



DOMESTIC WORK AFTER LABOUR LAW: THE CASE OF BRAZIL AND SPAIN

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Introduction

Domestic workers have been historically denied their labour rights. In 2011, for the first time in history, an international treaty (the ILO Convention 189 on Decent Work as Domestic Workers) recognized that these workers have the right to fair labour conditions and fundamental labour rights. Convention 189 has created a new momentum for better protection of the rights of domestic workers. Accepting the argument that labour law has a central role in diminishing the precariousness of domestic work, our objective is to examine how labour law is performing this role and propose possible policy solutions for problems faced by the law. For this, this paper develops a critical analysis of legal systems that already regulate domestic work, in order to examine obstacles, effects and trends of the law. We examine two case studies: Brazil and Spain.

Brazil and Spain are in an intermediary level in guaranteeing domestic worker's rights, that is, even though both countries guarantee labour rights to domestic workers, there are still problems in making these rights effective. Brazil is one of the biggest employers of domestic workers among developing countries, while Spain is the developed country with one of the highest number of domestic workers.¹ In Spain, there is approximately 569,100 domestic workers; in Brazil, 6.2 millions domestic workers. In Spain, two law reforms have changed regulation of domestic work in 2011: Law 27/2011 incorporated domestic workers into the general pension system beginning in 2012, and Royal Decree 1620/2011 improved their working conditions. In Brazil, in 1988 the Federal Constitution recognized some

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¹ ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection* (Geneva: ILO, 2013) at 35.

fundamental labour rights to domestic workers; in 2006 the law #11.324 complemented an existing law, guaranteeing more labour rights to domestic workers; and in 2013 Constitutional Amendment 72/2013 was approved recognizing to domestic workers most labour rights guaranteed to a typical employee. The law in both countries is in accordance with ILO Convention 189 on decent work for domestic workers. Their regulation even exceeds the benefits of the Convention in some points, such as the consecutive weekly rest of 36 hours in Spain.

The paper starts by assessing the profile of domestic workers in Brazil and Spain. The study then analyzes two aspects of domestic work regulation in both countries: first, the process by which law reform was achieved; second, what are the prospects for labour regulation of domestic work. Throughout the paper, we will also address two related issues: the compatibility of the domestic regulations with Convention 189 (not yet ratified by Brazil, nor Spain) and also with the recommendations of the Council of Europe and European Union (in the case of Spain); and the involvement of domestic workers association in the process of regulation of domestic work. This paper contributes to the literature on this issue by analyzing what are the conditions by which the regulation of domestic workers' rights could be an effective remedy to the vulnerability of domestic work.

1. PROFILE OF DOMESTIC WORKERS

Both Brazil and Spain have collected some data on domestic work. As common traits, in both countries domestic work is performed mostly by women and represents a significant parcel of the labour force. The majority of domestic workers are nationals of the country in Brazil, but in Spain foreign domestic workers exceed those of the country in the last few years according to the available data.² In Brazil, domestic workers are 7.1% of the labour

² Data of the Spanish Ministry of Employment and Social Security, March 2013, on line: Ministry of Employment and Social Security <<http://www.empleo.gob.es/series/>>.

force (2011)³ and in Spain, they reach 424.060 Social Security members of a total of 16.169.814 members⁴.

In Brazil, most data on domestic work concerns urban domestic workers. Domestic workers are still one of the main professional categories in Brazil, but there has been a decline in the number of domestic workers: from 7.9% of all workers in 2009 to 7.1% in 2011.⁵ This decline has led to a growth on their income. They still receive lower wages than other categories of workers,⁶ but while formal domestic workers' income grew 5.2% between 2009 and 2011, formal workers' income grew 4.9%.⁷ Concerning these workers, in 2009, most domestic workers were women (94.5%), informal (63.1%) and had elementary school level (41.9%).⁸ Most of them were African-Brazilians (62%).⁹ They also share with domestic workers from other countries a disadvantaged situation if compared with other workers. For example, between 2003 and 2009, formal work grew 5% (from 44.3% to 49.4%), but among domestic workers it grew less than 2% (from 35.3% to 36.9%).¹⁰ In the

³ Brazilian Institute of Geography and Statistics (IBGE), PNAD, 2011, Comentários, on line: IBGE <[ftp://ftp.ibge.gov.br/Trabalho_e_Rendimento/Pesquisa_Nacional_por_Amostra_de_Domicilios_anual/2011/Sintese_Indicadores/comentarios2011.pdf](http://ftp.ibge.gov.br/Trabalho_e_Rendimento/Pesquisa_Nacional_por_Amostra_de_Domicilios_anual/2011/Sintese_Indicadores/comentarios2011.pdf)>.

⁴ Data of the Spanish Ministry of Employment and Social Security, March 2013, on line: Ministry of Employment and Social Security <<http://www.empleo.gob.es/series/>>.

⁵ Brazilian Institute of Geography and Statistics (IBGE), PNAD, 2011, Comentários, on line: IBGE <[ftp://ftp.ibge.gov.br/Trabalho_e_Rendimento/Pesquisa_Nacional_por_Amostra_de_Domicilios_anual/2011/Sintese_Indicadores/comentarios2011.pdf](http://ftp.ibge.gov.br/Trabalho_e_Rendimento/Pesquisa_Nacional_por_Amostra_de_Domicilios_anual/2011/Sintese_Indicadores/comentarios2011.pdf)>.

⁶ Around 35% of the income of workers in general. Brazilian Institute of Geography and Statistics (IBGE), 'Perfil dos trabalhadores domésticos nas seis regiões metropolitanas investigadas pela Pesquisa Mensal de Emprego 2006', on line: IBGE <www.ibge.gov.br/home/estatistica/indicadores/trabalhoerendimento/pme_nova/defaultestudos.shtm>.

⁷ Brazilian Institute of Geography and Statistics (IBGE), PNAD, 2011, Comentários, on line: IBGE <[ftp://ftp.ibge.gov.br/Trabalho_e_Rendimento/Pesquisa_Nacional_por_Amostra_de_Domicilios_anual/2011/Sintese_Indicadores/comentarios2011.pdf](http://ftp.ibge.gov.br/Trabalho_e_Rendimento/Pesquisa_Nacional_por_Amostra_de_Domicilios_anual/2011/Sintese_Indicadores/comentarios2011.pdf)>.

⁸ Brazilian Institute of Geography and Statistics (IBGE), 'Algumas das principais características dos Trabalhadores Domésticos vis a vis a. População Ocupada.', on line: IBGE <www.ibge.gov.br/.../princ_carac_trab_dom.pdf>.

⁹ Brazilian Institute of Geography and Statistics (IBGE), 'Algumas das principais características dos Trabalhadores Domésticos vis a vis a. População Ocupada.', on line: IBGE <www.ibge.gov.br/.../princ_carac_trab_dom.pdf>.

¹⁰ Brazilian Institute of Geography and Statistics (IBGE), 'Algumas das principais características dos Trabalhadores Domésticos vis a vis a. População Ocupada.', on line: IBGE <www.ibge.gov.br/.../princ_carac_trab_dom.pdf>.

same period, workers' contributions to social security grew 5.6% (from 61.2% to 66.8%), while among domestic workers it grew 2.8% (from 39.1% to 41.9%).¹¹

Notwithstanding, there have been some positive developments in the conditions experienced by domestic workers in Brazil. Less and less domestic workers are "live-in": only 3.2%;¹² more and more domestic workers work for more than one family (it grew from 14.1% to 21% from 2003 to 2009). The *diaristas* (day workers) have a higher income than the domestic workers who work for one family.¹³ In spite of the fact that the majority of domestic workers have a low level of education, in seven Brazilian cities¹⁴ from 2003 to 2009, the number of domestic workers that have completed high school or incomplete superior education has increased from 15.3% to 26.8%.¹⁵ These workers are the ones who offer more specialized services, such as nannies and care-givers for seniors. Based on these numbers, we could draw a modern and urban domestic worker as a worker with a slightly higher income than in the past, more qualified and specialized.

