour has been its endorsement of the importance of the role of social-protection systems with the publication of the World Bank *Social Protection and Labour Strategy 2012-2022*.⁸²⁷ In the Bank's 2012 Strategy it reiterates the core theme of previous policy initiatives that investing in early childhood is a crucial prerequisite for children's future productivity as labour-market participants.⁸²⁸ The Bank links social-protection programmes with social equity concerns, stating that "investing in children is broadly acknowledged to be one of the best pathways for reducing poverty by reducing the inter-generational transmission of poverty."⁸²⁹ Significantly, and in contrast to its previous policy discourse on early childhood, the Bank explicitly integrates child labour within its strategy, specifically in the context of upholding core labour standards. The strategy notes that, "[i]n this area, it is vital to look at the determinants of child labour and unequal opportunity at work and explore the social protection and labor instruments that have been successful, such as cash transfers that reduce children's work and women-focused labour market programs."⁸³⁰ The Bank asserts that social-protection and labour strategies have an important role to play across sectors in helping families invest in their children by providing a basis for

⁸²⁷ WB 2012, *supra* note 109.

⁸²⁸ *Ibid* at 25.

⁸²⁹ *Ibid*.

⁸³⁰ *Ibid* at 29.

ensuring equality in opportunities. In particular, the Bank notes that developing child-sensitive social-protection mechanisms is urgent given poor children's vulnerability, the high returns on investing in children, and the consequences of inaction.⁸³¹

5.3.4 Assessing the Implications of Diverse Discourses for Childhood Economic Exploitation

When assessed from the perspective of children who are engaged in or at risk of economic exploitation there are a number of noteworthy features in the discourse of the World Bank that distinguishes the Bank's approach towards childhood and childhood economic exploitation, when juxtaposed against the ILO policy on the child and the social protection systems debate; however, there are also some important parallels between these two approaches. First, the World Bank splits the life cycle of childhood, concentrating its investment during 0-8 years rather than 0-14 years for example, during which time children are legally prohibited from engaging in employment, or 0-18 years in accordance with the human-rights definition of a child. The Bank asserts that this timeframe is consistent with the understanding within developmental psychology of the ways in which children learn and with the 'international definition' of early childhood which includes pre-natal development and continues through the early school years, in particular the transition into primary school.⁸³² While acknowledging that a rights-based framework would speak to the rights of *all* children, the Bank nevertheless claims that the "evidence is in on the value of early attention to the *needs* of the child."⁸³³

⁸³¹ *Ibid* at 38. See further DFID, HelpAge International, Hope and Homes for Children, Institution of Development Studies, International Labour Organisation, Overseas Development Institute, Save the Children UK, UNDP, UNICEF and the World Bank, *Advancing Child-Sensitive Social Protection*, August 2009.

⁸³² WB Early Childhood Counts 2000, *supra* note 32 at 2.

⁸³³ *Ibid* at 7.

This policy neglects those from 8 years upwards who, according to the most recent ILO Global estimates, continue to be at significant risk of engagement in child labour. For example, 44 per cent of children in child labour are between 5-11 years, 28 per cent are between 12-14 years and 28 per cent are between 15-17 years.⁸³⁴ Childhood economic exploitation remains relevant throughout the 5-17 years of age spectrum. By limiting its period of intervention to between 0-8 years, the Bank's policy fails to encompass vulnerabilities that arise across the full spectrum of childhood and to recognize, similar to the ILO life-cycle approach, the linked set of processes that entrench disadvantage in childhood through a continuum that leads to poverty and disadvantage in adulthood.

Second, the Bank's policy on early childhood cites the scientific case for investment in early childhood, relying largely on US-based interventions and sample populations drawn from US cities. However, the harms resulting from child labour within low- and middle-income countries have been documented extensively by the ILO and other institutions with depressing regularity.⁸³⁵ Notably, there is no reference to the established harms of childhood economic exploitation within the various World Bank policy documents on early childhood despite the clear evidence base that exists, drawn from Global South countries, documenting its harm across the full spectrum of childhood.

A third noteworthy feature of World Bank discourse surrounding early childhood is how centrally it focuses on the *future* productivity of children as market participants in which an efficient investment can be made in the present in order to enhance future returns in the context of returns on education and reduced costs of healthcare

⁸³⁴ ILO Global Estimates 2013, *supra* note 5 at 6.

⁸³⁵ See for e.g., ILO Targeting the Intolerable, 1998, *supra* note 179; ILO 2004, *supra* note 15; ILO Hazardous Work 2011, *supra* note 2; UCW Bangladesh 2011 *supra* note 118.

and other services.⁸³⁶ The Bank notes that the economic arguments for investing in early childhood have gained force in recent shifts in economic policy which “emphasize open economies that require a well-educated and flexible labour force in order to compete globally.”⁸³⁷ In order to deliver on the future productivity of children, within the Bank’s policy, adult women figure as maternal agents to be enlisted in ensuring the development of the new generation. Women’s role is cast in terms of their ability to deliver on the conditionalities of cash transfers, as potential childcare workers in informal, community-based systems of childcare and as potential earners with the capability to increase overall household income.⁸³⁸ Without acknowledging the potential for tension and conflicts of interest between women’s different roles that cross the public and private spheres, the Bank’s policy simultaneously places central faith on the beneficent possibilities of market participation for women as a means to increase the income and therefore the well-being of families overall.⁸³⁹ Notably, the Bank does not deal explicitly with the relationship between women’s participation in the labour force or women’s income-generation projects and the linkages with childhood economic exploitation. It is assumed that by enhancing the income of the primary caregiver, particularly women, positive effects for children will follow in terms of their access to education, improved health outcomes and overall well-being. Apart from the deeply

⁸³⁶ WB Early Childhood Counts 2000, *supra* note 32 at 10.

⁸³⁷ *Ibid* at 8.

⁸³⁸ See further Rittich 2010, *supra* note 106, who notes that, “because conditional cash transfers are expressly given to women and because of the gendered division of labor that tends to obtain within households, it is women who bear the responsibility for ensuring compliance. For this reason, transfers are, at best, equivocal in their effects on gender equality. But they are also ambiguous with respect to households and markets. While they may be egalitarian with respect to girls, they are deeply maternalist in their assumptions about women, and for a variety of reasons women may end up more, rather than less, tied to their households and less, rather than more able, to participate in markets in the mode envisioned by development planners,” at 1041. See also Maxine Molyneux, “Mothers at the Service of the New Poverty Agenda: Progresa/Oportunidades, Mexico’s Conditional Transfer Program” (2006) 40(4) *Social Policy and Administration* 425.

⁸³⁹ See further Rittich 2010, *supra* note 106 at 1039.

maternalistic assumptions underpinning the Bank's policy, arguably the assumptions underlying early childhood investment programmes reflect a lack of understanding of the inner workings of households and the burdens and knock on impacts of care labour.⁸⁴⁰ The ILO on the other hand has at least acknowledged the potential tensions between increased female participation in the labour force and child labour prevalence.⁸⁴¹ However, similar to the World Bank, the ILO retains a focus on increasing female participation in the labour force and/or income-generation projects which it asserts have led to increased female empowerment within the household. The ILO does not engage in a more in-depth analysis of the potential negative implications for children, in particular girl children who may be absorbing the social reproduction role of their parent when they become engaged in 'productive' work. Therefore, in the crucial area of care and social reproduction which I have argued in the previous chapters is an enduring social process that underpins childhood economic exploitation, there are some parallels between the World Bank and the ILO approach.

A final noteworthy feature of the World Bank policy discourse, when juxtaposed with the ILO discourse on social protection mechanisms, is the almost complete absence of a reference to the role of law and legislative frameworks in extending social protection as a matter of legal right, rather than an element of development policy. In its policy work on early childhood development the Bank does not generally refer to advancing the legal basis for such interventions, nor does it refer to the obligations of States under international human rights law.⁸⁴² In its 2012 Strategy there appears to be a slight shift in the discourse with the Bank asserting that, "[b]eyond risk

⁸⁴⁰ See Rittich 2010 *ibid* at 1039-1041.

⁸⁴¹ ILO Gender Equality 2009, *supra* note 166 at 69. See further Chapter Four at 224-227.

