

FEMALE DOMESTIC WORKERS. NEW CHALLENGES RAISED BY THE ILO CONVENTIONDolly Natalia Caicedo Camacho¹

RESUMEN: Este artículo analiza la Convención de la OIT num.189 de trabajadoras del hogar desde una perspectiva feminista y legal. El Convenio de la OIT incorpora el reconocimiento del trabajo doméstico como una actividad laboral. Esta declaración represente un paso adelante para el reconocimiento de la contribución del trabajo doméstico a la sociedad y a la economía global, mas aún, cuando esta continúa siendo una actividad feminizada y socialmente devaluada. El Convenio de la OIT reconoce un conjunto de derechos laborales y sociales como el salario mínimo, periodos de descanso, condiciones de salud y seguridad, libertad de asociación, entre otros. La incorporación de unas condiciones laborales mínimas pueden representar cambios importantes para las legislaciones de los Estados miembros caracterizadas por la inequidad del régimen laboral o incluso por la ausencia de legislación sobre trabajadoras del hogar. El artículo también examina el impacto que las migraciones internacionales han tenido sobre el trabajo doméstico y desarrolla el marco teórico de la

globalización del cuidado y las relaciones inequitativas entre norte y sur. El artículo resalta la ausencia de la perspectiva migratoria en la Convención de la OIT.

PALABRAS-CLAVES: trabajadoras domésticas, derecho internacional, derechos laborales y sociales, género.

ABSTRACT: This article analyses the 189 ILO Convention on domestic workers from a feminist and legal point of view. The ILO Convention opens with the recognition of domestic work as a labour activity. This statement represents a step forward for the acknowledgment of the domestic work's contribution to society and the global economy, moreover when it still being a highly feminized and socially devalued activity. The ILO Convention also allocates a set of labour and social rights like wages, rest periods, conditions of health and safety, freedom of association, among others. The incorporation of a minimum working conditions may represent relevant challenges for the member states, since its domestic labour laws are characterized for

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the inequality regime in labour conditions or even the absence of any legislation on domestic work. The article also goes on the impact that international migration have had on domestic work, by pointing out the framework of the globalization of care in a highly unequal relationship between north and south. The article highlights the absence of a migration perspective of the ILO Convention.

KEYWORDS: domestic workers, international law, social and labour rights, gender

INTRODUCTION: THE SOCIO-LEGAL CONTEXT OF FEMALE DOMESTIC WORKERS

Housework, throughout history, has been seen as an activity that requires no specific qualifications and which makes no contribution to the creation of wealth. For these reasons, domestic work is not recognised as a formal labour market activity. Indeed, worldwide the sector is characterised by the highly precarious working conditions of female domestic workers, often exposed to situations of exploitation and abuse favoured by the principle of the privacy of the home. The International Labour Organisation's (ILO) Convention No. 189, on female and male domestic

workers, of 16 June 2011, and supplementing Recommendation No. 201, on decent work for female and male domestic workers, are the first international regulations to provide a response to the precarious employment situation of these workers. Convention No. 189 aims to promote the development of the domestic legislation of the signatory States so as to guarantee minimum working conditions comparable to those provided for all other workers. Moreover, in order to make these measures effective, Convention No. 189 provides for the protection of female workers that find themselves in situations of abuse or violence by guaranteeing them right of access to the courts and labour inspections.

The situation of female domestic workers is closely linked to the gender division and spatial distribution within patriarchal societies. This is based on the historical premise that the external or public sphere belongs to the man, while the internal or private realm is reserved for the woman, inasmuch as she is responsible for providing care and reproductive tasks. This public vs. private divide has come to embody a different social and economic value to

each space and to build hierarchical relations that subordinate or devalue the internal or private space assigned to women (Pateman, 1996). When this dichotomous relationship is transferred to the labour market we find that the housework performed by women is considered a sector of very little value in terms of economic productivity, while the work performed in the public realm belonging to men is productive and rewarded as such.

Although in recent decades the struggle engaged in by women to incorporate themselves into the formal labour market has led to the reconfiguration of some spaces, the same cannot be said for domestic work. The participation of women in the public sphere as salaried workers, together with man's refusal to participate in household chores, has left a vacuum in household work that has been filled by outsourcing the tasks to a third party. As Ruth Mestre describes it, the unequal division of domestic chores has been eliminated by bringing in other women (Mestre i Mestre, 2002: 191). The private sphere continues to be very much a female space or concern. According to ILO estimates, of the 52.6 million domestic workers worldwide, about 83% are

women and one of every thirteen female wages comes from household work (ILO, 2013: 19). Several authors have stressed, moreover, that the decision to outsource is always taken by a female and the negotiation of working conditions is a relationship between women (Ehrenreich and Hochschild, 2002; Anderson, 2007; Mestre i Mestre, 2002). Indeed, the demand for female domestic workers shows that in the context of couples' relationships inequality persists, because the man continues to see housework as an alien task (Devetter, 2013).

