

The Gap between Legal Rights of Migrant Care Workers and their Enforcement

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Preface

Home care workers have become the backbone of long-term home-care services and provide frontline hands-on services to frail older adults(Iecovich 2011). Employment of migrant home care workers has become an emerging global issue due to the severe shortage of local workers, and there are growing concerns about the ability to keep pace with the growing needs for care. Migrant care workers arrive in numerous aging societies and Mediterranean countries such as Israel have attracted large flows of migrant care workers, enabling severely disabled older persons to age in place. In Israel a significant proportion of frail older persons receive home-care services from migrant live-in workers, with most of them coming from Asia and the others coming from Eastern Europe, in particular from Ukraine and Moldova.

Home-care services in Israel compose the core formal services that are provided by home care agencies and are mostly financed by in-kind benefits that are provided to frail older adults under the Long-term Care Insurance law (Iecovich, 2011). As of August 2010, there were about 57,000 migrant care workers in Israel, of whom 48,000 were employed by frail older persons and their families thus composing 38% of the total number of care workers in the elder care industry of Israel (Nathan, 2009). This number does not include illegal workers.

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The unique and fragile situation in which a migrant non-member of the family lives with a frail older adult creates various problems for both sides. To mention several: the inferior status of the migrant care worker both as a worker who is entirely dependent on his or her employer and as a migrant; ignorance of local language; the fact that s/he has to share most of her/his daily life in a totally different cultural, ethnic, religious, gastronomic and societal environment with an aging and weak person who has lost his/her status as a vital and productive human being; the existence of other family members at home; the absence of family and relatives of the worker, being left behind in their country of origin; lack of social supportive networks. All these unique circumstances of the foreign worker have attracted us to study profoundly the weak condition of the worker and the emanating treats.

The main purposes of this study is therefore twofold: First, to explore and inquire how foreign workers in home-care services Israel require information about their legal rights. Second, to investigate whether and how they receive legal aid when their rights are infringed.

This will enable us to evaluate the level of enforcement of rights and the extent to which migrant care workers are able to claim for their rights and the extent to which their employers respect their rights).

Challenges in lawmaking and enforcement

1. Laws Relating to the Immigration

During the last decades several laws have been enacted to improve the conditions of the workers. For example, the Migrant Workers Law, enacted in 1991, defines the rights of migrant workers. This law was followed by a series of regulations and guidelines. New regulations that came into force in January 2009 relate to migrant homecare workers that are recruited through manpower agencies. According to these regulations the agencies have to employ social workers whose duties include several missions: (1) conducting home visits to the elderly persons prior to the assignment of a suitable worker to diagnose their need, and to examine the conditions that are offered to the worker, (2) conducting a second home visit during the first month after the assignment of the worker to make sure they get along (3) conducting home visits at least once every three months. During this visit the social worker has to supervise both the care provided and make sure that the care recipient's family provides the homecare worker his/her rights and to inform the homecare worker about all his rights including an address to whom to apply in case his/her rights are violated. (4) preparing reports about the visits and the findings. (5) reporting to the person in charge about any exceptional events including harassment or abuse of the worker.

Yet, studies conducted in Israel and included mainly Filipino workers (.Ayalon, 2009a; Ayalon, 2009b; Iecovich, 2007, 2011, Iecovich & Porat 2010) point at work-related problems, including abuse in the following themes: inadequate living conditions, insufficient food, verbal and emotional abuse, exploitation, not paying for fringe benefits or delaying the salary payments, physical and sexual abuse, barriers to access the legal system and fear of the legal system. "Kav-Laoved" an Israeli advocacy voluntary organization that is aimed to protect migrant workers against exploitation and abuse has reported that from 100 application about 35% of the workers were subject to abuse and exploitation (Kav Laoved, 2010).

A recent report (May 2011) published by the Comptroller's Office examined the importance of migrant care workers, their treatment by the state and their relationship with elderly employers. According to the report, the Population and Immigration Authority was required to design a system that would find a balance between protecting the rights of migrant care workers and ensuring that those in need of home-based-care, mostly the elderly, receive adequate care. "It was also supposed to provide stricter supervision of the agencies that bring in migrant workers from abroad," read the report, adding, "Two years have passed since [the Interior Ministry's Population and Immigration Authority] took over the treatment and responsibility for migrant caregivers, but still it has not provided even the basic outline of a new method of working with the migrants."