In Spain, the 2009 *Módulo Anual de la Encuesta de Presupuestos Familiares sobre hogares con servicio doméstico* (Annual Household Budget Survey Module regarding households with a domestic work) has found that 14.4% of Spanish households had some type of domestic work on a regular basis. In larger municipalities this percentage increased, reaching 18.7% of the households in municipalities with 100,000 inhabitants or more. With respect to the autonomous communities, Madrid was the community with the highest expenditure and Extremadura the lowest. Likewise, if the chief of the household had a higher level of income or education, the household was more likely to have domestic

¹¹ Brazilian Institute of Geography and Statistics (IBGE), 'Algumas das principais características dos. *Trabalhadores Domésticos* vis a vis a. População Ocupada.', on line: IBGE <www.ibge.gov.br/.../princ_carac_trab_dom.pdf>.

¹² Brazilian Institute of Geography and Statistics (IBGE), 'Algumas das principais características dos. *Trabalhadores Domésticos* vis a vis a. População Ocupada.', on line: IBGE <www.ibge.gov.br/.../princ_carac_trab_dom.pdf>.

¹³ DIEESE, *As Características do Trabalho Doméstico Remunerado nos Mercados de Trabalho Metropolitanos*, Sistema PED Esp., Abril 2011, p.14.

¹⁴ Belo Horizonte, Distrito Federal, Fortaleza, Porto Alegre, Recife, Salvador e São Paulo.

¹⁵ DIEESE, *As Características do Trabalho Doméstico Remunerado nos Mercados de Trabalho Metropolitanos*, Sistema PED Esp (Abril 2011) at 8.

work.¹⁶ The number of domestic workers increased from 355,000 in 1995 to 747,000 in 2010, experiencing a slight decline since the onset of the crisis in 2008. Spain, together with France and Italy, is the European country with the highest number of domestic workers. A common trait to all of them is the employment of immigrant women for whom domestic work is their main way of accessing the labour market¹⁷.

According to the Labour Force Survey of the National Statistics Institute of Spain (2012), 569.100 people (556,600 women) declared working as domestic workers¹⁸. However, according to the Social Security data there were 416.124 domestic workers registered in December 2012¹⁹. This allows us to appreciate a range of informal workers without social protection.

Concerning working hours, the aforementioned study (2009) pointed out that domestic worker's hours of work were less than 10 hours a week in the majority of the households, and only 8.3% provided these services on a full-time basis. Concerning wages, 40.5% of the households paid between eight and ten Euros an hour, whilst almost half the households that had full-time workers paid a monthly net salary of between 700 and 900 Euros.²⁰ Finally, the study indicates that, in Spain, only 3.8% of the households had workers who sometimes slept overnight in the household where they worked²¹.

¹⁶ Instituto Nacional de Estadística, *Boletín informativo del Instituto Nacional de Estadística [National Statistics Institute Informative Bulletin]*, No. 3, at 1-2 (2012), on line: Instituto Nacional de Estadística <http://www.ine.es/ss/Satellite?L=es_ES&c=INECifrasINE_C&cid=1259936766685&p=1254735116567&agename=ProductosYServicios%2FPYSLayout>.

¹⁷ ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection*, (Geneva: ILO, 2013) at 35.

¹⁸ Data of the Instituto Nacional de Estadística (2012), on line: Instituto Nacional de Estadística <<http://www.ine.es/jaxiBD/tabla.do?per=12&type=db&divi=EPA&idtab=646#nogo>>.

¹⁹ Data of the Spanish Ministry of Employment and Social Security (December 2012), on line: Ministry of Employment and Social Security <<http://www.empleo.gob.es/series/>>.

²⁰ The Royal Decree 1717/2012, 28 December, setting the minimum wage for 2013 (RCL 2012, 1084), established 645,30 euros/per month. Domestic workers are also entitled to the minimum wage, but in the case of part-time domestic workers ("by hours") they will receive at least 5,05 euros per hour worked (art. 4).

²¹ Instituto Nacional de Estadística, *Boletín informativo del Instituto Nacional de Estadística [National Statistics Institute Informative Bulletin]*, No. 3, at 5-6 (2012), on line: Instituto Nacional de Estadística <http://www.ine.es/ss/Satellite?L=es_ES&c=INECifrasINE_C&cid=1259936766685&p=1254735116567&agename=ProductosYServicios%2FPYSLayout>.

This same study indicated that the services were mainly provided by women (97.8%), of Spanish nationality (58.1%), and aged between 30 and 44 years old (40.6%). Among foreign women, the main nationalities were Rumanian (21.4%), Ecuadorian (11.1%) and Bolivian (11%).²² In the last few years there has been a notably increase of foreign domestic workers. In fact, the Social Security data of March 2013 indicate that the number of foreigners registered within the Special Domestic Worker System is 228.299; 45.008 of whom originate from European Union countries and 183.290 from other countries,²³. Their age depends on whether there are minors or elderly people in the household, as in the former case the person providing the service tends to be younger, whereas in the latter, the age increases.²⁴

Other recent studies evidence the similar increase in foreign female workers in the sector. Indeed, the 2011 "Third report on the situation of women in the Spanish socio-labour reality" indicates that there is an "over-representation" of women employed in domestic work and as cleaners in buildings, administrative assistants and in personal services. These female-dominated jobs are related to the role that women have traditionally played in society, assuming responsibility for household chores and as caregivers for dependent people. According to this study, foreign women (belonging to the European Union or not), who were registered in the Social Security as domestic workers, represented 57.5% of all the women registered in this sector.²⁵

²² Instituto Nacional de Estadística, *Boletín informativo del Instituto Nacional de Estadística [National Statistics Institute Informative Bulletin]*, No. 3, at 4 (2012), on line: Instituto Nacional de Estadística <http://www.ine.es/ss/Satellite?L=es_ES&c=INECifrasINE_C&cid=1259936766685&p=1254735116567&pagename=ProductosYServicios%2FPYSLayout>.

²³ Spanish Ministry of Employment and Social Security, *Afiliación de extranjeros a la Seguridad Social* (March 2013) at 3, on line: La Moncloa <<http://www.lamoncloa.gob.es/ServiciosdePrensa/NotasPrensa/MinisterioEmpleoySeguridadSocial/2013/230413AfiliadExtranjeros.htm>>.

²⁴ Instituto Nacional de Estadística, *Boletín informativo del Instituto Nacional de Estadística [National Statistics Institute Informative Bulletin]*, No. 3, at 4 (2012), on line: Instituto Nacional de Estadística <http://www.ine.es/ss/Satellite?L=es_ES&c=INECifrasINE_C&cid=1259936766685&p=1254735116567&pagename=ProductosYServicios%2FPYSLayout>.

²⁵ Consejo Económico y Social, *Tercer informe sobre la situación de las mujeres en la realidad sociolaboral española* 1/2011 (2012) at 136-138. The Social Security registration data have been taken from the Statistics Yearbook of the Spanish Ministry of Labour and Immigration of 2010.

The 2013 United Nations report, *Domestic workers across the World*, also places emphasis on the fact that women represent more than 90% of the total of these workers in Spain, so it is a highly female-dominated sector. Furthermore the majority are foreign women, mainly from Spanish-speaking countries in Latin America (according to data from the year 2005).²⁶ More recently, the Social Security data of March 2013 indicate that among foreign women, the main nationalities are Bolivian (40.257 registered), Rumanian (32.264), Paraguayan (18.822), and Ecuadorian (16.373)²⁷.