⁸⁴² WB Investing in Children 1995, *supra* note 32; WB Early Childhood Counts 2000, *supra* note 32.

management and poverty reduction, social protection and labour policies and programs are increasingly recognized as a vehicle for implementing social contracts, *securing people's rights* and fulfilling their obligations.”⁸⁴³ However, beyond this passing acknowledgement of the existence of a rights framework, the Bank is generally weak on the side of the necessary legislative framework that would define the entitlements of beneficiaries as a matter of legal rights and on the side of financing social protection by the State.⁸⁴⁴ As Cichon notes, “[t]he notion that there is a human rights foundation to the case for the [social protection floor], which is fundamental to the ILO’s approach, does not underpin the Bank’s own SPL strategy.”⁸⁴⁵

When juxtaposed with the ILO policy discourse surrounding the child as a subject of development policy, it appears that the ‘second generation’ turn in World Bank development policy has led to the reframing of many of the social objectives pursued within development policy. This provides further evidence for what Rittich has called the “growing instrumentalization of social goals” within development policy.⁸⁴⁶ As Rittich notes, there has been a re-ranking of the social goals themselves so that those that appear to most directly enhance the extent and quality of market participation, for example investments in human capital in children as future market participants, become more favourably ranked than others.⁸⁴⁷ As a result, a wide range of social concerns are not merely being incorporated and assimilated into market reform and governance projects, they are in fact being *transformed* at the same time, with the international financial institutions (‘IFIs’) increasingly becoming the arbiters as to

⁸⁴³ WB 2012, *supra* note 109 at ixv.

⁸⁴⁴ Cichon 2013, *supra* note 137 at 55-56.

⁸⁴⁵ *Ibid.*

⁸⁴⁶ Rittich 2004/5, *supra* note 179 at 230.

⁸⁴⁷ *Ibid.* See further Kabeer 2010, *supra* note 131 at 17.

the scope and normative content of the goals themselves.⁸⁴⁸ As the divergent approaches to childhood and the scope of social protection outlined above demonstrates, it is clear that “in their efforts to propose solutions to the social, the IFIs are as likely to reject as embrace the claims and evaluations of other international institutions, scholarly experts and civil society groups” in relation to the social issue under consideration.⁸⁴⁹

While the World Bank has centralized the child as a subject of development, it has simultaneously reduced the object and scope of the potential range of interventions that could have been applied in the context of childhood, by splitting the life cycle of childhood through a market-centred rationalization of specific types of early interventions. The full implications of the reduction in the scope of interventions that focus on early childhood only within the context of child labour are not fully clear. However, the linkages between the World Bank early-childhood development strategy and child-labour initiatives appear to be at a very preliminary stage at the inter-agency level, notwithstanding the significant increase in Bank funding of early childhood initiatives since 1990. A recent inter-agency report completed by the World Bank, ILO and UNICEF in advance of the 2010 Hague Conference on child

⁸⁴⁸ In the context of gender equality for example, Rittich demonstrates how in the process of centralizing gender equality within its work the Bank has adopted a particularly narrow definition of gender equality that explicitly rejects the goal of substantive economic equality between men and women, even as it promotes market processes and greater market participation as the engines of gender equality. See Rittich 2010, *supra* note 106 at 1039.

⁸⁴⁹ Rittich 2004/5, *supra* note 179 at 231. In the context of gender equality, Rittich asserts that, “[r]ather than simply replicate the vision of gender equality already mapped out in international human rights instruments or platforms of action, *Engendering Development* constructs its own. The result is a gender equality agenda that, compared to the transformative projects envisioned at the United Nations Fourth World Conference on Women or those plausibly housed under the Convention on the Elimination of All Forms of Discrimination Against Women, is conceived and measured in limited and even peculiar ways. At the outset, *Engendering Development* explicitly rejects substantive equality, or equality of outcomes, as the appropriate measure of gender equality. ... because *Engendering Development* does not directly attend to the matter of women’s economic disadvantage, the paradoxical result is a market-centred equality paradigm from an international financial institution that appears not to assess progress in gender equality in the most obvious (and for such institutions, standard) of ways: via economic indicators such as wages, income, wealth and poverty levels,” at 581-582.

labour noted the relevance of early-childhood strategies for child-labour interventions, but stated that “more analysis is needed in order to support the design of programmes and other interventions relevant for the children who are at risk of being involved in child labour.”⁸⁵⁰ Some minimal evidence was cited on the positive impacts of early childhood interventions on the prevention of child labour among children in their early years; however, it does not appear that the Bank has sought to integrate child labour specifically within its early childhood-development investment stream despite its documented harms.⁸⁵¹ This appears to be a significant missed opportunity within Bank interventions because it neglects a large cohort of children from 8-17 years who are arguably at increased risk of exploitation as they grow older and it does not appear to be fully in keeping with the stated aim of preparing and educating future labour-market participants.

The significance of the contours of these diverging approaches needs to be understood within a broader context. As Gerry Rodgers notes in his work on the ILO’s role in advancing social justice, when “[s]een within the broader international environment, there is still a sharp divide between the ILO’s approach to social security, based on universality, solidarity and redistribution, and that promoted by the World Bank in recent years, of ‘social risk management.’”⁸⁵² While the social risk management approach espoused by the World Bank may appear to be wider than social security because it seeks to proactively prevent risks rather than simply responding to them, the ‘social risk management’ approach also means that the

⁸⁵⁰ Understanding Child Work, *Joining Forces against Child Labour, Inter-Agency Report for the Hague Global Child Labour Conference* (ILO and UCW, May 2010) at 82, para 195.

⁸⁵¹ *Ibid.*

⁸⁵² See Rodgers 2009, *supra* note 138 at 167. See further Deacon *supra* note 4 at 54 who states, “[t]he story of the fundamental clash of approaches, ideologies and policies between the Social Security Department of the ILO and the Social Protection and Labor Division of the World Bank in the fields of pension policy, of safety net versus universal cash benefits policies, of even the definitions and purposes of social protection has been told many times.”

treatment of social risks is based on the idea of *individual* management; individuals are considered as entrepreneurs managing their own life and selling their skills on the labour market, with a very limited role delineated for the State.⁸⁵³ Rittich similarly observes that in reconceptualising social welfare in terms of ‘social risk management,’ economic security of the poor is advanced not primarily through redistributing resources in the manner in which has been the traditional role of the State in the context of social security, but by developing household capacity to reduce and cope with economic risk through strategies such as ‘income smoothing’ over a lifetime.⁸⁵⁴

Underlying the rationale for the two discourses by the ILO and World Bank on effective interventions in the context of childhood and the scope of social protection mechanisms lies different understandings of the role of the market, the family and the State in allocating the burdens and risks of economic responsibility and care labour between these various parties. Childhood and the family emerge as sites through which these diverse ideologies are played out, with the family increasingly integrated into concerns around human capital formation by the World Bank, although this is rarely explicitly acknowledged.⁸⁵⁵ As Rittich observes, “[t]he

⁸⁵³ *Ibid.* Rodgers 2009, *supra* note 138 at 167. See further Roddy McKinnon, “Social Risk Management and the World Bank: Resetting the ‘Standards’ for Social Security?” (2004) 7:3 *Journal of Risk Research* 297.

⁸⁵⁴ Rittich 2010, *supra* note 106 at 1041. As Mahon asserts, “[t]he World Bank ... draws inspiration from the residual USA social policy model, targeting the poor, leaving the rest to rely on markets and families”; see Mahon 2010, *supra* note 139 at 187.