In the feminist debate the question has been raised regarding the extent to which the outsourcing of domestic work to another woman in precarious working conditions and with very little legal protection supposes a redefinition of gender inequalities or whether, on the contrary, it is a model that can individually benefit some women, albeit without modifying the foundations of the patriarchal system. Undoubtedly, this model is tremendously beneficial for middle-class women as enables them to enter the formal labour market, while outsourcing home care to another woman. This outsourcing also allows men to maintain

they comfortable position of not getting involved in household chores and in decisions concerning the home. But, from a gender perspective, it is a model that has brought very few benefits to the working class or immigrant women that have filled the vacuum. The transfer of the tasks of care and reproduction between women takes place in the framework of working conditions that fail to ensure the provision of fundamental rights, and which often fail to protect female workers from abuse and exploitation. Therefore, the incorporation of women into the formal labour market represents an improvement for middle-class women, but it has failed to contribute to the redefinition of the private sphere and to an improvement in the living conditions of all women. Domestic work continues to be feminine and to be seen as a job that attracts little social recognition, that is, it continues to be classed as undervalued, feminised work (Nussbaum, 2009).

Globalisation and immigration are two other phenomena that have had a significant impact on domestic work in immigrant-receiving countries. Immigration can constitute a process of social mobility for women allowing them access to better wages and better

working conditions and even, in some cases, to escape regimes of domination and oppression in their country of origin. However, the migratory processes of women are not automatically linked to processes of empowerment. In fact, the incorporation of women into the international labour market places migrant women on the lowest rungs of the labour market ladder and serves to reinforce inequalities. Global 'care chains' (Hochschild, 2000; Kofman, 2008, 2010; Parella, 2003) and the intensification of inequalities between women (Harrington, 2000) are some of the disturbing consequences of the feminisation of immigration.

As mentioned, the so-called care crisis involves the transfer of household tasks to another woman and, in the case of the countries of the global north, this space has been covered by thousands of women from the global south (Ehrenreich and Hochschild, 2002; Kofman, 2008). Here, it should be borne in mind that immigrant selection systems are applied to labour markets that are disaggregated by sex, by differential ability levels and by socio-cultural concepts of what are appropriate roles for men and women (Piper, 2005). In this system, the appropriate role for the

migrant woman is that of domestic worker. In this sense, social stereotypes and immigration legislation, in particular immigrant's selection instruments, are a key element for placing migrant women in domestic work sector (Caicedo, 2016; Moré, 2015). The disproportionate presence of migrant women in labour sectors that are undervalued or devoid of protection, such as household services, or even criminalised, such as prostitution, demonstrate that under the guise of migration the role of women linked to social reproduction and care has been globalised (Kofman, 2008: 66).

The framework introduced by immigration is characterised by even more precarious working conditions when the latter intersects with migration laws. The recognition of the rights and freedoms of non-nationals is based on a system that partially includes immigrants with legal status, but which excludes immigrants who are in an irregular situation from the enjoyment of their basic rights. In fact, the precariousness attributable to the immigration process is one of the key factors explaining why female employers prefer a female migrant to a national worker (Anderson, 2007). Domestic work is one of the activities for

which there is most demand in immigrant-receiving countries, but paradoxically regular migration pathways are virtually closed to this activity. There are countries that do not recognise domestic work as an employment point-of-entry and those that do issue visas for working in this sector impose a series of requirements, including being in possession of a work contract of at least a year's duration, that are difficult to meet (FRA, 2011). As a result, most migrant domestic workers find themselves in an irregular situation and, therefore, access to any of the social and labour rights recognised under labour legislation is conditional upon the future regularisation of their legal status.

A typical figure of the migration process is the live-in domestic workers. In this case, the fact that female workers live and work in the same place means a significant reduction in their autonomy and privacy, greater control over their working hours and rest periods, as well as being less likely to be protected against verbal, sexual and psychological abuse and other forms of exploitation (Fredman, 2015: 399). Today, the links between live-in domestics, immigration and exploitation are becoming increasingly visible. In

fact, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also known as the Palermo Protocol) includes domestic servitude as a form of human trafficking. Also, the European Court of Human Rights has, on three occasions (Siliadin vs France, 2005; C.N. and V. vs France, 2012 and C.N. vs the United Kingdom, 2012), recognised the link between the trafficking of persons and the prohibition of slavery and forced labour (Article 4 ECHR). In these cases, the Court examined the potential breach of the Convention's rights resulting from the transfer of women, some of them minors, from Togo, Burundi and Uganda to France and the United Kingdom, to be subjected to domestic servitude. In all cases the Court highlights the little protection that domestic legislation offers immigrant women who are subject to situations of servitude and labour exploitation.

ILO Convention No. 189 is shaped in the context of the fight for the recognition of decent working conditions and equal treatment for female domestic workers. As is discussed in this article, the provisions of the Convention as they relate to minimum wage coverage, the definition

of working hours and the right to join a union may represent significant changes to the domestic labour laws of the signatory States. Convention No. 189 makes an important effort to introduce into the formal employment sector the activity of domestic work, the treatment of which has oscillated between simple paternalism and being of little relevance in labour legislation (Quesada, 2011: 3).

2. ILO CONVENTION NO. 189 ON DOMESTIC WORKERS

Convention No. 189 on domestic workers (2011) is the first international instrument devoted exclusively to regulating the employment conditions of domestic work. Prior to that, the protection of female domestic workers was provided for under general statements of human rights such as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights or under ILO Conventions specific to certain sectors, such as Convention No. 131 on minimum wage fixing (1970). Thus, the introduction of an international text that seeks to reconsider the social value of this activity through the recognition of

decent working conditions and legal protection against violations represents a milestone.