2. PROCESS BY WHICH THE LAW REFORM WAS ACHIEVED

Both in Brazil and Spain, domestic work was originally regulated as a special type of employment contract and gradually became more and more integrated into the general labour law regulation. In Brazil and Spain, recent regulations have expanded the labour rights of domestic workers. An important question in reviewing the process of law reform in these countries is what has made the reform possible? Analyzing these two cases might help us understand how to promote changes in other countries.

2.1 Brazil

The process of regulation of domestic work started in the beginning of the last century with provincial regulations defining domestic worker and making mandatory their legal identification through the expedition of a labour card. These regulations aimed to create a

²⁶ ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection* (Geneva: ILO, 2013) at 35-36. These data, referred to the United Nations Study, originate from the report of the Consejo Económico y Social de España [Spanish Economic and Social Council] of 2006, entitled *Panorama sociolaboral de la mujer en España* [Socio-labour panorama of women in Spain]. More specifically, it pointed out that 32% of female domestic workers originated from Ecuador and 13% from Colombia. .

²⁷ Spanish Ministry of Employment and Social Security, *Afiliación de extranjeros a la Seguridad Social* (March 2013) at 13, on line: La Moncloa <<http://www.lamoncloa.gob.es/ServiciosdePrensa/NotasPrensa/MinisterioEmpleoySeguridadSocial/2013/230413AfiliadExtranjeros.htm>>.

system of control of domestic workers, mostly for sanitary and criminal reasons.²⁸ While early labour laws and the labour code (the CLT)²⁹ excluded domestic work from their coverage, in 1960, law #3807, for the first time, guaranteed one particular right to domestic workers – it recognized domestic workers as voluntary contributors³⁰ to the social security system. Only in 1972, a federal law, #5.859 (known as domestic workers law, *lei dos empregados domésticos*), was promulgated, defining domestic work, making mandatory the registration of their labour card and guaranteeing paid vacation.

In 1988, the new federal Constitution guaranteed to domestic workers some of the fundamental labour rights guaranteed to all employees. Article 7 of the 1988 Constitution guaranteed to domestic workers ten of the twenty nine fundamental labour rights:³¹ minimum wage; irreducibility of wage; annual bonus equal to one month's salary; paid weekly rest, preferably on Sundays; annual paid vacation (30 days) with remuneration at least one third higher than the normal wage; 120 days paid maternity leave; five days paid paternity leave; notice of dismissal; as well as of integration in the social security system.

Since then, the regulation has followed a trend towards the inclusion of domestic workers in the labour and social security systems. This trend has been motivated by the action of domestic workers' trade unions in the national and international sphere and by the government's intention to bring these workers to the formal market.

Concerning the trade unions, the first domestic workers' trade union in Brazil was the Santos Professional Association of Domestic Workers from 1936 in São Paulo.³² Its main goal was to be recognized by the State as a trade union in order to guarantee their members labour rights. Similar to today's demands, this trade union called for equality by law of

²⁸ Bernardino-Costa, J. *Sindicatos das trabalhadoras domésticas no Brasil: teorias da descolonização e sabers subalternos* (Brasília, tese de doutorado, Universidade de Brasília, 2007) at 245.

²⁹ See Article 7, "a", CLT.

³⁰ As voluntary contributors, domestic workers have to pay themselves for their social security contributions.

³¹ 1988 Constitution, article 7, only paragraph.

³² Ministério do Trabalho e Emprego (MTE) *PLANSEQ Trabalho Doméstico Cidadão* at 4 on line: MTE http://www.mte.gov.br/discriminacao/LivretoPlanseq_trabalhodomicocidadao.pdf.

domestic workers with other categories of workers.³³ In 1972, the president of Santos Professional Association of Domestic Workers asked the ministry of labour to include domestic work in the labour legislation. The answer came with the promulgation of law #5.859 that recognized a few rights to domestic workers. After the passing of that particular law, the Santos trade union initiated a campaign against domestic workers living in the employers' household. The campaign sought to allow domestic workers to live in their own homes in order to end the concept of domestic workers being part of their employers' families.³⁴

There are domestic workers trade unions in all Brazilian provinces. Among the most active trade unions are the ones in São Paulo, Campinas, Rio de Janeiro, Bahia, Recife, Belo Horizonte, Porto Alegre, Maranhão, and Belém e Nova Iguaçu. In 1997, FENATRAD,³⁵ a national federation of domestic workers was created and later on affiliated to one of the main central trade unions in Brazil – Central Única dos Trabalhadores (CUT). FENATRAD has a very important political role in the debate of expanding and guaranteeing labour rights to domestic workers.³⁶

The federal government plan to bring domestic workers to the formal market has had also an important role in the regulation of domestic work. After law #5.859 in 1972, it was only in 2006 when a new law recognizing more labour rights to domestic workers was promulgated: law #11.324/2006. This law modified some articles of the law #5.859, guaranteeing the right to thirty days of paid vacation, employment protection for pregnant workers, paid legal holidays, and the prohibition of wage discount in case of supply of meals, housing and hygienic products by the employer.³⁷ The initial goal of the law # 11.324 was to encourage formalization of domestic workers, both autonomous and employees, by allowing employers to discount from their income taxes the amount paid by

³³ Bernardino-Costa, J. *Sindicatos das trabalhadoras domésticas no Brasil: teorias da descolonização e sabers subalternos* (Brasília, tese de doutorado, Universidade de Brasília, 2007) at 92.

³⁴ Bernardino-Costa, J. *Sindicatos das trabalhadoras domésticas no Brasil: teorias da descolonização e sabers subalternos* (Brasília, tese de doutorado, Universidade de Brasília, 2007) at 99.

³⁵ Federação Nacional das Empregadas Domésticas.

³⁶ Bernardino-Costa, J. *Sindicatos das trabalhadoras domésticas no Brasil: teorias da descolonização e sabers subalternos* (Brasília, tese de doutorado, Universidade de Brasília, 2007) at 228.

³⁷ Ministério do Trabalho e Emprego (MTE), *Trabalho doméstico: direitos e deveres: orientações* (Brasília: MTE, SIT, 2007) at 6.

the employer to the domestic worker social security contribution. Domestic workers are one of the main professional categories in Brazil and only 10% of informal domestic workers contribute to the social security system.³⁸ This measure lasted until 2012. The Federal Government proposed the law aiming to bring these workers to the social security system. During the debates on its approval, the proposal was changed by the National Congress in order to include the recognition of the labour rights mentioned above. Thus, in the case of Brazil, where domestic workers constitute such a significant professional category, it is very important to the government to find ways to promote the payment of social contributions by these workers. Once this debate started, political parties pressured by women's associations and domestic workers' trade unions also questioned the absence of labour rights guaranteed to these workers³⁹ and changed the law proposal in order include the recognition of some labour rights.

The international recognition of rights to domestic workers is also an element in process of legal reform in Brazil. The decree # 6481 in 2008 included domestic child labour among the worst forms of child labour and prohibited domestic work for workers under the age of eighteen years old. This decree creates the Brazilian list of worst forms of child labour in accordance with ILO Convention 182 ratified by Brazil.

In 2013, a Constitutional Amendment 72/2013 was approved recognizing to domestic workers the fundamental labour rights guaranteed to a typical employee, such as indemnization in case of dismissal without cause, unemployment insurance, extra pay for night-shift work, additional remuneration for night-shift work, family bonus, overtime pay, limited hours of work, severance pay indemnity fund system⁴⁰, and occupational accident insurance. Brazil still did not ratify ILO Convention 189, but it has already been taking

³⁸ Brazilian Institute of Geography and Statistics (IBGE), *Síntese de Indicadores Sociais* (2012) 29 at 221, on line: IBGE <<http://www.ibge.gov.br/home/estatistica/populacao/condicaodevida/indicadoresminimos/sinteseindicais2012/default.shtm>>.