2. Typical problems of live-in homecare workers

These migrant workers experience difficulties in their job which often are not treated properly by each of the players involved in their employment – the government, the manpower company, the family of the care recipient and the care recipient herself. The difficulties refer to the following issues: (1) communication problems due to lack of language; (2) economic difficulties and their influence on the care and the worker – the main reason for their coming to the foreign country is economic. Very often, the migrant worker is a young woman who left behind family with children and who is economically dependent on the care recipient family. This situation can cause difficulties in several parallel tracks:

The first - Lack of training and paramedical knowledge. Older people who receive permission to employ migrant worker are usually those with severe health problems that need professional training. Only part of the workers who arrive are trained to take care of such

ailing persons. Indeed, research (Iecovich, 2011) shows that professional workers who have a strong sense of themselves as workers and establish businesslike relations with their care recipients. They underscore their technical skills and qualifications and draw boundaries between professional and interpersonal relations. The other and larger group is the “saints” who are no professionals, weakly identify themselves as workers and underscore familial relations with their care recipients. These characteristics influence the status of the care giver within the family and we will refer to that below.

The second: emotional stress and mental difficulties with negative influence on the care given to the care recipient. A very common problem is the issue of day off and annual vacation – in employment arrangement based on live-in contract the migrant worker is actually the only person who really lives with the older person who cannot be left alone at all. Consequently the migrant worker finds herself trapped in an impossible arrangement where she is compelled to remain with the patient without any possibility to go out, enjoy a day off or a vacation. Though she receives overtime increment, the situation can be unbearable. Especially with mentally ill older people who cannot sleep at night. The worker has to stay awake all night and then has to function during the day. All this causes the worker dangerous mental attrition without any organized adequate psychological help. This issue receives a greater significance with nonprofessional workers who find themselves having to perform a job to which they had never received any previous preparation.

The third – abuse of the migrant worker and mal treatment. A live-in arrangement creates very complicated problems with the family of the care recipient. In an arrangement where the family does not live with the care recipient the family very often expects the worker to

perform all the chores and takes advantage of the low status of the worker to force her to do that. On top of that, in an arrangement where family members live with the care recipient the abuse sometimes amounts to the worker being forced to perform chores for which she was not hired or even harassed by a family member of the care recipient. The dissatisfaction and abuse can cause the worker to leave the job and become an illegal migrant exposed to deportation.

3. Working Hours Law and Home-Based-Care-Workers:

One crucial issue still pending has to do with working hours and compensation for overtime. According to the Hours of Work and Rest Law, 1951 a working day shall not exceed eight hours. This is a labor protection law and is aimed at securing private life and quality of life for workers including migrant home care workers. Consequently penalties are cast on violations. Yet there are exceptions to the application of the law. Among them are persons employed in administrative positions as requiring a special degree of personal confidence; and employees whose working conditions and circumstances do not allow the employer to control working hours and rest.

These two articles served as legal structure for defining working time and wages for home care workers co-reside with the care recipients in the latter's houses and are supposed to take care of the care recipients around the clock. The dilemma is whether to consider the overtime as 16 extra working hours per day which entitle the worker to receive extra compensation for these hours. A positive answer will increase the price of care-work thus denying the possibility of employing home-care workers from many care recipients.

The Israeli law does not include an appropriate arrangement for this special employment mode of live-in home care workers. Therefore, Israeli labor courts found themselves confronting this issue with different attitudes all of which take into consideration the socio-economic dimensions. The first and conservative approach insisted on the application of the legal exception on home care workers therefore excluding them from the entitlement of the extra pay.

The second – was based on the premise that the exception of the law applies, therefore the workers are not entitled to extra compensation per hour. But it entitled them an extra 30% on the minimum wage. The decision was based on the nature and character of work (the Tuduranjan case) that it is difficult to differentiate between the working and non-working hours.

The minority in this case expressed a very different approach: they thought that workers should have the right to receive compensation for overtime. Therefore in cases where it was difficult to practically prove the working hours, evidence should be provided for the character and structure of work in general.