⁸⁵⁵ See Rittich 2010, *supra* note 106, who observes that, “[t]he significance of the family to development, then, is immense. Despite this, the family remains something of a black box in the discourse and policy of mainstream development institutions such as the World Bank. ... More often than not [the family] is sidelined or simply missing in debates about economic growth; where it is considered, its integration into policy discourse remains partial and incomplete. To the extent that the household does come into view, it tends to be where it is perceived to impinge upon ‘real’ productive activity, which in development parlance is understood to be market activity. ... The result is not only that the significance of the family within development remains obscure. Because the household and family are themselves central sites of economic activity, much about the character and effects, and hence the desirability, of development initiatives themselves remains obscure as well. Put simply, the aggregate economic picture is quite different than the partial one with the household blacked out, and development initiatives may be much

pervasive conception of the family as private and as non-economic in its essence – and the correlative conflation of economic with markets – often makes it difficult to locate the family within the domain of economic concerns.”⁸⁵⁶

For the World Bank the role of the State in advancing human development and welfare is located broadly in enabling participation in the market, with the market envisaged as the principal means to advance the social and economic standing of disenfranchised groups, in particular women which it is assumed will have positive derivative impacts for children.⁸⁵⁷ However, as Kabeer observes, the Bank does not deal fully with the risks that can arise from the market, including the labour market, itself and some of the countervailing trends that can arise for disenfranchised groups through their integration into the market.⁸⁵⁸ In transforming the ‘social’ and the human rights concerns it has chosen to recast in the service of market-centred growth, the Bank promotes a conception of human development that is centred around the protection of *individual* entitlements and substantially delinked from the broader commitment to collective empowerment, widespread economic security and redistributive policies.⁸⁵⁹ In accordance with this approach, the State’s role is now framed in other terms: merely to create an ‘enabling’ environment for individuals to manage economic risks and to sell their skills on the labour market with the obligation to be employed both deepened and widened.⁸⁶⁰ Social reproduction work, under this approach, especially caring for children, is considered to be a private and

less functional, even on their own terms, than they appear once the family is brought back into view,” at 1027-1028.

⁸⁵⁶ Ibid. at p. 1027.

⁸⁵⁷ See Rittich 2010, *supra* note 106 at 1036-1037, noting the manner in which the mainstream development agenda traverses the market/household divide. In particular Rittich notes, “participation in markets has emerged as the principal means to advance the social and economic status of disenfranchised groups. But this means that families, households, and individual family members are subject to more discipline by the market and, paradoxically, sometimes greater bureaucratic control as well.” See further Fudge 2005, *supra* note 803.

⁸⁵⁸ See Kabeer, *supra* note 135 at 17.

⁸⁵⁹ See Rittich 2007, *supra* note 494 at 115-116; see also Fudge 2005, *supra* note 803 at 645-646.

⁸⁶⁰ See Rittich 2007, *supra* note 494 at 116; see also Fudge 2005, *supra* note 803 at 645.

individual responsibility that will be provided by the individual within the family or through the marketization of care.⁸⁶¹ While unacknowledged within World Bank policy discourse, within this equation there are tensions that arise for the eradication of childhood economic exploitation. Not only has childhood economic exploitation been neglected by the reduction of the scope of Bank interventions to early childhood on the basis of a market-centred rationale based on economic efficiencies, but in some instances the broader development agenda pursued by the Bank could be seen to be operating at cross-purposes to reducing childhood economic exploitation, or at least to raise questions as to the potential risks of the equivocal impacts of these broader development agendas.

For the ILO, a central emphasis is placed on the role of the State in advancing human development and welfare which is located more squarely within a human-rights law framework. In ILO Recommendation No. 202, the State is envisaged as undertaking this role in keeping with the principles of solidarity, universal protection, social cohesion and equality, and is required to extend social protection as a matter of legal right, rather than on an *ad hoc* basis. In keeping with the international human rights law framework overall, including the UNCRC, ILO Recommendation No. 202 delineates in more concrete terms the specific elements of the obligations of the State to advance the rights of the child to benefit from an adequate standard of living and adequate social security. While non-binding in nature, the ILO Recommendation provides an important soft law template of the types of considerations that should be prioritised within nationally defined social protection systems. This could serve to move the debate beyond questions of justiciability of economic and social rights, to processes of implementation and extension of social protection mechanisms at

⁸⁶¹ See Fudge 2005, *supra* note 803 at 645.

national levels, in ways that could integrate more effectively workers in the informal economy. Notwithstanding the strength of the ILO discourse in delineating a central role for the State, the question of social reproduction and care work continue to be neglected and relegated to the private sphere. In parallel with the World Bank, while the ILO acknowledges the implications and the need for care supports for women workers in informality, it has not yet fully grappled with the full implications of care work for women workers in the informal economy and the linkages between care work and childhood economic exploitation. In a manner that mirrors the reification of the private sphere within the UNCRC which I have critiqued in Chapter Three, the World Bank and the ILO continue to assume that the family has the capacity to absorb the burden of social reproduction work in light of its “natural and fundamental” role and to provide for the socio-economic rights of their children without acknowledging some of the tensions that can arise for poor families in the implementation of income-generation and employment based projects particularly for women workers in the informal economy. As Rittich has observed in the development context,

the family remains something of a black box in the discourse and policy of mainstream development institutions such as the World Bank.The result is not only that the significance of the family within development remains obscure. Because the household and family are themselves central sites of economic activity, much about the character and effects, and hence the desirability, of development initiatives themselves remains obscure as well. Put simply, the aggregate economic picture is quite different than the partial one with the household blacked out, and development initiatives may be much less functional, even on their own terms, than they appear once the family is brought back into view”

Given their very different mandates, the ILO and the World Bank inevitably occupy different ends of the policy spectrum in the context of social protection mechanisms

and in the role that they envisage for the State and legal frameworks in advancing socio-economic rights. However, in their failure to fully grapple with social reproduction and care work, the approaches of these two very different organisations do not appear to be very far apart and replicate the structural inadequacies of the labour law and human rights law frameworks that I have described. Nevertheless, the policies that flow from the approaches adopted by the World Bank and ILO have real implications for the ways in which the burdens and risks of economic responsibility and care labour are allocated between the market, the family and the State and have central influence over the success or failure of mechanisms to reduce childhood economic exploitation. In the section that follows, I will illustrate the impacts of these different types of mechanisms through available empirical evidence in the context of childhood economic exploitation. I argue that this evidence reinforces the relevance and importance of the relational framing of the child, and demonstrates in practical terms the type of model that is most successful in reducing the prevalence of economic exploitation in childhood.

5.4 Complicating the Nexus between Social Protection Mechanisms and Childhood Economic Exploitation

On 12 June 2014, on the occasion of the World Day Against Child Labour, the ILO Director General placed social-protection mechanisms at the centre of the policy response to child labour following on from the first ILO *World Report on Child Labour* on the role of social-protection systems in lowering child labour prevalence.⁸⁶² Nevertheless, the complexity surrounding the impacts of both explicit child-friendly social-protection measures and broader measures that have an impact

⁸⁶² ILO Press Release 12 June 2014, *supra* note 33.

on child welfare is increasingly being acknowledged.⁸⁶³ In its 2013 Report, the ILO observes that where the elements of a social security system fail to account adequately for the special vulnerabilities of children, child labour can be one of the negative outcomes, and that building social security systems that are child sensitive is an important component of a broader policy response to child labour.⁸⁶⁴ Similarly, the ILO and UNICEF have acknowledged that desirable outcomes in terms of child labour are not always guaranteed in the context of social protection, even when social protection instruments succeed in achieving their broader social goals.⁸⁶⁵

5.4.1 Conditional and Unconditional Cash Transfers – Analyzing the Mixed Results

Cash transfers, both conditional and unconditional, aim to alleviate current income poverty through increasing household income, and through conditions to reduce the likelihood or extent of future poverty by prompting behavioural changes that increase household investment in human capital.⁸⁶⁶ Conditional cash transfers in particular provide a cash transfer to vulnerable households that are explicitly linked to behavioural conditions such as requiring that children attend school or that parents engage in health checks. Despite the prioritization of social protection mechanisms within the context of child labour by the ILO, cash-transfer schemes are not often designed with the explicit aim of reducing child labour or with

⁸⁶³ See for example DFID, HelpAge International, Hope and Homes for Children, Institution of Development Studies, International Labour Organisation, Overseas Development Institute, Save the Children UK, UNDP, UNICEF and the World Bank, “Advancing Child-Sensitive Social Protection” (August 2009); see also De Hoop & Rosati 2013a, *supra* note 107; De Hoop and Rosati 2013b, *supra* note 107.

⁸⁶⁴ ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 10. See further UNICEF Social Protection 2013, *supra* note 560.

⁸⁶⁵ *Ibid* at 56. See UNICEF Social Transfers 2013, *supra* note 360 at 37.