³⁹ Bernardino-Costa, J. *Sindicatos das trabalhadoras domésticas no Brasil: teorias da descolonização e sabers subalternos* (Brasília, tese de doutorado, Universidade de Brasília, 2007) at 219.

⁴⁰ The employer must deposit, until day seven of each month, in the corresponding bank account, the importance of 8% of the remuneration of the previous month. In the case of dismissal without cause, for example, employees can withdraw the value of the deposits from their entailed bank account. Law # 8.036, from May 11 1990 regulates the FGTS.

steps in this direction. In the debates on the approval of the amendment, one point that was emphasized was the possible ratification of ILO Convention 189. For this, the law would need to be compatible with the convention, guaranteeing to domestic workers limited hours of work, pay for extra time and for night-shift work.⁴¹ And these changes were made through the Constitutional Amendment 72/2013.

2.2 Spain

In Spain, the traditional marginalisation of domestic work in the labour law system has been due partly to the fact that the domestic work relationship takes place inside the family household. Thus, even though a domestic work contract had all the characteristics of an employment contract, it was regulated by the Civil Code (articles 1583-1587) as precarious service agreement.⁴² Only in 1944, a law⁴³ provided domestic workers with some family and old-age benefits, as well as insurances for occupational accidents and diseases. However, this was not put into practice until Decree 385/1959, 17 March⁴⁴, which established a special protection regime for domestic workers, the Montepío Nacional.⁴⁵

In 1969, Decree 2346 created the Special Social Security Regime for domestic work.⁴⁶ This Decree distinguished two modalities of domestic work for registration, affiliation and contribution obligation purposes: full time and part-time. Full time domestic workers were those working more than half a normal working time, that is, forty hours a week (art. 7 RD 1424/1985)⁴⁷ on a permanent and exclusive basis (art. 46.1 RD 2064/1995).⁴⁸ In these

⁴¹ Senado Federal, Parecer da Comissão de Constituição, Justiça e Cidadania (13/03/2013), available at: Senado Federal <http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=109761>.

⁴² Montoya Melgar, A. *Derecho del Trabajo* (33rd ed. Madrid: Tecnos, 2012) at 507.

⁴³ Law of 19 July 1944 (RCL 1944, 1050).

⁴⁴ Decree 386/1959, 17 March, which creates the Montepío Nacional (RCL 1959, 433).

⁴⁵ On the initial regulatory evolution, see Alonso Olea, M. & Tortuero Plaza, J. L. *Instituciones de Seguridad Social* (18th ed. 2002) at 585-586.

⁴⁶ Decree 2346/1969, 25 September, which regulates the Special Social Security Regime for domestic work (RCL 1969, 1882).

⁴⁷ Royal Decree 1424/1985, 1 August, which regulates the special employment relationship of the family domestic work (RCL 1985, 2017).

cases, the employer was bound to the registration, affiliation and contribution. Part-time domestic workers were those working less than eighty hours of effective work a month in one or more households, either permanently or on a fixed term basis. In these cases, the domestic worker was bound to the social security to the registration, affiliation and contribution (art. 49.2 RD 84/1996).⁴⁹ In this system, part time workers were in disadvantage, as by demanding the employee to assume the obligations with respect to the Social Security, there was a greater the risk of excluding a considerable number of workers from the system. In the Special Domestic Worker Regime⁵⁰, there was no provision concerning the protection against occupational accidents and diseases, nor domestic workers were entitled to unemployment benefits.⁵¹

In 1985, the Royal Decree 1424⁵² regulated domestic work as a special employment relationship according to article 2.1 b) of the Workers' Statute of Rights.⁵³ The Decree was motivated by "the need to reconcile the equalisation of the working conditions of domestic workers with those of all the other workers, and the consideration of the peculiarities that are derived from an activity provided in the field of a family household". Its aim was to balance the need to protect domestic work with the employer's need for flexibility, so that both employers and workers could determine the service conditions by mutual agreement, not forgetting that, in the family field where this work is developed "constitutional rights, related to personal and family privacy, are projected."⁵⁴

⁴⁸ Royal Decree 2064/1995, 22 December, which approves the General Regulation on Contributions and Settlements of the Social Security (RCL 1996, 251). This Regulation repealed article 6 of Decree 2346/1969.

⁴⁹ Royal Decree 84/1996, 26 January, which approves the General Regulation on the registration of companies and the registration, affiliation, termination of affiliation and variations of workers' data in the Social Security (RCL 1996, 673).

⁵⁰ Decree 2346/1969.

⁵¹ Tascón López, R., "Sobre la situación actual del régimen especial de Seguridad Social de los empleados de hogar y la necesidad de su homogeneización con el régimen general" in Fernández Domínguez, J.J. Martínez Barroso, M.R., *Regímenes y sistemas especiales de la Seguridad Social* (Pamplona: Aranzadi Thomson Reuters, 2011) at 430-433.

⁵² Royal Decree 1424/1985 complied with the legislative mandate established in additional provision one of the Law 32/1984, 2 August, on modification of certain articles of Law 8/1980, 10 March, of the Statute of Rights for Workers (RCL 1984, 2012).

⁵³ Law 8/1980, 10 March, of the Statute of Rights for Workers (RCL 1980, 607).

⁵⁴ Preamble of Royal Decree 1424/1985.

In 1995, the Toledo Pact was approved, providing an important boost to the reforms needed to improve social and labour conditions of domestic workers. This Pact, signed almost unanimously by Spanish political parties, performed an analysis of the Social Security situation of domestic workers and of what reforms had to be undertaken. The Pact idea was to place the social protection of domestic workers and its permanent development in a context of continuous dialogue and search for consensus among political parties of different spectrums. The idea expressed by the Pact was that dialogue and consensus were the only ways by which the institutional reforms would be effective. The most important results of the Pact were a series of recommendations and agreements concerning financing, protective action and the structure and management of Social Security.⁵⁵ These recommendations were subject of major social agreements between trade unions and employers' associations.⁵⁶

One example is the Agreement on Social Security related measures from 13 July 2006⁵⁷ that guaranteed the equalization of benefits and the simplification of the structure of the Social Security system through the integration of the special regimes (such as the Special Domestic Worker Regime) into the General Regime. The Agreement promoted social security protection against occupational accidents and diseases, the review of the starting date to receive temporary disability and the adoption of measures to guarantee the protection of part-time domestic workers (workers "por horas"). Furthermore, the 2006 Agreement promoted the study of the special labour regulation of Domestic Workers to adapt it to present-day reality.

⁵⁵ Ministerio de Trabajo e Inmigración, *Informe de evaluación y reforma del Pacto de Toledo* (Madrid: Ministerio de Trabajo e Inmigración, 2011) at 12.

⁵⁶ In the post-Franco era, the adoption of economic adjustment measures based on social dialogue and consensus was seen as a positive step, as in the case of the 1977 Moncloa Pacts. Following this important experience of consensus in the democratic era, the reform of the Spanish Social Security system took a similar model in the Toledo Pact on pensions. That explains the objective of achieving social agreements between trade unions (Unión General de Trabajadores and Comisiones Obreras) and employers' associations (CEOE [Spanish Confederation of Business Organisations] and CEPYME [Spanish Confederation of Small and Medium Enterprises]) with the Government.

⁵⁷ On line: Spanish Ministry of Employment and Social Security <<http://www.seg-social.es/prdi00/groups/public/documents/binario/49497.pdf>>.