It did not take long before another case was brought before the court with the same issue (the Gloten case). Yulanda Gloten was a migrant home-care worker employed also as a domestic worker. After the death of her employer she claimed in court delayed salary due to the omission to pay her compensation for over time. Three court instances dealt with this case: the district court accepted her claim. At the national labor court the majority refrained from giving a general decisive judgment because the majority of judges were aware of the economic difficulties of the care recipients to pay the excessive amounts for overtime had they decided to grant it to the workers. Practically the majority thought that there was no reason to grant overtime compensation based on two arguments:

The third instance dealing with the issue was the supreme court that, again, refused to thoroughly discuss and solve the problem. They were ready to opine that the majority approach of the labor court granting 30% increment to the minimum wage is not based on any legitimate legal source. Yet, they confirmed that pay of overtime will pose an insurmountable difficulty for care recipients and their families. Therefore, the supreme court concluded, this issue cannot be solved by a court decision and it needs a fundamental arrangement by law. The court referred to the u.s. legal arrangement which provides in the Fair Labor Standards Act (29 U.S.C. § 213(a)(15)), that (a)Minimum wage and maximum hour requirements shall not apply with respect to (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

The Israeli court also referred to the Canadian arrangements in Quebec, Alberta and Manitoba for home care workers, and recommended as a model.

Last November 2011 the advocacy organization appealed again to the supreme court asking to reconsider the decision denying incremental pay for overtime. They based their argument on three axes: the poor and unorganized condition of the workers; the deviation from the minimum norms of labor law; and the severe gender-based and ethnic discrimination.

At the end of the hearing it was agreed between the parties that the government will soon legally arrange the employment special rights of home care workers. Therefore, we hope to be able to report the news at the conference.

4. Enforcement

Enforcement is one of the core issues which can help to improve the situation of home care migrant workers.

There are two separate arms responsible for the enforcement of labor law rights for migrant workers:

- a) The government decision 3599 dated 15/6/08 established the population and immigration authority and in that decision it was decided that the issue of labor laws' enforcement on employment of migrant workers will remain within the authority and the ministry of industry trade and employment (hereinafter: ITE ministry). Consequently the ITE ministry has appointed a commissioner responsible for migrant workers' rights. Simultaneously, there is a special labor laws enforcement unit in the ITE ministry authorized to supervise the employers' obedience to labor laws securing rights to migrant workers. Yet, this unit suffers from several ailments: The unit is chronically understaffed – despite the 16 strengths of controllers and 16 strengths of students it employs only 6 controllers and 2 students. There are 8 workers responsible for enforcing labor laws on 250,000 migrant workers. The main problem preventing staffing of the strengths is low wages.
- b) Another arm of enforcement responsible a different aspect of employment of migrant workers exists in the population authority: it controls the legal employment of migrant workers according to the permission granted by the authority.

A report conducted by the research and information center in the parliament stresses several issues for discussion: (Nathan, 2011)

The possibility of abusing migrant workers, employing them overtime and paying them less than minimum wages are among the main reasons of preferring the employment of migrant workers.

Despite the fact that two years have passed since the establishment of the immigration authority the control unit is understaffed with a direct damage on the enforcement process.

There are real difficulties in communication with migrant workers. Very often they do not understand any language but their mother tongue so the inspectors are unable to take care of the injustice. ???

c). By the Government

The Israeli government has been concerned with the phenomenon of migrant care workers moving between jobs with no commitment to their elderly employers. Many migrant care workers preferred to work in the central region of the country and to provide care to frail older persons who are not severely handicapped or who are not cognitively impaired, thus causing difficulties in finding workers to care for these severely frail older persons. Therefore on May 2011 an amendment to the Entrance to Israel Law, 1952 has been passed in the Israeli Parliament stating that the Minister of Interior can restrict the transition of migrant care workers between employers and even restrict their work to a specific geographical region.

The law has received the title: “the binding law”, since enforcing this law is expected to bind migrant care workers to a single employer as well as to certain geographic areas even if the worker requires a change of employer for any reason whatsoever. This might be in contrast to a 2006 decision of the High Court of Justice in an appeal that was submitted regarding a similar policy five years ago. The Court stated that “binding policy” badly hurts migrant caregivers as well as their elderly and disabled employers. (Bagatz 4542/02 KavLaoved v. The Government of Israel).

Methodology:

The purposes of the research deal with the deep awareness of the workers of their legal rights and the possibilities to enforce them. In order to achieve them, a research structure combining both legal and field-pilot research has been established. The need for field research stems from the interdisciplinary nature of the socio-legal purposes of the research. The field-pilot study mainly used the qualitative research methodology, which exclusively supplies deep insights into the examined phenomenon with its subjective components - those being extremely important for the investigation of the social reality (Tuval-Mashiah 2010) As much interesting as it might have been to build a research structure with combined methodologies of qualitative and quantitative methodologies, there is no unanimity in the literature regarding its efficiency. There are arguments that such combined studies actually intensify the double character of the quantitative-qualitative research and complicates the conclusion process (J.E Symponds and S. Gorard "Death of mixed methods? Or the rebirthof research as a craft" Evaluation & Resaerch in Eduvation vol. 23, no. 2, June 2010, 121-136, p. 134;). The lack of agreement about the advantages of such combined study and the exclusivity of our research as a legal research based on field qualitative study, which anyway is exceptionally rare in kind, we decided to build the pilot research according the qualitative research principles.