⁸⁶⁶ Conditional cash transfers generally provide cash transfers on condition that the members of the recipient household adhere to specific behavioural requirements which are typically in the areas of education, requiring regular school attendance by the children of the recipients, or in the area of health, requiring regular health check-ups or attendance at health seminars. Unconditional cash transfers, on the other hand, aim to reduce poverty and address household vulnerability, without attaching explicit conditionality’s to the transfer provided. See further ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 29-36; De Hoop & Rosati 2013a, *supra* note 107 at 5-10.

conditionalities linked directly with this aim.⁸⁶⁷ Nonetheless, the degree to which cash-transfer schemes are capable of having a positive impact on child-labour outcomes is increasingly being evaluated. Cash transfers currently represent the social-protection instrument about which the most evidence has been gathered to date, including in the context of child labour. The evaluations accumulated demonstrate a broad evidence base that cash transfers, conditional and unconditional, have the potential to lower child labour prevalence and can cushion the effects of economic shocks that may lead households to use child labour as a coping strategy.⁸⁶⁸ Generally, cash transfers have *not* been found to increase the incidence of child labour. However, there is considerable variation across diverse programmes with some programmes resulting in statistically-significant reductions in child labour, while others have little or no impact.⁸⁶⁹

There are a number of noteworthy features that have begun to emerge from data on both conditional cash transfers and non-conditional transfers that require further analysis. Where conditional cash transfers have been linked to school attendance, for example, the evidence demonstrates that an increase in school attendance does not necessarily reduce child labour; in other words, the impact of a cash transfer on child labour may not be reciprocal to its impact on education.⁸⁷⁰ Where a cash transfer is received, working hours might simply be reallocated triggering an adjustment in children's activities and time-use, or a change in the kinds of activities engaged in rather than a reduction of work or labour. For example, children may simply combine work and schooling, rather than reduce engagement in work overall, or they

⁸⁶⁷ ILO WR Social Protection and Child Labour 2013, *supra* note 21.

⁸⁶⁸ ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 39; De Hoop & Rosati 2013a, *supra* note 107 at 21.

⁸⁶⁹ ILO ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 39; De Hoop & Rosati 2013a, *supra* note 107 at 8.

⁸⁷⁰ ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 33-34; De Hoop & Rosati 2013a *ibid* at 9-10.

may engage in different types of work, in particular in the social reproduction context, or their siblings may be reallocated the work that they are no longer undertaking within the family home.⁸⁷¹ Therefore, the relationship between conditional cash transfers to increase attendance in education and reductions in child labour are more complex than would appear at first glance, demonstrating that there may be other complex social processes at play within the relational context of the household that are inhibiting children from fully decreasing their hours of work.

Cash transfers accompanied by diverse forms of additional interventions have been found to have very variable impacts. For example, cash transfers accompanied by grants for microfinance projects to start new income-generating activities were found to have significantly less impact on reducing child labour. The ILO has observed that these investments created further opportunities for children's involvement in family work or in home-based work due to the presence of income generating activities taking place within the home.⁸⁷² Given the porous nature of the boundary between the productive and reproductive spheres that I have argued typifies the contextual realities of child labour, it could also be observed that where parents are engaged in productive activities in the home or elsewhere, this will have knock on impacts for children, in particular girl children in their engagement in social reproduction work within the household. Therefore, the evidence demonstrates that households use the transferred resources not only for investment in children's human capital, but also for investment in productive assets which can increase family incentives to engage children in work. In contrast, the evidence demonstrates that cash transfers

⁸⁷¹ De Hoop & Rosati 2013a *supra* note 107 at 9-10.

⁸⁷² ILO WR Social Protection and Child Labour 2013 *supra* note 21 at 36-37. In the *Atencion a Crisis* programme in Nicaragua, for instance, some households were provided with "grants for productive investments" to start new income-generating non-agricultural activities. One study found that this additional element significantly diminished the impact of the programme on child labour, because the investment grant altered the returns on child labour making it profitable to employ children in the new developed household business.

accompanied by supply-side interventions that involved direct investments in education and health facilities were found to result in a statistically-significant decrease in child labour, with programmes such as extended school-day programmes playing an instrumental role in keeping children out of work and remaining in school.⁸⁷³ The ILO has observed in its empirical studies that the positive impacts of conditional cash transfers depends partly on their integration within other interventions that seek to support a broader range of socio-economic rights beyond basic income mechanisms.⁸⁷⁴

Third, in terms of the gendered impacts of cash transfers, it has been found that conditional cash transfers have a more measurable impact in reducing the engagement of male children engaged in economic activities than for female children in a number of programmes.⁸⁷⁵ Reflecting one of the structural weaknesses of the labour law model that I have sought to highlight throughout the analysis, the ILO observes that this is likely to be at least in part a reflection that household chores, frequently performed by girls, were not included in the definition of child labour in the studies undertaken. Therefore the impacts of cash transfer in reducing social reproduction and care work which is more prevalent for girls has not been sufficiently measured by studies that focus primarily on the impact of these programmes on economic activity.⁸⁷⁶ Similarly, it was found that the relative impact of conditional cash transfers on male and female child labourers depended on the specific type of work performed with impact on work for pay and work outside the

⁸⁷³ ILO WR Social Protection and Child Labour 2013 *supra* note 21 at 37. For example, in Brazil a programme that combined conditional cash transfers with a mandatory after-school programme that essentially doubled the length of the school day for participating children was found to have a major impact on reducing child labour with the extension of the school found to have been instrumental in keeping children out of work.

⁸⁷⁴ See De Hoop & Rosati 2013a *supra* note 107 at 21.

⁸⁷⁵ ILO WR Social Protection and Child Labour 2013 *supra* note 21 at 35.

⁸⁷⁶ *Ibid.*

home stronger for boys than for girls, while impact on domestic work, work without pay and work at home stronger for girls than for boys.⁸⁷⁷ Finally, the effectiveness of conditions that are attached to cash transfers has been the subject of ongoing debate in development circles. More evidence is needed to fully assess whether conditions are a necessary element of the programmes.⁸⁷⁸ However, UNICEF observes that conditionality when applied strictly might fail to reach children in poverty in areas without supply-side infrastructure, and could fail to reach children in extreme vulnerability where parents are unable to comply with programme conditions.⁸⁷⁹

The analysis of cash transfers reveals that while they are broadly successful in reducing the prevalence of child labour there is some complexity in their application in practice which underscores the importance of nesting the child and the household within the interconnected web of personal and institutional relationships that determine their wellbeing, rather than targeting the individual child, woman worker in informality or poor household in a decontextualized manner that focusses solely on income transfer without considering the surrounding context. For example, there is some complexity in the relationship between cash transfers that are linked to education and reductions in child labour that requires further empirical study, demonstrating that where other social processes have not been sufficiently addressed within the household, for example family engagement in income generating activities within the home that may incentivise child work, the success of cash transfers may be inhibited. Similarly, the more positive impacts of cash transfers for boys in reducing their engagement in economic activities underscores the degree to which girls are engaged in non-economic and social reproduction work falling at the contested

⁸⁷⁷ *Ibid.*

⁸⁷⁸ *Ibid* at 35-36.

⁸⁷⁹ See UNICEF Social Transfers 2013, *supra* note 360 at 22.

contours of the definition of child labour within the labour law framework. This raises questions as to whether in fact children engaged in social reproduction and care work are at this time sufficiently covered by cash transfer schemes as currently designed, in particular those cash transfers that are explicitly targeted at addressing “child labour” as defined within the labour law model. In a manner that replicates some of the exclusions of the labour law model and the reification of the private sphere under the human rights law model, it appears that social reproduction and care work remain neglected and more difficult to measure in terms of the outcomes of cash transfer mechanisms. It may be queried whether in fact social reproduction and care work could prove more challenging to address through cash transfer programmes in light of its hidden, invisible and *ad hoc* nature, in particular for those programmes that explicitly seek to challenge engagement in labour rather than to extend engagement in education for example. Finally, it is noteworthy that the most successful cash transfer programmes were those that are more closely aligned with the State centred focus of ILO Recommendation No. 202 which advocates a model based on a central role for the State in keeping with the principles of solidarity, universal protection, social cohesion and equality. In contrast, the cash transfers that were more closely aligned to the World Bank model which delineates a more minimalist role for the State and a maximum role for the market through enabling market participation for individuals, in particular income-generation projects linked with cash transfers, were shown to have less effective results.