The Convention aims to work progressively towards the elimination of discrimination and exploitation of female domestic workers. The first action taken by the Convention to achieve this objective is the recognition of domestic work as labour and economic (Fredman, 2015; Albin and Mantouvalou, 2012). The preamble recognises the significant contribution made by female domestic workers to the global economy, the importance of the provision of care to meet the increasing needs of the elderly, children and the disabled, and the contributions that remittances and money transfers made by female domestic workers represent for their countries of origin.

However, and as is discussed at length throughout this article, the Convention could have gone much further in the level of protection it affords, above all as regards the obligations it imposes on the signatory States and on employers. Yet, the existence of an international treaty represents an important step towards full recognition of the rights and of the equality of female domestic workers. In

fact, many of the States' labour laws have introduced improvements in the working conditions of both male and female workers thanks to the existence of the ILO Convention. In addition, the Convention has opened up the hitherto largely silenced and invisible debate on the recognition of domestic work as a formal and valued job and on the urgent need to improve the working conditions of the women dedicated to it.

2.1 DEFINITION OF DOMESTIC WORK

Article 1 of Convention No. 189 defines domestic work as “*work performed in or for a household or households*”, while a domestic worker is defined as “*any person engaged in domestic work within an employment relationship*”, explicitly excluding domestic work performed only occasionally or sporadically.

The definition of domestic services as work is a significant step in the reconsideration of the social and labour value of domestic tasks. In addition, the Convention includes services performed in one or more households as domestic work, which recognises the fact that domestic workers

are increasingly working concurrently, on a part-time basis, in several households (Oelz, 2014: 173). While it might be argued that the definition of domestic work is overly general and brief, this brevity clearly responds to the objective of achieving ratification of the Convention by the largest number of countries possible.

Article 2 of the Convention provides for the possibility of excluding, wholly or partly from its scope, categories of workers that are otherwise provided with at least equivalent protection or those in respect of which special problems of a substantial nature arise. For a State to exclude a certain category of worker it needs to consult with the most representative organisations of employers and workers in the sector, and prepare a report justifying their exclusion. The reasons for the introduction of a clause excluding certain categories of workers and the provision of a very flexible procedure (consultation and justification) for so doing can only be understood as a desire to avoid obstacles to ratification in cases where the Convention is not fully adapted to a particular group of domestic workers.

However, the definition of domestic work contains a number of omissions and makes certain clarifications that are worth highlighting. The first is the exclusion of domestic work performed under contract with a private employment agency. Often the international migration of domestic workers is conducted through private employment agencies, with the latter performing the functions of intermediating between the worker and employer, publishing job offers, bringing the two parties into contact, and selecting the worker, among others. But the agencies also play an active role in establishing the working conditions. The employment relationship and the regime of rights and obligations are established within a relationship involving the three parties, where even the level of legal protection of the worker depends on how this triangular relationship is formed (Fredman, 2015: 409). What is more, private employment agencies often contribute to the fact that abusive working practices continue to exist, preventing or hindering any legal action against serious violations of rights (Avdan, 2012).

Although the Convention does not mention private employment

agencies in its definition of the employment relationship, a reference is included when regulating the instruments of protection of female workers in situations of abuse or exploitation. Thus, Article 15.1 points out that *“to effectively protect domestic workers, including migrant domestic workers, recruited or placed by private employment agencies, against abusive practices, each Member shall: (a) determine the conditions governing the operation of private employment agencies recruiting or placing domestic workers, in accordance with national laws, regulations and practice; (b) ensure that adequate machinery and procedures exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers”*.

The provisions incorporated in Article 15 of the Convention recognise the role employment agencies have in relation to situations of abuse, exploitation and fraudulent practices. Agencies can be entities that contribute to the consolidation of situations of abuse of female domestic workers, but they can also be entities that monitor

complaints and collaborate in their resolution. Whatever the case, the effectiveness of the provisions depends largely on the involvement of each one of the States and the pressure that the different associations or movements for the rights of domestic workers can bring to bear on their domestic legislative policy.

The definition of domestic work included in Article 1 of the Convention assumes that any person engaged in domestic work does so within an employment relationship. The link established by the Convention between work and the employment relationship thus excludes domestic workers working on a self-employed, casual basis (Albin and Mantouvalou, 2012: 71; Fredman, 2015: 407-408). Yet, the labour laws of several States, including those of Spain, regulate domestic work under the regime of self-employed workers. This strategy of including domestic work as a form of self-employment means that female domestic workers act as their own employers and provide care services under a service provision contract and not within an employment relationship. This situation exacerbates the precarious nature of the working conditions and leads to the establishment of a covert

employment relationship. As such, it would have been desirable to incorporate some reference to this situation in Convention No. 189, particularly given that in its preamble it cites Recommendation No. 198 of the ILO on the 2006 employment relationship, which “is particularly useful in clarifying the grey areas where it is difficult to distinguish between the work done in the context of an employment relationship and the work carried out under another kind of relationship” (Oelz, 2014: 174).