The pilot research included eleven depth standardized open-ended interviews with foreign workers located by social workers. Among the 11 interviewees 6 are from Moldova, 1 – Ukraine, 1 – Thailand, 2- Rumania, 1 –Srilanka. The ethnic variety of the interviewees is a result of the difficulty to find them, as well as of the wintention to examine a primary connection between the questionts and the ethnic origin of the interviewees. All the interviewees agreed to the research use of the interview. The interviews were texted and processed according to the principles of the theory of refining significance units from the texts created during the research, collecting and categorizing them, while comparing the results and

exposing the linkages among the categories (Strauss&Corbin 1998). The main findings of this research, citations of research importance, will be presented further according to the categories assembled from the interviews:

1. General awareness of workers to their rights: Despite the difficulties in local language and lack of social networks, it seems that the foreign workers are at least partly aware of their rights. A good example is Alona, a Moldavian citizen who works in Israel only 4 months. She reported that she is aware of her rights since on her arrival she has received from the manager of the agency a pamphlet (Ze'choton = "rights") written in Russian which includes all foreign worker's rights: "the manager of the agency told me my rights and gave me a page with the rights. It is in Russian. I know all of it and meanwhile everything is fine".
2. The gap between the awareness which was manifested above and the enforcement of the rights fixed in the law: One of the salient examples is the Hours of Work and Rest Law, 1951. In this context the workers have high awareness to the legally permitted working hours but the enforcement is low. For instance, Mara said "I am working very hard despite the fact that I have to work 10 hours out of which 2 are supposed to be rest". When she was asked whether is know what were her rights, it was very clear from her answer that she was fully aware of her rights, and she even knew that she could apply to a non-profit organization helping foreign workers to enforce their rights (Kav-La'Oved).
3. The job and the responsibility – Most of the workers reported that the work they perform exceed the definition of the job as was defined and certainly exceed the terms expressed by the manpower agencies. For example: Matilda, who came from Sri-Lanka and lives in Israel for three years already, knows the normative legal framework applied to foreign workers. Yet, she is not

satisfied from the demands of her employers. She tells: When the children come for dinner I am responsible to put the house in order after they leave, and I have to clean. Sometimes they give me instructions and I do not like it". A. a Moldavian citizen, lives in Israel for three years. She tells that at the beginning she had many arguments with the family about her working hours. They wanted her to be available 24/7 but finally they came into agreement. But still she tells: "I don't think I have to clean and do the dishes after big meals when all the family arrives. The woman has a very big family. If it were once a month it would have been fine, but they come every week and I have to clean after them. It is not fair. I went to talk with my agency and asked her to explain it to the family but it did not help." Oleg (yes) from Chiang Mai, Thailand, who works already three years in Israel tells that his job is not so difficult, but he reports that "I am asked to clean the houses after the guests leave though I do not have to do it. I spoke with the daughter of the old-age person and with the agency and they have taken care of it." Meaning that contrary to Matilda and A., Oleg managed to match his work condition to the initial demands of the job to his complete satisfaction.

4. The enforcement structure – Today the authorities are mostly busy with expelling foreign workers and less with enforcing employment rights. From the interviews we learnt that only third sector organizations practically help the workers. For instance, Sweta said: once I complained and Kav-La'oved (the third sector organization) helped to solve the problem. Also Irena, a Romanian worker reported that if she has problems "she turns to the agency or to Kav-La'oved" to assist her.
5. Living conditions: Apparently there are problems of limitations between the private life of the workers and the persons they are taking care of. For instance, Sweta told that she sleeps with

the woman at the same room because that woman is afraid to sleep alone and she (Sweta) is not satisfied from it.