In its January 2011 Report, the Monitoring and Assessment Commission of the agreements of the Toledo Pact advised the definite integration of the Special Domestic Worker Regime into the General Regime, which would have to respect a transition period.⁵⁸ In the same direction, the Social and Economic Agreement for growth, employment and guarantee of pensions⁵⁹ referred to the fact that the situation of the Special Domestic Worker Regime should be reviewed during the parliamentary proceedings for the reform of the Social Security, with a view of integrating them into the General Social Security Regime.

Months later, UGT and CCOO Trade Unions achieved a new development for the Social and Economic Agreement of February 2011. They obtained a commitment from the government to include an amendment to the Bill of Social Security Reform, which was then being processed in the parliament, to include the Special System for domestic workers within the General Social Security System in 2012. An old trade union demand was thus achieved,⁶⁰ and Spanish domestic workers' associations made their contribution⁶¹ in this process.

The integration of Domestic Workers into the General Social Security Regime was carried out by the Law 27/2011⁶², which created a special system for these workers in the General Regime.⁶³ Following the indications of the Toledo Pact, the rule foresaw a transition

⁵⁸ Ministerio de Trabajo e Inmigración, *Informe de evaluación y reforma del Pacto de Toledo* (Madrid: Ministerio de Trabajo e Inmigración, 2011) at 81.

⁵⁹ This Agreement was signed on 2 February 2011 by CEOE (Spanish Confederation of Business Organisations), CEPYME (Spanish Confederation of Small and Medium Enterprises), CCOO (Comisiones Obreras trade union) and UGT (Unión General de Trabajadores trade union) and the Government, on line: Unión General de Trabajadores <www.ugt.es/actualidad/2011/febrero/acuerdo_social_y_economico.pdf>.

⁶⁰ UGT, *UGT y CCOO anuncian un primer acuerdo para integrar por fin el Régimen del Hogar en el Régimen General de Seguridad Social*, on line: Unión General de Trabajadores <<http://www.ugt.es/actualidad/2011/junio/a27062011.html>>.

⁶¹ RTVE.es, *Empleadas de hogar piden equiparación con el Régimen de Seguridad Social*, on line: Radiotelevisión Española <<http://www.rtve.es/noticias/20100328/empleadas-hogar-piden-equiparacion-regimen-seguridad-social/325633.shtml>>.

⁶² Law 27/2011, 1 August, on the updating, adaptation and modernisation of the Social Security system (RCL 2011, 1518).

⁶³ This issue has been extensively developed in Fernández-Costales Múñiz, J.; Baviera Puig, I.; Kahale Carrillo, D. T. *Régimen especial de empleados de hogar: su integración en el régimen general* in Sempere Navarro, A. V. & Fernández Orrico, F. J. *Reforma y Modernización de la Seguridad Social* (Pamplona: Aranzadi Thomson Reuters, 2012) at 469-521.

application period. In this sense, Law 27/2011 established that within a period of six months following its entry into force, that is, until 30 June 2012, the General Social Security Treasury should be informed of compliance with the conditions required for the inclusion of Domestic Workers into the special system. Failure to make this communication would entail the exclusion of part-time domestic workers from this special system, with the subsequent removal from the General Regime.

For workers, the advantage of being integrated into the General Regime is that the employer would be the one responsible for Social Security obligations even in the case of part-time workers. In addition to that, the former Special Regime did not take into account salaries effectively received, but rather, it was based on a single contribution base established by law each year. Law 27/2011 changed the contribution bases to the Social Security to salaries effectively received.⁶⁴

Another development brought by Law 27/2011 was the extension of some Social Security benefits for domestic workers under the terms and conditions established in the General Social Security Regime, with some peculiarities. Even though, these workers are still excluded from the right to unemployment insurance, important advances have been made in other aspects. Thus, since 2011, domestic workers are entitled to temporary disability benefits, in case of non-occupational disease or accident.⁶⁵

As the Special Social Security Regime for Domestic Workers had been reformed, integrating domestic workers into the general system; on the labour law side, the special labour regime established by the Royal Decree 1424/1985 became anachronistic and needed a

⁶⁴ The Law created a scale and for a transition period, in accordance with the recommendations of the Toledo Pact. In 2019, the contribution bases by a common and occupational contingencies will be determined in agreement with the provisions for all the other workers of the General Social Security Regime.

⁶⁵ The payment of the subsidy is on the employer's account from the fourth to the eighth day (inclusive) and on the Social Security's account as from the ninth day (Additional provision 39, 3 of Law 27/2011). Until now, they have only been entitled to the economic supplement as from day 29 following the onset of the disease or the moment the non-occupational accident occurred (art. 30 of Decree 2346/1969).

reform.⁶⁶ In Brazil, law reforms have been promoted by the government plan to include domestic workers in the social security system and this process triggered the labour law reform process motivated by the pressure of domestic workers' trade unions and traditional trade unions. In Spain the adoption of these measures has been fostered under the Toledo Pact on pensions, searching the biggest possible social consensus. In this context traditional trade unions have also supported the change, some of them negotiating at a higher level with government and employers' associations. Once this reform was achieved in 2011, it was also necessary a reform on domestic work's labour conditions. Domestic workers' associations have contributed in improvements in the law.⁶⁷

In 2011, Royal Decree 1620 replaced the Royal Decree 1424/1985 in regulating the special domestic work employment relationship. Among the important novelties brought by Royal Decree 1620/2011, is the guarantee of greater job security for domestic workers by revoking the annual temporary contract that could be terminated without cause. According to the new rule, a temporary contract is subject to the Statute of Rights for Workers and therefore requires a legal cause; otherwise the general rule of presumption of the indefinite nature of the contract is effective.

According to the Decree, the employer has the obligation to inform the worker about the working conditions. The wage should be paid in cash, the employer must provide a receipt, and the law guarantees a minimum inter-professional wage. Concerning the payment of wages in kind, the maximum percentage allowed by law is 30% of the wage (compared with the previous 45%)⁶⁸, as it is to all other employees. Domestic workers are also guaranteed two extraordinary bonuses each year.

⁶⁶ Preamble of Royal Decree 1620/2011, 14 November, which regulates the special employment relationship of family domestic work (RCL 2011, 2074).

⁶⁷ Such as the contributions made by the Plataforma Estatal de Asociaciones de Trabajadoras de Hogar to the draft of Royal Decree which regulates the special employment relationship of the family domestic work <<https://docs.google.com/file/d/0B9JmBJnkcwuINjU5ODY2ZDgtYTlkYy00MzhjLTgzNjQtZDcwNjk0MDIyNmM4/edit?pli=1>>.

⁶⁸ Art. 6.2 of Royal Decree 1424/1985.

Concerning working hours, the Decree establishes that the hours will be fixed by mutual agreement between employer and domestic worker. It increases in two hours the rest period between working days, and it establishes, according to the general regulation of the Statute of Rights for Workers, the consecutive nature of the weekly rest (36 hours). As a general rule this free time will include “Saturday afternoon or Monday morning and all day Sunday” (art. 9.5 Royal Decree 1620/2011). This was the formula demanded by domestic workers’ associations, as the 36 consecutive hours did not guarantee that the half day covered at least 50 per cent of an ordinary working day⁶⁹. The extension of leave of absence to all cases provided for in Article 37 of the Statute of Rights for Workers enables the workers to exercise their rights related to the reconciliation of work and family life in equal conditions to all other workers.