2.2 REGULATION OF MINIMUM WORKING CONDITIONS: WAGES, REST PERIODS AND CONDITIONS OF HEALTH AND SAFETY

The precarious working conditions and insufficient legal protection that characterise domestic work are a reflection of the degree of feminisation and undervaluation to which this sector has been exposed throughout history (ILO, 2013: 21). In this sense, the incorporation of standards that promote reforms in the labour laws of the States with the aim of ensuring decent working conditions is an important step in the fight to reverse the

imbalance between formal employment and domestic work and to recognise the value of housework and tasks of care.

Article 11 of Convention No. 189 states that “*Each Member shall take measures to ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex*”. This provision for a minimum wage represents one of the elements that is likely to have the greatest impact on the socio-labour situation of female domestic workers. This is because, if seen in a broader context, minimum wage coverage has important implications both for gender equality and for women’s participation and situation in the labour market (Oelz and Rani, 2015). Article 11 of the Convention introduces a mandate for the States to place the working conditions of domestic work on a par with those provided for all other remunerated activities, thus contributing to a transformation of the collective imaginary associated with the undervaluation of domestic work. But, minimum wage coverage is also one of the most relevant provisions of the Convention because its inclusion represents a substantial improvement in

the living conditions of women and their families.

Provisions for a minimum wage are complemented by a final condition that states that remuneration should be established without sex-based discrimination. The provision of gender equality is an important tool to prevent gender becoming an element that devalues working conditions, especially when surveys indicate that more than 80% of domestic workers are women (ILO, 2013). However, it would have been desirable if the clause had included other grounds of discrimination, such as those of nationality or race. It is true that the Convention seeks to do just that with the inclusion in Article 3 of a general clause prohibiting discrimination in respect of employment and occupation. Yet, a more precise reference including other categories of discrimination is necessary, especially when studies tell us that the recognition of the job skills of domestic workers is based on stereotypes linked to nationality (Moré, 2014; Anderson, 2017; 2012) and, therefore, the decision as to whether to hire a woman as a domestic worker tends to be mediated by nationality.

Another important aspect regulated by the Convention is payments in kind. Given the nature of domestic work, it is common for the wages to be partly paid in the food or housing consumed by the worker. This is especially common in live-in domestic positions, where it is agreed that the goods and services consumed by the worker should be deducted from her full wage. In relation to this situation, Article 12.2 of the convention states that *“National laws, regulations, collective agreements or arbitration awards may provide for the payment of a limited proportion of the remuneration of domestic workers in the form of payments in kind ...”*. In all circumstances, payments in kind must be for the personal use and benefit of the worker, the monetary value attributed to them must be fair and reasonable and cannot be less favourable than those generally applicable to other categories of workers.

The regulation of working hours is provided for under Articles 9 and 10 of the Convention. Article 10.2 establishes that weekly rest should be at least 24 consecutive hours, but the day of the week when this rest should be taken is understood to be open to the

agreement of the parties. In determining working hours, one of the key aspects is the regulation of periods of rest. In the case of domestic work, it is common for employers to assume workers will be at the disposal of the household during their periods of rest in the working day, for example, at meal times. In relation to this, Article 10.3 of the Convention provides that “*Periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work ...*”.

Within this framework of the regulation of periods of rest, Article 9 of the Convention also includes a specific reference to domestic workers who reside in the household. If in the case of a worker that does not reside in the household the tendency is for her employer to assume that she is available including during the periods of rest within the working day, in the case of a live-in domestic worker, her employer assumes the worker to be available full time. The first provision of the Convention is to encourage States to adopt in their labour laws “*measures to ensure that domestic workers: (a) are free to reach agreement with their*

employer or potential employer on whether to reside in the household”. Moreover, Article 9 also provides that the States should adopt measures to ensure that domestic workers “*who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave*”.

In relation to working conditions, Article 13.1 of the Convention states that “*Every domestic worker has the right to a safe and healthy working environment.*” States should adopt effective measures, taking into account the specific characteristics of domestic work, to ensure these conditions. This provision is subject to the progressive application by the States. Clearly such escalation clauses are a useful tool for achieving the commitment of States on labour rights and for obtaining the highest number of ratifications of the Convention. Yet it is surprising that the regulation of such a basic concern as that of the health and safety of workers, and one so closely linked to decent conditions, should be included in an escalation clause.

2.3 EQUAL WORKING CONDITIONS

In some cases, the framework of legal protection for female domestic workers is promoted by means of sectoral regulations that form a secondary legal system with fewer guarantees; in others, there is no protective labour legislation whatsoever (Albin and Mantouvalou, 2012; ILO, 2012). In the case of countries that have legislated on the working conditions of female domestic workers, the social protection provided is always less than that provided for under the general employment system. Female domestic workers are denied such basic rights as a minimum wage, holidays, periods of rest and access to benefits such as unemployment or a maternity allowance. In fact, according to ILO data, only 10% of all female domestic workers are covered by the general labour legislation with the same conditions as other workers (ILO, 2013: 95). In the case of countries with no regulations at all, the protection of female workers is dealt with within the framework of informality or charitable activities.