5.4.2 Income-Generation Projects through Micro-Finance Mechanisms– Analyzing the Challenges

Small loans through microcredit are assumed to be a powerful tool to facilitate income-generation in micro and small enterprises/farms. These types of projects

have been at the forefront of World Bank policies and development policy more generally as a method to increase the income-generating potential of impoverished communities in way that mirrors the ‘social risk management’ approach of the World Bank more generally grounded in empowering individuals to engage with their labour and other productive activities in the market.⁸⁸⁰ As poverty is one of the root causes of child labour, it is assumed that through their potential to positively impact household incomes, microloans for investment may be able to reduce child labour. However, the empirical evidence on the linkages between income-generation through microcredit and reductions in the prevalence of child labour remain inconsistent.⁸⁸¹ Specifically, evidence demonstrates that microloans may even have a negative impact on the household economy, if for example, they increase the total labour demand of a family enterprise and thus increase the children’s workload and the incentives for families to use child labour.⁸⁸² Empirical evidence has demonstrated negative impacts on child labour where family enterprises have invested in production intensive business assets with families often demonstrating a preference for employing their own children over external labourers because of costs, higher flexibility, agency problems and in order to keep valuable knowledge and skills within the family.⁸⁸³ In the context of a growing informal economy where outsourcing and subcontracting are increasingly integrating households and homeworkers into larger global markets and with the absence of effective labour law regulation, the risk that families may be at increased risk of engaging their children in labour is a real one. These effects are particularly compounded where the quality

⁸⁸⁰ See further ILO Microfinance 2011, *supra* note 82.

⁸⁸¹ *Ibid.* See further Canadian International Development Agency, *Impacts of Microfinancing Initiatives on Children: Overview of the Study Report*, (Gatineau, Quebec: CIDA, 2007).

⁸⁸² ILO Microfinance 2011 *supra* note 82 at p. 11.

⁸⁸³ *Ibid.*

of education available is perceived to be poor and the opportunity costs for education appears to increase.⁸⁸⁴

The impact of microloans on child labour also has important gender dimensions. Similar to the trend for conditional cash transfers, numerous microcredit programmes specifically target women as the beneficiaries of loans. According to the rationale underpinning these projects, access to credit contributes to the empowerment of women providing them with greater access and control over resources, which in turn can increase their income-generating potential, their autonomy and decision-making power and this is often associated with positive effects for children as women are more likely to invest additional income in education and family well-being. However, empirical evidence has demonstrated that the positive effects of microcredit on gender and household well-being may be offset by the negative impacts of women's increased workload.⁸⁸⁵ In particular, it has been demonstrated that the increase of the mother's time in self-employment may lead to a substitution between the daughter's time in school and her time in household production or self-employment.⁸⁸⁶ This substitution seems to be especially strong when the girl's time is a close substitute to that of her mother's time.⁸⁸⁷ For example, in an empirical evaluation of the impact of microcredit provided by 13 microfinance institutions in Bangladesh, the authors found that "[p]articipation in microcredit programs adversely affects children's schooling and exacerbates the problem of child labor".⁸⁸⁸ Girls in particular were found to be adversely impacted and increased work by about 20 or 30 percentage points depending on the gender of the credit recipient

⁸⁸⁴ *Ibid.*

⁸⁸⁵ ILO Microfinance 2011 *supra* note 82 at 12-13.

⁸⁸⁶ *Ibid.* at p. 13.

⁸⁸⁷ *Ibid.*

⁸⁸⁸ De Hoop & Rosati 2013b, *supra* note 107.

in the household. The study concluded that “[f]or children of participating households, the odds of being in self-employment activities instead of being in school are more than doubled than nonparticipating households. This suggests that increased child labour is in large part because of household enterprises set up with microcredit”.⁸⁸⁹

The evidence from income-generation projects that targets increasing women’s engagement in ‘productive’ activities clearly demonstrates that increased income and assets do not necessarily result in a reduction of child labour within the household, with intra-household inequalities in relation to gendered care work being transferred to the girls within the household in some instances. These findings once more underscore the high prevalence of girl children in social reproduction work within the household which is largely invisible in statistical data and which falls outside the contested contours of the ‘child labour’ definition under the labour law model, although it is integrated within the human rights law model where educational deprivation occurs. The negative implications of income-generation projects also underline the porous nature of the relationship between the ‘productive’ and ‘reproductive’ spheres within families, and the potential tensions arising from increased adult female participation in income-generation and employment where the correlative burden of care and social reproduction work have not been taken into account. Finally, a purely income-generation approach to interventions in this field, which does not integrate a broader range of socio-economic supports, aligns more closely with the model of intervention espoused by the World Bank, although the ILO has also emphasised the role of income-generation projects in this field without

⁸⁸⁹ *Ibid.* at p. 15.

adequately addressing the potential countervailing concerns for child labour prevalence.

5.4.3 Public Employment and Public Works Schemes – The Crucial Role of Care Work

Public works programmes guarantee employment during periods of low labour serving the primary goal of providing a source of employment to adult members of the household.⁸⁹⁰ Such programmes may include on-the-job training to reintegrate low-skilled workers into the labour force or provide other inputs to reduce the vulnerabilities of poor families.⁸⁹¹ The extension of public-employment schemes is becoming increasingly popular in low- and middle-income countries as an element of their emerging social protection systems. However, their impacts in a context of child labour indicate the possibility for mixed results.⁸⁹² In theory, public-employment schemes have the potential to address the income poverty that underpins child labour and can provide temporary support to households whose breadwinner has lost his or her job, as well as helping to smooth the earnings for workers in seasonal jobs. However, the ILO and UNICEF have noted that there are some risks arising from such schemes in a context of child labour. First, the risk can arise that the public-employment scheme itself employs children as participants thereby increasing the demand for child labour. Second, the risk arises that children may replace participant parents in their former jobs or in performing household chores or care labour, and finally, the risk arises that children's access to care may suffer,

⁸⁹⁰ For an overview diverse programmes throughout middle- and low-income countries, see Stephen Devereux and Colette Solomon, "Employment Creation Programmes: The International Experience" (2006) Issues in Employment and Poverty Discrimination Paper No. 24 (Geneva: International Labour Office).

⁸⁹¹ ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 39-42.

⁸⁹² *Ibid* at 42; De Hoop & Rosati 2013b, *supra* note 107 at 7-8.

particularly where women take up public employment scheme activities where there is inadequate provision for child care.⁸⁹³

Preliminary evidence is beginning to emerge on the linkages between child labour prevalence and the Mahatma Gandhi National Rural Employment Guarantee Act 2005 (NREGA) in India which is the largest public employment programme in history worldwide.⁸⁹⁴ NREGA offers a legal guarantee of employment to households that request it, and if local government fails to provide work within 15 days of the time of request, households are entitled to an allowance commensurate with what they would have earned from the work.⁸⁹⁵ In designing the programme, NREGA has sought to minimize the risk that households will substitute children for adults in domestic tasks or other employment through limiting the number of days of work available per household.⁸⁹⁶ Moreover, NREGA requires worksites to provide childcare for households who need it in order to help equalize work opportunities for men and women, and to free older children from the task of minding their younger siblings.⁸⁹⁷

Despite these important safeguards, in a preliminary impact evaluation of NREGA on child labour, the ILO found some problematic results. While there were generally positive impacts among households in spending on education, healthcare and savings for child well-being overall, these were not significant given the small earnings that arose from the programme.⁸⁹⁸ There was little evidence that the public-works schemes employed children under 14 years; thus, it has not led to an increase

⁸⁹³ ILO WR Social Protection and Child Labour 2013, *supra* note 21 at 40; see UNICEF Social Transfers 2013, *supra* note 360 at 38; see De Hoop & Rosati 2013b, *supra* note 107 at 7-8.

⁸⁹⁴ See ILO, *Impact of the Mahatma Gandhi National Rural Employment Guarantee Scheme on Child Labour* (Geneva: International Labour Office, 2013) [ILO MGREG 2013].

⁸⁹⁵ See further Mahatma Gandhi National Rural Employment Guarantee Act 2005.

⁸⁹⁶ ILO MGREG 2013, *supra* note 895 at 41.