Domestic workers’ vacations are of thirty calendar days, which can be divided provided that the worker enjoys at least fifteen consecutive days. The vacation period will be agreed between the parties. In the absence of an agreement, at least a fifteen days period will be fixed by the employer. Finally, the rules concerning the termination of the contract were modified taking as a basis the general system of the Statute of Rights for Workers (art. 49) with several exceptions as the withdrawal (*desistimiento* – a type of termination of the contract without cause specific to the case of domestic workers)⁷⁰ and the dismissal with disciplinary cause (where the compensation is less than that established, in general, in the Statute of Rights for Workers, if declared wrongful by the courts). The regulation of the withdrawal is improved as it requires now a written communication expressing the cause of the termination and the compensation, in this case, is increased from seven to twelve days of work per year’s service, with the limit of six monthly payments.⁷¹

⁶⁹ Margarita Miñarro Yanini, *La nueva regulación de la relación laboral de carácter especial del servicio del hogar familiar: una mejora mejorable (II)* (2012) 5 Relaciones Laborales at 79. According to the contributions made by the Plataforma Estatal de Asociaciones de Trabajadoras de Hogar to the draft of Royal Decree which regulates the special employment relationship of the family domestic work <<https://docs.google.com/file/d/0B9JmBJnkcuwUjNjU5ODY2ZDgtYTlkYy00MzhjLTgzNjQrZDcwNjk0MDIyNmM4/edit?pli=1>>.

⁷⁰ Montoya Melgar, A. *Derecho del Trabajo* (33rd ed. Madrid: Tecnos, 2012) at 508.

⁷¹ This Royal Decree provides for a study on domestic workers’ contract termination system and about the unemployment benefit for this kind of workers.

Spain has still not ratified ILO Convention 189, but it has carried out a considerable effort to make its law compatible with the Convention. It can be predicted that it will do so shortly, in view of resolution 1811⁷² and Recommendation 1970⁷³ adopted by the Council of Europe in 2011, on protection of immigrant women on the labour market, fostering the participation of Member States in the drafting of the aforementioned Convention and also their recognition and protection of domestic work. Furthermore, the European Commission has presented a proposal for a Council Decision⁷⁴ authorising Member States to ratify, in the interests of the European Union, Convention 189.

3. PROSPECTS FOR LABOUR REGULATION OF DOMESTIC WORK

Labour laws in Brazil and Spain have been changed in order to expand the rights of domestic workers. In Brazil, a recent and important example is the limitation in hours of work changing a national habit of having full time, live-in domestic worker available 24 hours/day. The limitation of hours in 8 hours/ day and 44/ week means a extraordinary transformation in how domestic work is performed in Brazil. In Spain, the Special Social Security Regime for Domestic Workers had been reformed, as we explained above, integrating domestic workers into the general system, according to the Toledo Pact. In addition to this, the special domestic workers' labour regime has been also improved. An important example is the adoption of the general rules of the Statute of Rights for Workers concerning the format of the employment contract. The new law requires a written contract in certain cases and establishes some requirements in order to give greater guarantees to workers and to prevent abuses.⁷⁵

⁷² Resolution 1811 (2011) Protecting migrant women in the labour market, on line: Council of Europe <<http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1811.htm>>.

⁷³ Recommendation 1970 (2011) Protecting migrant women in the labour market, on line: Council of Europe <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/EREC1970.htm>>.

⁷⁴ Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189), 21.3.2013, COM(2013) 152 final.

⁷⁵ Margarita Miñarro Yanini, *La nueva regulación de la relación laboral de carácter especial del servicio del hogar familiar: una mejora mejorable (I)* (2012) 4 Relaciones Laborales at 57.

In countries, such as Brazil and Spain, where the law has already been changed to include domestic workers in the general labour law coverage, a major problem is to bring informal workers to the coverage of labour and social security law. The change in the law is only an initial step in effectively guaranteeing the rights of domestic workers. After this first stage, labour policy should keep focusing on bringing workers to the formal market as sometimes a policy can have an adverse effect. For example, in Spain the inclusion of domestic workers in the General System has led to an increase in the number of members of the Social Security system. Some problems caused by this integration in family's economies have brought a change in the law. As from 1st April 2013, an employee working less than sixty hours per month per home will administer his/her obligations with the Social Security if he/she agrees this with his/her respective employer. An important drawback of this new law is that these workers will not be able to take advantage of the temporary reduction in the amount to pay the Social Security, which the employer does benefit from if he/she has registered the worker as from 1st January 2012.⁷⁶ This measure does not encourage domestic workers to abandon the informal economy.

In Brazil, between 2001 and 2009, the number of formal domestic workers has increased 30% while the number of informal domestic workers increased 20%.⁷⁷ The decrease of the informal market is related to the decrease in the number of domestic workers, who are migrating to the service sector.⁷⁸ The formalization has continued during the first decade of

⁷⁶ Second additional precept of Royal Decree-Law 29/2012, 28 December, on improvement of management and social protection in the Special Domestic Worker System and other economic and social measures (RCL 2012, 1802).

⁷⁷ IPEA, *Características da formalização do mercado de trabalho brasileiro entre 2001 e 2009*, (2011) Comunicados do Ipea 88 at 7, on line; IPEA <http://www.ipea.gov.br/portal/index.php?option=com_alphacontent&view=alphacontent&Itemid=133>.

⁷⁸ Brazilian Institute of Geography and Statistics (IBGE), *Síntese de Indicadores Sociais* (2012) 29 at 136, on line: IBGE <<http://www.ibge.gov.br/home/estatistica/populacao/condicaodevida/indicadoresminimos/sinteseindicais2012/default.shtm>>.

the 2000s. However, informal domestic workers still are 70% of all domestic workers.⁷⁹ From all informal domestic workers only 10% contributes to Social Security in 2011.⁸⁰

A common argument in countries that recognize labour rights to domestic workers is that regulation will push more workers to informality. This is the case in Brazil where much of the debate after the approval of Constitutional Amendment 72/2013 has been about the risk of increasing informality. The argument is that the more rights that are guaranteed to domestic workers the bigger will be the gap between formal and informal domestic workers. That is, the more we regulate domestic work, the more difficult will be to informal domestic workers to become formal. In the case of Brazil, however, the trajectory of the informal labour market concerning domestic work does not show this.⁸¹ Formal domestic work started to increase in 1990s after the first wave of recognition of labour rights by the 1988 Federal Constitution. The formal market continued to increase during the first decade of the 2000s, when the law 11.324 /2006 recognized more rights to domestic workers. It is true that formal domestic work increased slower than formality in other professional categories, but this slower growth might be caused by the characteristics⁸² of domestic work and not by the regulation.

We identify three issues on which labour policy should focus in order to fight against informality: (1) to make labour inspection possible (2) to make compliance to these new rights less complex to the families and (3) to promote domestic workers' unionization and social dialogue.

⁷⁹ Brazilian Institute of Geography and Statistics (IBGE), Síntese de Indicadores Sociais (2012) 29, on line: IBGE
<<http://www.ibge.gov.br/home/estatistica/populacao/condicaodevida/indicadoresminimos/sinteseindicisociais2012/default.shtm>>.

⁸⁰ Brazilian Institute of Geography and Statistics (IBGE), Síntese de Indicadores Sociais (2012) 29 at 221, on line: IBGE
<<http://www.ibge.gov.br/home/estatistica/populacao/condicaodevida/indicadoresminimos/sinteseindicisociais2012/default.shtm>>.

⁸¹ Berg, J. *Laws or Luck? Understanding Rising Formality in Brazil in the 2000s*, on line: Tufts University
<www.ase.tufts.edu/gdae/Pubs/rp/BergLaborFormalityBrazil.pdf>.

⁸² Domestic work is work performed in the seclusion of private households where conditions are very different from those found in a typical workplace. International Labour Organization (2007) *Equality at work: Tackling the challenges* (Global report under the follow-up to the Declaration), on line: ILO
<www.ilo.org/wcmsp5/groups/public/---.../wcms_082607.pdf>.