6. Yearnings: It was very intriguing to find out that one of the most predominant difficulties was the distance from the land of origin, the defective and interrupted communication with home and the strong yearnings. Despite the fact that this issue is not legal it shows the

To conclude:

From this pilot we can evaluate that the level of enforcement of rights of foreign workers in Israel is less than satisfactory and there is still a lot of field work to be done. This has various negative ramifications on the satisfaction of the workers from their job. Nevertheless the flow of workers ready to come has not decreased due their personal problems. Yet, we believe that Israel, as a democratic country, should continue to improve the foreign workers' conditions as defined by law.

References:

- Ayalon, L.** (2009a). Evaluating the working conditions and exposure to abuse of Philippine home care workers in Israel: Characteristics and clinical correlates. *International Psychogeriatrics*, 21(1), 40-49.
- Ayalon, L.** (2009b). Family and family-like interactions in households with round-the-clock paid migrant Carers in Israel. *Age & Ageing*, 29(6), 671-686.
- Controller's Office** (2011) report on migrant workers (in Hebrew)
- Iecovich, E.** (2011). What makes migrant live-in home care workers in elder care be satisfied with their job? *The Gerontologist* Doi: 10.1093/geront/gnr048.
- Iecovich, E.& Porat I.** (2010) Relationships between elderly care recipients and their migrant live-in home care workers in Israel, *Home Health Care Serv Q* 29:1-21. 2010
- Iecovich, E.** (2007) Client satisfaction with live-in and live-out home care workers in Israel *J Aging Soc Policy* 19:105-22.
- Nathan, G.** (2009) *Migrant Workers in Israel*, Jerusalem: Haknesset-Research and Information Center www.knesset.gov.il
- Nathan, G.** (2011) *The Control of Securing Migrant Workers Rights* Haknesset-Research and Information Center www.knesset.gov.il
- Kav Laoved**, (2010) http://www.kavlaoved.org.il/default_eng.asp
- Tuduranjan v. Ma'ayn**, (1113/02 National Labor Court)
- Yulanda Gloten v. Ya'akov** (157/03 National Labor Court) (the Gloten case - national)
- Yulanda Gloten v. The National Labor Court** (1678/07 Supreme Court) (the Gloten case - supreme)

Yulanda Gloten v. The National Labor Court (10007/09 Supreme Court – further hearing)

הקשיים של העובדים הם באותו קטע שמדברים על הקשיים שיש להם בעיות של שפה, תקשורת, וסיבת בואם היא סיבות כלכליות כשהם משאירים משפחה מאחורה כולל ילדים קטנים מה שמביא אותם למצבי לחץ ומצוקה נפשית גדולים. מצד שני התלות שלהם בהכנסה יוצרת גם תלות שלהם במעסיקים שלהם מה שמאפשר למעסיק לנהוג בהם בחוסר הגינות ומתוך חשש שיאבדו את רשיון העבודה שלהם הם נאלצים לעבוד שעות ארוכות ולבצע משימות שזה לא תמיד תפקידם. +

יש נוהל של משרד התמת שקובע שאחת לשלושה חודשים תבקר עובדת סוציאלית בבית. +
להוסיף – הרבה פעמים כאשר עובד כזה מרגיש שהוא מנוצל הוא עוזב את המעסיק שלו יורד למחתרת והופך בצורה כזו לעובד לא חוקי שצפוי לגירוש.

לגבי היום החופשי הרבה פעמים העובד לא יוצא אבל מתוך הסכמה כי מרוויח על זה יום עבודה נוסף וככה יוצא שחודשים הוא לא זוכה לחופש. אפילו לא ליום בשבוע. הדבר הזה גורם לשחיקה בעיקר כאשר הזקן הוא תשוש נפש ולא ישן בלילה וגורם לעובד שלא יוכל לישון. צריך להיות בכוננות מסביב לשעון. +

אפרירוי העובדים מקבלים היתר העסקה רק אצל זקנים שמצבם הטיפקודי קשה במיוחד – מרותקים למיטה או זקוקים להשגחה והם באים ללא הכשרה מוקדמת. +
צריך להרחיב את הפסיקה.

מה הסוגיות המרכזיות ואיך זה מתנגש עם דברים אחרים.

לגבי המחקר האיכותני צריך לפרט ולציין שמאחר ואין מחקרים בתחום של מה העובדים יודעים ובאיזו מידה נוקטים בצעדים כדי לממש זכויות כשהן מופרות לציין שזה יהיה מבחן פילוט כדי לקבל מידע בסיס שאנחנו לא יודעים אותו. זה יעשה על ידי בחירה אקראית של אנשים שיסכימו להתראיין ממוצאים שונים +