The configuration of a dual system of labour protection is often justified on the grounds that the female domestic worker works in the intimate

personal and family circle of the person that hires her and is in contact with or cares for their property and persons (Quesada, 2011). Clearly, the job has a number of specific characteristics that prevents it from being assimilated with all other jobs. However, these differences should not result in a substantial reduction in the job's basic working conditions, including minimum wage, periods of rest and entitlement to certain social benefits. The poor working conditions of female domestic workers can only be understood in the context of the social devaluation that domestic work suffers. In reality, the absence of labour legislation or a dual regulation responds to the social stratification built in accordance with the social value attached to each job, a stratification that places domestic work at the lowermost levels and, therefore, least deserving of protection (Browne and Misra, 2003).

Faced with this duality or even the absence of any means of social protection, Convention No. 189 contains two provisions through which it seeks to promote equal employment conditions. The first of these is a general clause on working conditions provided for in Article 10.1: *“Each Member shall take measures towards ensuring equal*

treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work". The second provision on equal treatment contained in the Convention refers exclusively to social security protection. Thus, Article 14 incorporates a special reference to ensure equal conditions in respect of social security, including with respect to maternity. This provision is also included in the framework of the general escalation clause.

The effective application of the inclusion of domestic workers in the social security system will depend largely on how such inclusion is established. In the vast majority of cases, female domestic workers find it unfavourable to register in social protection systems because the wages they are paid are low and the social security quotas they have to pay are overly burdensome. Therefore, guaranteeing equal conditions of employment entails not only the adoption of measures to promote access

to social security, but also the development of formulas that address their position of disadvantage. The principle of material equality should promote the design of special measures, such as quotas proportional to the wage received or the recognition of a wider catalogue of benefits. Otherwise, the step towards the formalisation of the labour activity is so costly for the female worker that, paradoxically, working outside the system of social protection presents itself as a more favourable option.

3. FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

The recognition of the rights to freedom of association and collective bargaining are provided for under Article 3 of the Convention. The latter establishes that the State parties should promote and fulfil the right to freedom of association and the effective recognition of the right to collective bargaining. Consequently, it also recognises the right of female workers and their employers to establish organisations, federations and confederations of their own choosing and to join them.

The recognition of the rights to freedom of association and collective bargaining represents a major step for this sector, given it is characterised by individual or quasi-family relations. The bilateral relationship between the employer and the female domestic worker gives rise to a framework of unequal power relations, so that working conditions are in most cases agreed unilaterally, but also that any improvement in labour conditions benefits the female worker individually. In contrast, collective bargaining rebalances the positions, increasing the capacity of the worker to bring pressure to bear to improve working conditions, while the collectivisation of demands means that the benefits obtained in terms of wages, workload or periods of rest extend to all workers. Therefore, collective bargaining can fulfil the very important function of modifying the essentially contractual nature of this working relationship, introducing a collective approach to the interests of the social subjects (Quesada, 2011: 18).

However, freedom of association and collective bargaining require that, along with the necessary recognition in the legislation of each member country, the conditions

necessary for the effective exercise of these rights also prevail. The singular nature of domestic work means that there are certain factors that hinder the creation of unions in this sector and the calling of a strike. For example, the physical dispersion of female domestic workers and their working hours hinder opportunities to meet. In this regard it should be remembered that Article 10 of the Convention states that female domestic workers are entitled to a weekly rest of 24 consecutive hours, but in most cases this schedule is set according to the needs of each family (ILO, 2013). Authors such as Sandra Fredman indicate that the experience of Brazil, one of the most advanced in terms of trade unions for domestic workers, shows that factors such as low wages influence greatly the strength or the economic capacity of the union. Indeed, the wages of female domestic workers reflect the vulnerability of unions from an economic point of view (Fredman, 2015: 411).

Moreover, it should also be borne in mind that in Western countries most female workers are of immigrant origin. Being a non-national is an additional limitation, since the ownership and exercise of the right to

association and collective bargaining will also depend on immigration legislation. That is, the recognition of the right is included in the Convention and so States can incorporate it in their domestic legislation, but the immigration legislation can deny it to female workers who are in an irregular situation. In the Spanish case, for example, Article 11 of the law on immigration recognises the right to associate regardless of the administrative situation of the migrant, but not the right to create a union.

4. PROTECTION AGAINST ABUSE, HARASSMENT AND VIOLENCE

Domestic work is a labour market activity that takes place in the privacy of a home, and where the health and safety conditions of the workplace are not visible to the public. In this context, situations of abuse, harassment and violence, often determined by the relations of power and status that characterise the employment relationship, are also protected by the privacy of the household. The non-public nature of the job favours exploitation and makes it very difficult to detect situations of abuse and

violence, or even human rights violations, such as trafficking.

The first measure adopted by the Convention to combat labour exploitation, abuse and violence is the regulation of child domestic labour. Article 4 of the Convention establishes that “*Each Member shall set a minimum age for domestic workers consistent with the provisions of the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182), and not lower than that established by national laws and regulations for workers generally*”. As such, the Convention allows domestic legislation to set a working age lower than 18, provided that this is permitted for other jobs. Moreover, States that establish a minimum working age for domestic workers lower than 18 should also take measures to ensure that the work does not deprive the workers of compulsory education, or interfere with opportunities to participate in further education or vocational training.