The absence of labour inspection contributes to a feeling of impunity by the employer in case of violation of domestic workers' rights. Labour inspection (and its absence) in the case of domestic work is mostly connected to the need to respect privacy rights in a household. This dilemma between the need to inspect labour conditions in the case of domestic work and the privacy of a household is still to be solved by most countries and the ILO. For example, the ILO Convention 189 contains only a very weak disposition on this subject establishing that member States should envision measures that "specify the conditions under which access to household premises may be granted, having due respect for privacy" (Article 17.2). Neither the Convention, nor the Recommendation suggests any conditions under which inspection should take place in the household (that means giving certain freedom too, because it depends on the conditions fixed in each national legislation). In the case of Brazil, the country gave an important step toward formalization and professionalization of domestic work when restricted the hours of work, but still it considers the domestic work's workplace only from the perspective of a private household when does not guarantee any type of labour inspection. Domestic workers' workplace is different from a typical workplace; however the mere fact of having a person working in the household justifies some interference of the state in order to guarantee the respect of this worker's fundamental and labour rights.⁸³ As soon as this dilemma is put aside, policy makers would feel free to think different the forms labour inspection can take in the case of domestic work, basing policy solutions on the present labour inspection system with specific changes to accommodate the peculiarities of domestic work.

⁸³ This balance of rights depends on the different legislation of the countries. E.g., in Germany, a non-judicial body may agree to forced entry in a residence in situations of emergency. But the Spanish Constitution is very rigorous with the guarantee of the inviolability of the home, ie, is very exhaustive with exceptions to this fundamental right, which is also linked to the fundamental right to privacy. The right to the inviolability of the home is protected by the judicial guarantee, which means that is necessary a reasoned judicial resolution in the absence of the consent of the owner (and in the exceptional case of flagrante delicto), to avoid the arbitrariness of the authorities (See Alcácer Guirao, R., *El derecho a la inviolabilidad del domicilio*, en Casas Baamonde, M.E, Rodríguez-Piñero, M., *Comentarios a la Constitución Española* [Madrid: Fundación Wolters Kluwer, 2008] at 430-436). Spanish legislator has been very sensitive to this issue, after the abuses occurred in the era of the dictatorship. So the role of the unions concerning their informative task about workers' rights is important, fostering a greater ability of employees to report to Labour Inspection about the possible abuses. In Spain, the obligation of a written contract facilitates the labour authority control.

Spain guarantees the control of the inspection with logical and explicable limits and even made little progress over previous legislation. In Spain, new regulations have abandoned the negative formulation of Royal Decree 1424/1985 on inspection control competences. According to Royal Decree 1424/1985, labour inspection “could only be carried out by safeguarding the rights to the inviolability of the home and the respect due to personal and family privacy”.⁸⁴ The Royal Decree 1620/2011 establishes that labour inspection will check for employment violations in the case of domestic work with powers and limits established by the Law 42/1997 on the Employment and Social Security Inspection.⁸⁵ However, this change has not had any practical effect.⁸⁶ The controlling of inspection in a private household is considered to be incompatible to the constitutional rights to personal and family privacy (Article 18.1 of the Spanish Constitution) and the inviolability of the household (Article 18.2 of the Constitution).⁸⁷ Labour inspection has no power to enter a home, except with the consent of the owner of the house or through a court order⁸⁸, according to Royal Decree 1620/2011.⁸⁹ Labour inspection acts only in response to a complaint and can only check external actions, for which no entry is required in the home. An important development came in 2011, when labour courts had recognized the jurisdiction to give order for inspectors to conduct internal inspections⁹⁰ (article 76.5 Law 36/2011).⁹¹

Another common obstacle to countries that already regulate domestic work is that complying with all the new labour rights can be a complex procedure to families. As it has happened in Brazil and Spain, the recognition of labour rights to domestic workers

⁸⁴ In Spanish, “sólo podrá realizarse salvaguardando los derechos a la inviolabilidad del domicilio y al debido respeto a la intimidad personal y familiar”.

⁸⁵ RCL 1997, 2721.

⁸⁶ Margarita Miñarro Yanini, *La nueva regulación de la relación laboral de carácter especial del servicio del hogar familiar: una mejora mejorable (II)* (2012) 5 Relaciones Laborales at 89.

⁸⁷ Spanish Constitution (RCL 1978, 2836).

⁸⁸ Art. 5.1 Law 42/1997.

⁸⁹ Likewise, this obstacle can be raised if the fraud is committed by the domestic worker. In the case of unemployment benefit being approved for a domestic worker who is in fact still working, the inviolability of the household will also prevent labour inspection from controlling the unlawful collection of this benefit. Selma Penalva, A. *Novedades en el Régimen de Seguridad Social de los Empleados de Hogar y su comparación con las propuestas de reforma anteriormente anunciadas* (2012) 2 Actualidad Laboral at 13-14.

⁹⁰ Margarita Miñarro Yanini, *La nueva regulación de la relación laboral de carácter especial del servicio del hogar familiar: una mejora mejorable (II)* (2012) 5 Relaciones Laborales at 90.

⁹¹ Law regulating social jurisdiction (RCL 2011\1845).

generates a need to simplify the way by which families can comply with all the rights. Constitutional Amendment 72/2013 refers to the need of simplify the payment of the taxes related to the newly recognized labour rights. The National Congress is still debating how this simplification will be achieved. The Spanish case provides an interesting example on this matter.

The creation of the Special Domestic Worker System entails a series of obligations for the employer taxpayers. The main obligations are: application for the assignment of a contribution account code to be able to register and remove domestic workers from the register, together with the notification of the bank account for payment by direct debit of the contributions, register the worker and notify the monthly payments received by the employee. As the contribution base depends on the monthly payment received, the contribution base, and thus, the contribution to be paid may vary from one month to another (which must be communicated to the General Social Security Treasury, and which becomes an administrative burden)⁹².

The Ministry of Employment and Social Security drew up a report on the launch of the new system, which showed that during the transition period of the new regulation, numerous queries had been received by the Administrations of the General Social Security Treasury, not only about the proceedings with the Social Security, but also on work-related content (about contracts, wages, dismissals...). There were also complaints from employers who had full-time workers prior to 1 January 2012 and could not benefit from the 20% reduction in employer contributions, only foreseen in the case of new contracts. The Ombudsman also highlighted complaints, mainly from elderly people, regarding the difficulties with the proceedings.⁹³

⁹² Ministerio de Empleo y Seguridad Social *Informe sobre el balance de la integración de los trabajadores del Régimen Especial de Empleados del Hogar en el Sistema Especial para Empleados de Hogar en el Régimen General* (2012) at 20-21, on line: Spanish Ministry of Employment and Social Security < http://www1.seg-social.es/ActivaInternet/Panorama/REV_031532>.

⁹³ Ministerio de Empleo y Seguridad Social *Informe sobre el balance de la integración de los trabajadores del Régimen Especial de Empleados del Hogar en el Sistema Especial para Empleados de Hogar en el Régimen General* (2012) at 31-32, on line: Spanish Ministry of Employment and Social Security < http://www1.seg-social.es/ActivaInternet/Panorama/REV_031532>.

The study underscored a series of important data. Thus, whilst the number of domestic workers registered in this Social Security system had increased by 28.3%, this had not represented an increase in collection (which had decreased by 3.95% from January to July 2012 with respect to the same period of the previous year). This decrease in collection is due to the reduction of the average contribution base, which is no longer the same for everybody, but which now varies depending on the salary received. In this sense, the limited number of hours that appear in a large number of contracts must be taken into account, which means a decrease in collection. The average number of weekly hours worked per household and worker is 21.45. 85.01% of domestic workers have one single employer, 9.33% have two and just 5.66% work for three employers or more. The future cost in benefits and management cost for the employers must also be taken into account in the loss of collection by the Social Security⁹⁴.