⁸⁹⁷ *Ibid.*

⁸⁹⁸ *Ibid.*

in child labour among this cohort. However, among children from 14-17 years, there was evidence that some of these children replaced the adult earner in their household, largely as a survival strategy in response to serious economic deprivation.⁸⁹⁹ Despite the legal requirements, crèche and shade facilities were found to be virtually absent at the worksites with 20 per cent of mothers bringing their children to the worksites with inadequate facilities and 32 per cent of working mothers leaving their young children aged 0-5 in the care of older siblings.⁹⁰⁰ Therefore, while assessments of the role of public-employment schemes in the context of child labour are very much preliminary, it is clear that some of the risks that have been identified by agencies such as UNICEF have materialized despite efforts to ameliorate these risks. This arises in part due to poor implementation of legal requirements. However, the evidence demonstrates that without a broader range of socio-economic support structures, in particular addressing the care and social reproduction needs of women workers, public-employment schemes may lead to negative results. Notwithstanding the important safeguards built into the scheme, the preliminary outcomes from this review of NREGA demonstrate that a model that focuses solely on increasing employment opportunities for families without a correlative focus on social reproduction and care work will be challenged in its ability to impact positively in the context of child labour.

5.4.4 Emerging Common Themes – Gender, Care and the Role of the State

When we return to the differences and similarities in approach that I have traced between the World Bank and the ILO, the shortcomings of both approaches become more apparent when viewed in light of the preliminary evidence that exists in this area. The contextual realities of child labour, including the social processes that

⁸⁹⁹ *Ibid.*

⁹⁰⁰ *Ibid* at 28-29.

surround the problem, cannot be dis-embedded from the impacts of broader development interventions on these social processes. When viewed in light of this preliminary evidence, the model that has led to the most positive outcomes in this field, namely, cash transfers accompanied by supply side interventions relating to the right to health or education, is most closely aligned with the ILO model for State obligations which requires the extension of social protection mechanisms through a rights based framework. On the other hand, the model that appears to have produced some of the most equivocal and in some instances negative outcomes, specifically employment schemes and income-generation projects, are more closely aligned with the approach to human development espoused by the World Bank. This approach is grounded in extending access to the labour market or increased incomes without considering the broader range of supports and rights that are required for children and their families.

The preliminary evidence from this range of social protection interventions also illustrates, the implications and burden of care labour is a structural issue that cuts across *all* of the different interventions and plays a crucial role in their varying outcomes. The burden of care is distinctly gendered, with the link between women and children creating both opportunities and challenges for women linked with their socially ascribed maternal role. Therefore, within cash transfer schemes, conditionalities often reinforce the maternal role, consolidating rather than challenging gender based stereotypes and the gendered burden of care. For example, the UN Special Rapporteur on Extreme Poverty and UN Special Rapporteur on the Right to Food have jointly observed that

even well-intended social protection programs that seek to take into account the specific time poverty and mobility constraints that women face due to the chores they assume in the household, may reinforce gender stereotypes and traditional division of roles, unless such programs include mechanisms for a redistribution of tasks and for the empowerment of women both in the public and in the private sphere.⁹⁰¹

On the other hand, where the provision of care is inadequate and where women are encouraged to engage in employment or income-generation projects, this can have specific implications for children who are engaged in “adult-releasing” care labour within the household to the detriment of their right to education. This is evident from the operation of public employment schemes where insufficient provision of support for care work can lead to equivocal impacts in the context of child labour, particularly for girl children and older siblings who replace adult care labour. As UNICEF observes, “[p]ublic works and employment guarantees are more likely to have adverse child protection effects on parental care” where they are not linked to human development objectives.⁹⁰² This is similarly evident in the case of micro-finance interventions, particularly those that encourage investment in household assets or income-generation that takes place within the household. These types of projects can have specific implications for the indirect involvement of children in adult releasing care labour.

5.5 Conclusion

A fuller understanding of the family and the gendered impacts of both the burden of care and its market enabling functions is required if social protection mechanisms

⁹⁰¹ See UN Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmon and UN Special Rapporteur on the Right to Food Oliver de Schutter, “The Need to Include a Rights Based Approach to Social Protection in the Post-2015 Development Goals” online:

http://www.ilo.org/wcmsp5/groups/public/---dgreports/---nylo/documents/genericdocument/wcms_227152.pdf

⁹⁰² See UNICEF Social Transfers 2013 *supra* note 360 at 38.

are to respond sensitively to the distinctive subject position of the child and to the underpinning social processes that reproduce the conditions under which children become involved in child labour. The preliminary evidence demonstrates that social protection systems should be designed and implemented in a manner that is cognisant of the relational and gendered dimensions of the family as a site of both productive *and* care labour, and as a site of equality and potential discrimination/exploitation. The central significance of social reproduction and care work re-emerges from the empirical evidence as a core element of the success or failure of an intervention, regardless of the type of intervention that is involved. This empirical evidence reinforces the relevance of the theoretical critique of the relegation of care in the labour law and human rights law models undertaken in Chapters Two and Three, and illustrates that there are real implications for children embedded within their relational contexts where social protection mechanisms neglect the crucial role of social reproduction.

Chapter Six – Conclusion

Towards a Structural Approach – Informality, Social Protection, Care, and the Law

The insights of critical legal scholarship remind us of both the potential and limits of rights discourse. However, in the words of Patricia Williams, “the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather, the goal is to find a political mechanism that can confront the denial of need.”⁹⁰³ Both the labour law model and the human rights law model critiqued in this thesis have undoubtedly been important political mechanisms for increasing the visibility of the serious harms of childhood economic exploitation and for extending recognition to children as rights holders within the broader international community and within the community of rights holders more generally where they have traditionally been neither seen nor heard. ILO Convention No. 182 in particular has played a key role in focussing Member States attention on the immediate physical and psychological harms that occur where children’s labour is commoditized, particularly in sectors and areas where the worst forms of child labour occur. While they are limited to the worst forms of child labour, there are prescriptive legal obligations outlined in the Convention requiring immediate attention by ratifying States to remove and rehabilitate this specific cohort of children. The drafters of the Convention were motivated by serious moral and humane concerns to combat the most egregious forms of child labour, and were concerned to generate political consensus around the Convention, in particular in light of the low level of ratification of the minimum age Convention No. 138 which came to be seen in particular by the countries in the Global South as a “complex and difficult convention to apply in its entirety, at least in

⁹⁰³ See Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991) at 163. See also Blackett 2007, *supra* note 13.

the short term.”⁹⁰⁴ As a result of Convention No. 182, numerous countries have both compiled and implemented national action plans, with targets to remove and rehabilitate specific cohorts of children from the worst forms of child labour. The political will as well as a specific national framework to engage in this type of exercise was not in existence before the widespread ratification of the Convention and its large-scale endorsement by the international community. The integration of both child labour Conventions within the *ILO Declaration* as part of the core labour standards have added further impetus to oversight of these Conventions by the ILO. Overall, this approach has served to raise the political profile and prioritization of the issue which is evident in the 2016 target for the eradication of the child labour in its worst forms, and which has most recently been integrated into the Sustainable Millennium Goals which aims to eradicate child labour in *all* its forms by 2026. In operationalizing these legal frameworks, including through IPEC, the ILO has gained rich experience, statistical evidence and important learnings that it has used to inform its policy approach.

The human rights law model has expanded the understanding of the concept of “economic exploitation” to include work that is harmful to the educational attainment of the child. As I have argued, this approach has the potential to move beyond some of the limitations and binaries of the labour law model, and to embrace the larger cohort of so-called ‘out of school’ or ‘inactive’ children, large numbers of whom are engaged in social reproduction and care work which is not counted in official statistical information on ‘child labour’ within the labour law model and which forms a hidden element of the challenge of children’s economic exploitation. Educational deprivation has the potential to comprise a structural approach because

⁹⁰⁴ See Noguchi 2010, *supra* note 9 at 518.

it centralizes a core harm that underpins *all* forms of economic exploitation in childhood and because it does not rely on legal categories that have proved challenging to regulate in practice in the context of a growing and dispersed informal economy where children often work in the private sphere of domestic or homebased work, or as unpaid family workers.

A critical precondition to greater childhood access to education, however, is familial economic wellbeing. Therefore, without being underpinned by a broader range of socio-economic supports in the form of social protection mechanisms that would effectively empower families to engage their children in education and that would offset the costs of children's labour, the application of the educational framework will remain limited. The mixed results from conditional cash transfers that are linked with children's attendance in education analysed in Chapter Five demonstrate that the relationship between conditional cash transfers to increase attendance in education and reductions in child labour are more complex than would appear at first glance. For example, where other social processes are at play within the relational context of the household, in particular the burden of social reproduction and care work, or the presence of income generating activities or home-work responsibilities, these may inhibit children from fully decreasing their hours of work.