From a broader perspective, Article 5 of the Convention incorporates a general clause according to which the signatory States undertake to adopt the necessary measures to ensure that

domestic workers enjoy effective protection against all forms of abuse, harassment and violence. Subsequently, Articles 16 and 17 of the Convention include specific measures to uphold the general protection afforded by Article 5 by means of the adoption of two instruments: the protection of the courts and labour inspections. According to Article 16, *“Each Member shall take measures to ensure, in accordance with national laws, regulations and practice, that all domestic workers, either by themselves or through a representative, have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally”*. Here, the legal solution is an instrumental right that guarantees protection against the violation of rights and the restoration of these rights. To guarantee the exercise of this right, the State legislations must uphold such rights as free legal aid, access to the courts without having to incur excessive costs and free legal proceedings, among others.

The second instrument incorporated by the Convention to deal with situations of abuse and the violation of labour rights is that of labour

inspections. Article 17.2 establishes that *“Each Member shall develop and implement measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations”*. There can be little doubt that a labour inspection is a very useful instrument to control the exploitation of female domestic workers. However, the employers’ right to privacy is introduced as a limit that hampers or prevents control by the State. As a rule, the State legislations that provide for the possibility of an inspection give priority to family privacy to the extent that without the family’s consent it is impossible to implement any type of control. In fact, the European Union Agency for Fundamental Rights has found that severe exploitation of female domestic workers is difficult to detect because of the invisibility of their work and the dependence of the domestic worker on the employer, but also because domestic labour laws prevent inspections in order to protect the privacy of employers (FRA, 2011: 51).

In drawing up the ILO Convention, the protection of privacy played an important role, thus Article

17.3 of the Convention establishes that “*In so far as compatible with national laws and regulations (measures for labour inspection) shall specify the conditions under which access to household premises may be granted, having due respect for privacy*”. The terms with which labour inspections are introduced in the Convention are indeed weak, while the States are under no direct obligation from them.

The regulation of labour inspections is one of the most complex issues when determining the instruments of public control over working activities undertaken in the home. This complexity is further intensified when the worker lives in. The conciliation or weighting of these two fundamental rights, i.e. the right to privacy and the rights of the female worker, makes it difficult to find a just balance that does not prejudice excessively the respective rights in question. Some countries have attempted to develop intermediate solutions so that they can inspect the working conditions of the domestic worker without interfering in the employers’ privacy. Among the solutions proposed are, for example, arranging meetings in places outside the house to conduct interviews with the employer and employee; or the

possibility of labour inspectors visiting private homes but if employers do not want to receive them an appointment being made at an alternative meeting place (Oelz and Rani, 2015: 23-24).

The difficulty encountered in conducting labour inspections is also directly related to the fact that the sector of care and reproduction is structured as a fully privatised sector, well removed from any form of public intervention. In this regard, consideration should be given to the creation of public agencies for recruiting female domestic workers that could act as intermediaries between the employer and the worker. In this way, State institutions would find it much easier to control and monitor the working conditions introduced in an employment contract and their subsequent implementation. Legislative intervention undoubtedly represents a step forward in the right direction, but while this service continues to be performed in a strictly private space, the opportunities to discover situations of abuse and to protect female domestic workers are minimal.

Finally, the Convention also provides that States should establish effective and accessible complaint mechanisms and means of ensuring

compliance with national legislation for the protection of domestic workers.

5. FEMALE MIGRANT WORKERS

As described at the beginning of this article, the transformation undergone by domestic work against the backdrop of increasing globalisation has meant that the woman that performed the tasks of care in the household has been replaced by a female migrant worker who emigrates for this very purpose and who undertakes her work in highly precarious conditions. According to the International Organisation for Migration, in Central and South America women migrate to richer countries in the region or to the United States and Europe, especially, Spain. In Asia, alongside the regional migration that takes place on that continent, there is also a significant flow of women migrating to work as domestic workers in countries of the Middle East and Europe (ILO, 2013: 22-23). When these women arrive in their country of destination, they find barriers have been put up to the qualified labour market, and that domestic work remains as one of the few niches for migrant women, many of whom find

themselves in an irregular situation (ILO, 2013: 22-23; FRA, 2011).

The Convention refers to these migrant workers in a number of general clauses. Article 2 on the scope of the Convention establishes that it “*applies to all domestic workers*”. As such, it is understood that all its provisions apply to female workers regardless of their nationality. As for the regulation of their specific situation, Article 9 recognises that migrant domestic workers are “*entitled to keep in their possession their travel and identity documents*”. And, if we seek more specific clauses, we find provisions for the protection of workers recruited via private employment agencies. Thus, Article 8 states that “*National laws and regulations shall require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment ...*”.

As can be seen, the provisions regarding female migrant workers focus essentially on the regulation of private employment agencies. The convention does not address one of the key issues in

relation to immigration, namely, the link between the administrative situation of the migrant workers and the regime of rights and their protection from situations of abuse. The demand in developed countries is for migrant labour in such sectors as cleaning, the care of the elderly and domestic work, but the instruments used to plan immigration close the door on workers seeking to enter the country of destination by making it impossible for them to obtain residence and work permits. In other words, migrant labour is required in the care sector, but the system of control and selection of migratory flows makes it very difficult to obtain the necessary authorisations in this sector. In fact, several countries that receive migratory flows and which have a high demand for domestic workers have no legal routes of entry for migrant women (FRA, 2011). And even countries like Spain, which include domestic work on a list of recognised occupations, subsequently incorporate conditions that make the contracting of workers for this sector practically inviable. The outcome is that female domestic workers reach European territory in an irregular situation.