The functioning problems of the Special Domestic Worker System (which entered into force in January 2012) gave rise to the need to introduce certain modifications in order to simplify the proceedings. To this end, Royal Decree-Law 29/2012, 28 December⁹⁵, decreased the number of brackets on the Social Security contribution scale for the year 2013 (compared with that established in Law 27/2011). It also established that as from 1 April 2013, employees providing services for a period of less than 60 hours per month per family household, if thus agreed with their respective employers, may individually assume responsibility for their obligations with the Social Security in order to expedite these actions. In these cases, employers are obliged to present part of the contribution to the Social Security when they pay the employee, and they are jointly responsible for the payment of this contribution⁹⁶.

⁹⁴ Ministerio de Empleo y Seguridad Social *Informe sobre el balance de la integración de los trabajadores del Régimen Especial de Empleados del Hogar en el Sistema Especial para Empleados de Hogar en el Régimen General* (2012) at 37, 40, 53-54, on line: Spanish Ministry of Employment and Social Security < http://www1.seg-social.es/ActivaInternet/Panorama/REV_031532>.

⁹⁵ Royal Decree-Law 29/2012, 28 December, on improvement of management and social protection in the Special Domestic Worker System and other economic and social measures (RCL 2012, 1802).

⁹⁶ Preamble of Royal Decree-Law 29/2012, 28 December.

A third obstacle to be overcome is the promotion of domestic workers' organization and social dialogue. Usually, domestic workers miss two key dimensions of labour law: they are not guaranteed fair labour conditions and have no effective way to express their autonomy.⁹⁷ Since they have no protection to form and join unions and to bargain collectively, they are not perceived as workers who are capable of collective action to express their interests and regulate their own relations. On the issue of how best to reverse domestic workers' vulnerability, it is essential to realize that effective solutions are not simply about guaranteeing labour standards;⁹⁸ to give voice to these workers is also a major part of the solution. Both in Spain and Brazil, domestic workers have their freedom of association rights formally recognized, but given the peculiarities of domestic work, there is a need for the promotion of these organizations.

In Brazil, even though domestic workers constitute the biggest professional category (7.1% of the labour force),⁹⁹ their trade union has the lowest percentage of trade union affiliation (1.9 percent or 101,000 domestic workers).¹⁰⁰ As a result, there is a perception that collective organization will not be effective in regulating domestic workers' labour condition.¹⁰¹ According to the FENATRAD, a major obstacle for domestic workers' trade unions are economic difficulties resulting from the lack of trade union' contributions. These associations generally lack resources and funds and often have difficulty remaining active. Under the Brazilian system, all registered trade unions receive a compulsory trade union due paid by the category of workers who have trade union membership. Domestic workers trade unions however, do not enjoy the same benefit, as Article 7, Line "a" of CLT excludes domestic workers' trade unions from receiving trade union dues. The Constitutional Amendment 72/2013, has just recognized the right to collective bargaining

⁹⁷ International Labour Organization *Organizing for social justice, Global Report under the follow-up the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva: ILO, 2004).

⁹⁸ Blackett A. "Promoting Domestic Workers' Human Dignity through Specific Regulation" n: Fauve-Chamoux A, ed. *Domestic Work as a Factor of European Identity: Understanding the Globalization of Domestic Work, 16th–21st Centuries* (Bern: Peter Lang SA, Éditions scientifiques européennes. 2005) at 211-237.

⁹⁹ IBGE *Pesquisa Nacional por Amostra de Domicílios, Síntese de Indicadores 2007* at 20 on line: IBGE <http://www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2007/comentarios2007.pdf>.

¹⁰⁰ IBGE, *Pesquisa Nacional por Amostra de Domicílios, Síntese de Indicadores 2007* at 29 on line: IBGE <http://www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2007/comentarios2007.pdf>.

¹⁰¹ Nunes, C. G. F. *Cidadania e Cultura: o universo das empregadas domésticas em Brasília (1970-1990)*. (Brasília: UnB, Departamento de Sociologia, 1993).

to domestic workers. In 2004 and 2005, there have been some attempts to negotiate a collective agreement between a domestic workers' trade union and an employers' association, but the labour courts did not recognize the agreement.¹⁰² Now, in face of the change made by the Constitutional Amendment, it will be just a matter of time before some collective agreements are negotiated.

In Spain, Decree 1620/2011 expressly recognizes domestic workers' freedom of association and collective bargaining rights (article 4 of the Statute of Rights for Workers). Although domestic workers' associations exist in Spain, collective agreements are still non-existent in this sector, due to the structural complexity of collective bargaining in the country, heterogeneity among domestic workers, the characteristics of domestic work and the consequent legitimization problems in negotiating collective agreements according to Spanish regulations.¹⁰³ The Preamble to Royal Decree 1620/2011 recognises the need to adapt the Labour Code's system of sources of regulation of employment relationship (including collective agreements) in the case of domestic work, but the law has not been changed yet.

Domestic workers' trade unions are one of the main actors in the promotion of these workers' rights and in the process of decreasing their vulnerability. Due to the characteristics of domestic work, many times trade unions' laws are not appropriated to the domestic work's workplace. The ILO has asked for creativity in finding new legal solutions to guarantee freedom of association to domestic workers.¹⁰⁴ After recognizing their freedom of association and collective bargaining rights, policy should focus on ways to

¹⁰² Ambito Jurídico: Justiça proíbe convenção dos domésticos, on line: Ambito Jurídico <http://www.ambito-juridico.com.br/site/?n_link=visualiza_noticia&id_caderno=20&id_noticia=10478>.

¹⁰³ Margarita Miñarro Yanini, *La nueva regulación de la relación laboral de carácter especial del servicio del hogar familiar: una mejora mejorable (I)* (2012) 4 Relaciones Laborales at 56. This explicit reference to collective bargaining can be considered a mere transcription of the text of the Statute on the sources of the labour relationship in Royal Decree 1620/2011. Thus, it can be seen as only a formal recognition, without changes regarding the previous situation in which individual autonomy prevailed. Moreover, the references to collective agreements in the Royal Decree are few. See Barcelón Cobedo, S. *La relación laboral del servicio del hogar familiar tras el RD 1620/2011, de 14 de noviembre* (2012) 1 Aranzadi Social (BIB 2012, 512).

¹⁰⁴ International Labour Organization, 'Decent work for Domestic Workers, International Labour Conference, 99th Session, 2010, Report IV(1)', on line: ILO <www.ilo.org/wcmsp5/groups/.../meetingdocument/wcms_143337.pdf>.

make trade unions' economic survival possible and in alternative ways to promote negotiation of collective agreements.

Conclusion

Regulation of domestic work in Spain and Brazil has undergone major advances. In Spain, since 2011, Royal Decree 1620/2011 and Law 27/2011 have improved the guarantee of social security and labour rights for domestic workers. In Brazil, since 1988 with the new Federal Constitution and more recently, in 2013, with Constitutional Amendment 72, domestic workers have recognized most labour rights as a typical employee. In Brazil, the law reform process has been initiated by the governments' plan to include workers in the social security system and motivated by the action of domestic workers' trade unions. In Spain, the major reforms were motivated by the Toledo Pact on pensions, in the search of a big social consensus, where the contribution of trade unions and of domestic workers' associations was significant.

The paper identifies as a next step to the law reform the need to include in the effective coverage of the law the many domestic workers who still work in the informal market. For this, labour policy should focus on make labour inspection possible in the case of domestic work, decrease the complexity in complying with labour and social security rights and promote domestic workers' trade unions and social dialogue.