In critiquing some of the limitations of both the labour law and human rights law models in this field, I have not sought to question the recognition of the child as a holder of labour rights or human rights, nor the rhetorical and political significance that rights hold for children. Rather, my aim has been to explore ways of realigning the conceptual frameworks of labour law and human rights law to view the problem of economic exploitation in childhood, and the multiple legal and policy solutions, through a relational lens. Therefore I have sought to reconstruct rights for children

in a way that is cognisant of the important role of relationships to children's lives and in a manner that has practical implications in this field. The rationale for adopting the relational framework lies in what I have argued is the theoretical salience of feminist relational theory for advancing our understanding of the distinctive subject position of the child when juxtaposed with the paradigmatic adult rights holder, and for interrogating how the labour law and the human rights law models have structured the legal and policy possibilities within this field, and have excluded or neglected some of the recurring social processes that underpin the problem.

Throughout the analysis, the distinctive subject position of the child has been explored and centralized. Children challenge the paradigmatic adult rights holder of labour law and human rights law in a number of distinctive ways. They are distinctly limited for specific periods in the life cycle in their ability to meet their own socio-economic needs, their dependence and vulnerability situates them within a web of familial and other care-giving relationships, and as a result, their socio-economic well-being and care needs cannot be fully conceptualized outside of the context of the relationships of dependence and interdependence with their primary caregivers, as well as with the labour market and the various institutions of the State. As distinct from other disadvantaged groups, children, in particular young children, cannot be fully empowered to overcome their physical and psychological immaturity and childhood is a key formative period of the life cycle that has specific temporal implications that continue to resonate throughout the life cycle. Relational theory grapples with and centralizes the 'situatedness' of the child by recognising her necessity for dependence and interdependence, and the vital importance and co-relative burden of care and reproductive work for children's lives and for their primary caregivers. In centralising relationships, this lens reveals the complex

relational matrix within which decisions to engage children in economic exploitation occurs at the household level, as well as the broader institutional and macro factors and processes that embed children's economic exploitation in the most disadvantaged segments of the informal economy. The relational enquiry broadens the lens beyond the individualized and abstracted child as a rights holder, or the individual family working in the informal economy, to reveal the numerous structural processes that reproduce the conditions under which children become engaged in labour, in particular their integration within the most vulnerable segments of the informal economy and within broader processes of globalization including subcontracting and the global care chains.

Throughout the analysis, the specific contextualized realities of children who are engaged in economic exploitation have been centralized - in particular the predominance of children's exploitation in the informal economy, children's prevalence in unpaid family work, children's (in particular girl children's) engagement in social reproduction and care work, and the continuity between women's often vulnerable position as informal economy workers and their children's engagement in economic exploitation.⁹⁰⁵ This analysis has demonstrated that particularly in sectors such as domestic work and home-work, children challenge the binaries between the public and the private spheres, they are engaged in both productive and reproductive activities including unpaid care work, and they often absorb the costs of their parent's engagement in productive work or their inability to engage in such work in the case of ill-health or occupational injury. Girl children in particular are more likely to be engaged in the social reproductive work and are more likely to replace their mother in undertaking care labour.

⁹⁰⁵ See further Chapter Four at 189-211.

In contrast to this complex picture, as I have sought to demonstrate the legal framework within the international labour law model, notwithstanding that it has the longest historical engagement with combatting exploitative labour, has adopted a narrow ‘penalty and prohibition’ approach grounded largely in labour inspection and the deterrent impact of criminal sanctions. The ‘prohibition and penalty’ approach encapsulated in the child labour standards retains a central faith in the capacity of labour inspection and criminal prosecution to effectively regulate child labour, including child labour in its worst forms, in a way that I argue is inattentive to the contextualized realities of child labour. Drawing on feminist critiques of labour law’s regulatory and procedural framework, I have sought to demonstrate how the fundamental building blocks of the labour law frame do not map well onto the contextualized realities of child labour described above.⁹⁰⁶ First, the labour inspection mechanism is deeply challenged in its ability to regulate a problem that occurs in the highly dispersed and fragmented informal economy, often taking place in private homes and isolated rural areas beyond the reach and legal mandate of inspection. While the ILO CEACR has taken a broad approach to the scope of international labour standards on child labour to encompass work in the informal economy, including unpaid work, the analysis has shown that this is not generally reflected in definitions of child labour in domestic labour laws and therefore the inspection powers of the labour inspectorate do not extend to some areas where child labour is highly prevalent.⁹⁰⁷ Unlike women workers in the informal economy who can be integrated within trade unions and membership organization, it is not possible to fully overcome the underrepresentation of children, in particular young

⁹⁰⁶ See further Chapter Two at 74-82.

⁹⁰⁷ ILO CEACR 2012 *supra* note 82 at 148 para 332.

children, as a social group through the measures of empowerment and increased representation. While there was a clear moral, humane and political rationale for prioritizing certain ‘worst’ forms of exploitative activities in the immediate term under Convention No. 182, the international labour law standards in this area continue to fail to address socio-economic rights and social protection supports as vital complementary elements to current ‘penalty and prohibition’ strategies. Social protection mechanisms specifically linked to the legal standards prohibiting child labour would potentially mitigate the negative impacts of enforcing laws that remove children from labour where the underlying economic necessity is not addressed.⁹⁰⁸ Social reproductive work and care undertaken by children, particularly where it is not considered hazardous but may compromise the right to education, does not fit fully within the labour law frame, thereby excluding a large cohort of so called ‘inactive’ or ‘out of school’ children who form a hidden element of the spectrum of children in economic exploitation. Finally, one of the foundational harms of child labour, deprivation of the right to education which gives rise to enduring limitations in human development across the life cycle, has not been fully captured in the labour law frame and was excluded in the final draft of Convention No. 182, notwithstanding that labour law drew much of its inspiration from the UNCRC in the formulation of its most recent Convention.

The international human rights law model for the protection of children’s rights has sought to capture the ‘irreducibility’ of childhood within an international treaty through advancing individual children’s right vis-à-vis their relationship with the State, while also recognising that the child is embedded within familial relationships. By recognizing the ‘natural’ and fundamental role of the family as the primary duty

⁹⁰⁸ See further Chapter Two at 104-105 and 124-125.

holder towards its children, the UNCRC has sought to protect the core value of family life and affiliation, and to preserve affiliative spaces for caring relationships that most often characterize this sphere of life. When analyzed through the relational lens it becomes clear that under the UNCRC the child's right to be free from economic exploitation under Article 32 is framed primarily as the right of the *individual* child, rather than being contextualized within the relational and material well-being of the family unit overall, as well as the family's situatedness within broader conditions of structural inequality. The obligation to provide for an adequate standard of living and for the care needs of children is assigned primarily to the 'private' responsibility of the family, with secondary socio-economic rights to be extended progressively by the State. I have argued that this framing serves to somewhat abstract the child from the range of structural social processes and inequalities that are shown to underpin childhood economic exploitation, namely, poverty and income volatility, worker vulnerability in the informal economy, and the burdens and implications of social reproduction and care work.⁹⁰⁹ The Convention continues to rest on the assumed capacity of the family to absorb the burden of care in light of its 'natural and fundamental' role. In addition, the UNCRC places central emphasis on the participation rights and developing autonomy and capacity of the child as a central tenet of the UNCRC. This is regarded as a particularly innovative element of the UNCRC because it recognises children's evolving capacity and autonomy – a concept that has provided a particular challenge to liberal legal conceptions of capacity.⁹¹⁰ However, as relational theory makes clear, autonomy can only begin to unfold within the context of constructive caring relationships between the child and her primary caregivers, as well as the broader range of institutions, such as schools, that play a

⁹⁰⁹ See further Chapter Three at 145-171.

⁹¹⁰ See for eg. Freeman 2007 *supra* note 128.

key role in children's lives. If the human rights model is to live up to its promise to recognize the evolving autonomy of the child as a rights holder, this *necessarily* requires a further interrogation and delineation of the crucial role of care in children's lives.