Thus, female migrant workers are referred to in the Convention in a number of general clauses (“*all workers*”), but paradoxically this generality and the few specific clauses end up excluding them from many of the rights recognised under the Convention. This is because their migrant status places them in a different social and legal position with respect to that of the other workers. In legal terms, their immigrant status plays a key role in determining their exclusion from many of the rights contained in the Convention. If a migrant worker finds herself in an irregular situation, she is not entitled to a contract of employment, she cannot participate in the social security system, nor is she entitled to any social benefits derived from her work, and in some States she is even denied the right to associate and engage in collective bargaining. A work permit is not only an administrative document authorising the worker to perform a labour market activity, but also an instrumental *document* that conditions any recognition of her rights and freedoms (Aparicio:2006). A residence permit serves to open and close the door to the ownership of basic rights and, in this case, it is a worker’s immigrant status that determines the

conditions in which she will carry out her activity. This situation is not recognised in the Convention.

Yet, even those rights that are recognised by domestic legislations, and which are directly concerned with protecting workers from situations of abuse and exploitation, are not always implemented effectively. If we consider a migrant worker in a regular situation, the close link between her social security contributions and the renewal of her residence permit often prevents her from registering any type of complaint or making any type of claim (Arango et al., 2014). If, on the other hand, we consider a migrant worker in an irregular situation, her vulnerability increases and the situations of exploitation to which she is exposed are more frequent. In this instance, her irregularity is a barrier that prevents her from reporting any abuse. The fear of facing a penalty and being expelled will often prevent the worker from making any allegations of abuse or exploitation. It is true that certain immigration laws, exceptionally, provide protection for migrants suffering abuse or exploitation; however, there is widespread ignorance about these procedures and so very few workers actually report situations of abuse.

Moreover, it is also common that any legal protection is conditional upon the existence of a court ruling that recognises the abusive situation, which means having to initiate legal proceedings with the economic burden that such action entails.

Finally, we should note the overall timidity of the Convention and its failure to address vitally important issues such as the protection of female domestic workers in the homes of diplomats and the role played by diplomatic immunity (Albin and Mantouvalou, 2012). And, in relation to workers' labour rights, there are no references to the regulation of the termination of the domestic work contract, appropriate schemes of compensation, the procedure to follow in case of contractual rescission, guarantees of wages in the event of default and professional training (Quesada, 2015).

CONCLUSIONS

The ILO Convention on domestic work is the first instrument of international scope to be drawn up with the aim of promoting the recognition of the labour rights of domestic workers. In this respect, the Convention has contributed to a reconsideration of the value of a job that has

remained largely invisible for much of its history. Moreover, this international standard should undoubtedly promote debate and pave the way for future reforms in the domestic legislation of many countries, with the ultimate goal of improving the working conditions of female domestic workers.

The first contribution of the Convention is the definition it provides of domestic work as a labour activity, a definition that implicitly recognises the social and economic contribution of housework. This reconsideration of the value of domestic work, especially the inclusion of non-discrimination clauses, is at the same time directly related to the recognition of dignified and equitable working conditions for female domestic workers. References to minimum conditions of employment, which include minimum wage coverage and participation in the social security system, should have the greatest impact on the current situation of domestic workers. Information concerning contractual and labour rights, as well as the regulation of specific issues such as payments in kind and daily and weekly periods of rest, are also critical aspects of the regulation, especially given that the erosion of labour rights generally found in these areas. A further point to note is the recognition of the workers' right to associate and to engage in collective bargaining, whereby the individual nature of an employment contract

is transformed into a collective understanding of rights.

As far as the protection of domestic workers from situations of abuse or fraudulent practice is concerned, the Convention promotes the regulation of private employment agencies, an area of vital importance considering their role in situations of exploitation. Moreover, the jurisdictional protection guaranteed to address the violation of rights should strengthen the recognition of rights via the provision of effective access to the courts. However, regulations concerning measures for labour inspections are particularly weak, with priority being given to the protection of a household's right to intimacy and privacy.

An analysis of the Convention from a gender perspective makes it quite evident that the needs of female domestic workers are poorly reflected in the text. Apart from a single reference to access to maternity leave, there are no other specific provisions regarding the impact of gender on this activity. Likewise, the needs of migrant workers are also poorly reflected in the Convention. Apart from some references to employment agencies and the right for migrant workers to keep their identity documents in their possession, the text does not address the problems and the absence of rights of millions of women that emigrate to find employment as domestic workers. In the articles concerning equal treatment and non-discrimination, nationality is not expressly

included and the Convention turns a blind eye to the situation of administrative irregularity in which many female domestic workers find themselves. Yet, more tellingly, the exercise of the rights recognised in the Convention may well be severely limited by the foreign status of the domestic worker, by the low wages that characterise work in this sector and by the unequal power relations between the parties. Moreover, the effectiveness of such rights as the freedom of association and access to social security is conditioned by the adaptation of these rights to the special conditions of domestic work. Finally, it should be noted that protection against situations of abuse and violence requires a judicial system that facilitates knowledge and access to the protection of the courts and a change in the strictly private, contractual nature of the employment relationship.

BIBLIOGRAPHY

Avdan, Nazli (2012): “Human trafficking and migration control policy: vicious or virtuous cycle?”, *Journal of Public Policy*, 32(3), 171 – 205

Anderson, Bridget (2007) “A very private business. Exploring the demand for migrant domestic workers”, *European Journal of Women’s Studies*, 14 (3), 247-264

Anderson, Bridget and Ruhs, Martin (2012) *Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy*. Oxford: Oxford University Press, Oxford:

Albin, Einat and Mantouvalou, Virginia (2012) “The ILO Convention on Domestic

Workers: from the Shadows to the Light”, *Industrial Law Journal*, 41(1), 67-78

Arango, Joaquin, Díaz Gorfinkiel, Magdalena and Moualhi, Djaouida (2014) *Promover la integración de las trabajadoras y los trabajadores domésticos migrantes en España*. Estudios sobre migraciones laborales núm. 114, OIT

Aparicio, Marco (2005) “El derecho al trabajo”, en Sur o no Sur, los derechos sociales de las personas inmigradas. Barcelona, Icaria, p. 63-92.

Browne, Irene and Misra, Jora (2003) “The intersection of gender and race in the labour market”, *Annual Review of Sociology*, 29, 487-513.

Caicedo, Natalia (2016) “Cruzando las fronteras: selección de la inmigración y sus implicaciones desde la perspectiva de género”, en La Barbera MC y Cruells M., (coord.) *Igualdad de Género y no discriminación de género en España: evolución, problemas, perspectivas*. Madrid, Centro de Estudios Políticos y Constitucionales, (for coming)

Costello, Cathryn and Freedland, Mark (2014) *Migrants at Work: Immigration and Vulnerability in Labour Law*. Oxford: Oxford University Press.

Devetter, François-Xavier (2013) ¿Por qué externalizar las tareas domésticas? Análisis de las lógicas desigualitarias que estructuran la demanda en Francia, *Revista de Estudios Sociales*, 45, 80-95.

Ehrenreich, Barbara and Hochschild, Arlie (Eds.) (2002) *Global Woman: Nannies, Maids, and Sex Workers in the New Economy*. London: Granta Books.

FRA (2011) *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*. European Union Agency for Fundamental Rights.

Fredman, Sandra (2015) “Home from Home: Migrant Domestic Workers and the International Labor Organization Convention on Domestic Workers”, in Costello, Cathryn and Freedland, Mark, *Migrants at Work: Immigration and Vulnerability in Labour Law*. Oxford: Oxford University Press.

Harrington, Mona (2000) *Care and Equality: Inventing a New Family Politics*. New York: Routledge.

Hochschild, Arile R (2000) “Global care chains and emotional surplus value”, in Hutton, Will and Giddens, Antony (eds.) *On the Edge: Living with Global Capitalism*. London: Jonathan Cape.

ILO (2010) *Decent work for domestic workers International Labour Conference*, 99th Session, 2010, Report IV (1). Geneva: ILO

ILO (2013) *Domestic workers across the world: global and regional statistics and the extent of legal protection International Labour*. Geneva: ILO.

Kofman, Eleonore (2008) “Gendered Migrations, Livelihoods and Entitlements in European Welfare Regimes”, in Piper Nicola (ed.), *New Perspectives on Gender and Migration, Livelihood, Rights and Entitlements*. Routledge, London.

Kofman, Eleonore (2010) “Gendered migrations and the globalization of social reproduction and care: New dialogues and directions”, in Schrouver, Marlou and Yeo, Eileen (eds) *Gender and Migration in Global, Historical and Theoretical Perspective*. London: Routledge.

Mestre i Mestre, Ruth (2002) “Dea ex machina. Trabajadoras migrantes y negociación de la igualdad en lo doméstico”, *Cuadernos de Geografía*, 72, 191-206.

Moré, Paloma (2015) “When your CV is ‘To be a Latina Woman’: Re-articulation of

Stereotypes and Re-construction of Identity of Ecuadorian Women Working in the Care Sector”, in La Barbera, Maria Caterina (Ed.), *Identity and Migration in Europe: Multidisciplinary Perspectives*, Springer.

Nussbaum, Martha (1999) *Sex and Social Justice*. Oxford: Oxford University Press.

Oelz, Martin (2014) “El Convenio y la recomendación de la OIT sobre las trabajadoras y los trabajadores domésticos. Una oportunidad para la justicia social”, *Revista Internacional del Trabajo*, 133 (1), 161-195.

Oelz, Martin and Rani, Uma (2015) *Domestic work, wages, and gender equality: lessons from developing countries*. Working Paper 5. ILO

Parella, Sonia (2003). Immigrant women iun paid domestic service. The case of Spain and Italy. *Transfer: European Review of Labour and Research*, 9: 503-517

Pateman, Carole (1996) “Críticas feministas a la dicotomía público-privado”, in Castells, Carme (comp.) *Prespectives Feministas en teoría política*. Barcelona. Paidós.

Piper, Nicola (2005) *Gender and Migration. Commissioned Background Paper for the Global Commision on International Migration*. Geneva: GCIM.

Quesada Segura, Rosa (2011) “La dignificación del trabajo doméstico. El Convenio nº 189 de la OIT”, *Revista General de Derecho del Trabajo y de la Seguridad Social*, 27.