The relational framing of the child centralizes the reality that children will continue to be nested within a web of familial or other relationships that act as important vectors for the delivery of socio-economic rights and care needs, which will inevitably play a hugely important role in ensuring freedom from exploitative child labour. The relationship and duty of care between the State and the child, as well as the child's relationship with the labour market, will inevitably be mediated and structured by the family or other caregivers who are located in some senses 'between' the child, the State and the labour market.⁹¹¹ As a result, I have argued that if we are to fully prioritize the elimination of childhood economic exploitation within both the labour law and human rights law models, then the necessity and burden of care, dependence and interdependence for families would need to be centralized, with workers and their family members regarded as existing at a fundamental level in relation to others, rather than as singular individuals engaged in the labour market absent their caring responsibilities.⁹¹² As Fudge outlines, "labour power is 'embodied' in human beings who are born, cared for, and tended in a network of social relations that operate outside the direct discipline of the market."⁹¹³ It is in this *embodied* reality of labour power that the quest for material survival for workers in the Global South, which is inevitably intertwined with their household and dependents, comes more fully into view.

⁹¹¹ See further Minow 1986, *supra* note 17 at 18.

⁹¹² See Robinson 2006, *supra* note 191 at 337.

⁹¹³ See Fudge Gender Equality 2011 *supra* note 531.

In recognition of the reality of dependency for periodic phases of the life cycle, an embodied understanding of labour power recognizes that workers do not come to the market as a *tabula rasa*, but have been *enabled* for market participation crucially during their childhood through the vital care labour of those who have provided their care. The lived experience of women workers who are members of the Indian organization SEWA demonstrates that many women, particularly in the informal economy, combine paid and unpaid ‘care’ work in the home or other social institutions, or often in others’ homes; many others engage in informal economy activities inside and outside of the home, including for example subsistence farming, homework and other survival strategies, all of which have implications for their children’s engagement in labour and work.

An attempt to address the vulnerability of workers in the informal economy has emerged within the labour law framework in recent years in the form of the Decent Work Agenda, although the full legal and policy implications of this agenda are only beginning to emerge as the analysis in Chapter Four illustrates. The Decent Work Agenda has moved the ILO policy discourse in relation to child labour significantly in the right direction towards an approach that contextualises the problem within a broader range of interdependent rights holders and interrelated structural processes. However, as a result of its promotional rather than mandatory approach, it has proved challenging to translate the vision of the Decent Work Agenda into specific legal and policy interventions that move beyond the ‘prohibition and penalty’ approach. A focus on combatting the ‘worst forms of child labour’ that flows from the legal obligations of States under the ILO Convention on the Worst Forms of Child Labour No. 182 remains a primary focus of Decent Work Country Programmes,

particularly in the case of Bangladesh. Even within the progressive standard setting context of Convention No. 189 on domestic workers, very little has been added to international labour standards that would enable the ILO to tackle a particularly harmful form of labour for child in the domestic private sphere.

While demonstrating a cognisance of the relationship between child labour and gender inequality within the informal economy which is at an early stage, to date the ILO has failed to fully grapple with the burdens and implications of care labour for families. This mirrors the relegation of care and social reproduction more generally which I have explored within the paradigmatic labour law model and within the children's rights human rights law models critiqued in Chapters Two and Three. In contrast to the approach of the ILO, SEWA provides an important practical illustration of an approach that accords equal weight and value to 'productive' and 'reproductive' work, and demonstrates a strong cognisance of the complex interface between these two spheres for the working lives of women in the informal economy. The 'whole worker' approach recognises that women and families do not engage their labour in an unencumbered way, but do so in a way that enables them to mediate the economic necessity of earning a livelihood which is necessarily combined with their caring responsibilities in the private sphere. This has led SEWA to extend its activities beyond traditional trade union concerns to integrate programmes that provide childcare and health care to their members to empower and enable them to mediate their productive role with their reproductive role. The ongoing failure to fully grapple with care and social reproduction by agencies such as the ILO as it relates to childhood economic exploitation, particularly in a context where women are increasingly either compelled or incentivised to engage in employment and productive activities, will continue to have implications for children, in particular girl

children who are absorbing the caring responsibilities of the household. The preliminary analysis undertaken in this research demonstrates that comprehensive and holistic models such as SEWA point towards promising future directions for policy and legal reforms in the context of the informal economy.

With the potential to challenge structural disadvantage and to give practical effect to socio-economic rights, including for workers in the informal economy, which I have argued have been neglected or absent within the labour law and human rights law models to date, the extension of social protection mechanisms appears to offer a crucial and potentially transformative complement to current legal strategies in this field. By analyzing some of the mixed results that can flow for the prevalence of economic exploitation in childhood, from conditional and unconditional cash transfers, public employment schemes and micro-finance interventions, I demonstrate that the available evidence from these projects shows that desirable outcomes in terms of childhood economic exploitation are not necessarily guaranteed, even when social protection instruments succeed in achieving their broader social goals. Empirical evidence that is available from the operation of social protection mechanisms in practice illustrates in real terms the ways in which childhood and the family are emerging as sites through which diverse ideologies are played out, with the family increasingly integrated into concerns around human capital formation by the World Bank and ILO, although this is rarely explicitly acknowledged.⁹¹⁴ As I have sought to demonstrate, the model that has led to the most positive outcomes in this field, namely, cash transfers accompanied by supply side interventions relating to the right to health or education, is most closely aligned with the ILO and human rights models for State obligations which requires the extension

⁹¹⁴ See Rittich 2010, *supra* note 106 at 1027-1028.

of social protection mechanisms through a rights based framework. On the other hand, the model that appears to have produced some of the most equivocal and in some instances negative outcomes, specifically employment schemes and income-generation projects, are more closely aligned with the approach to human development espoused by the World Bank that focuses on enabling actors to engage with the market. The implications and burden of care labour is a structural issue that cuts across all of the different interventions and plays a crucial role in their varying outcomes. Where the provision of care is inadequate and where women are encouraged to engage in employment or income-generation projects, this can have specific implications for children who are engaged in “adult-releasing” care labour within the household to the detriment of their right to education. This is evident from the operation of public employment schemes where insufficient provision of support for care work can lead to equivocal impacts in the context of child labour, particularly for girl children and older siblings who replace adult care labour. The equivocal impacts of these various interventions demonstrate that development initiatives may be much less functional, even on their own terms, than they appear once the family is brought back into view. Without grappling fully with the implications and burdens of social reproduction and care work, particularly in contexts where increasing access to the labour market and income-generation activities form the major impetus of development strategies of agencies such as the World Bank, it could be argued that one of the hidden forms of economic exploitation in childhood, social reproduction work, will continue to re-emerge as an element that undermines broader development projects. As Anne Stewart evocatively asks, “[w]ho is responsible for caring and broader social reproduction, and how is it

to be provided, when the economic imperative seems to be that all adults must be gainfully incorporated into the global market?.”⁹¹⁵

I began the research for this thesis with the core insight in mind that,

[r]efusing to split apart the ‘special’ question of child labour from exploitation in general may be the key which unlocks the child labour issue – placing the onus not on the aberration of exploiting children, but on a world system which makes this and other forms of hyper-exploitation all too typical.⁹¹⁶

As I have considered the distinctive subject position of the child nested within the multiple relationships that determine her well-being, and contextualized children’s economic exploitation within sectors such as domestic and homebased work, the continuity of exploitation between children’s lives and their families lives, as well as the poverty and structural disadvantage that surrounds the problem has become more evident throughout the analysis. At a political level, the question of child labour re-emerges time and again as a priority issue for the international community and has been the renewed subject of targets for elimination, including most recently in the Sustainable Development Goals. The Decent Work Agenda, albeit with the limitations outlined, has demonstrated at a policy level elements of what the promise of what advancing a decent childhood would entail from the international community and from domestic governments. The extension of social protection mechanisms in the form of a minimum social floor to all identified in the Sustainable Development Goals point towards future aspects of this promise. The analyzes and arguments in this doctoral research, it is hoped, will contribute towards debates on

⁹¹⁵ Stewart 2015 *supra* note 16 at 12.

⁹¹⁶ Vijay Prashad, “Calloused Consciences: The Limited Challenge to Child Labor” 225 *Dollars and Sense* (September 1999).

the future direction of policy and legal initiatives, and can be applied more broadly to advancing our understanding of the child as a subject of law and development.

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