

Migrant domestic workers, vulnerability and the law: immigration and employment laws in Cyprus and Spain¹

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ABSTRACT

Abstract: The intersection of gender, welfare and immigration regimes has been one of the main focus of a rich scholarship on paid domestic work in Europe. This article brings into the discussion the nexus of employment and immigration law regimes to reflect on the role of legal regulation in structuring and reducing the vulnerability of domestic workers. I analyse this nexus by looking at the cases of Cyprus and Spain, two states falling under the cluster of Southern Mediterranean welfare regimes, that share certain characteristics in terms of immigration regimes, but have substantially different employment law regulation models. The first part sketches the debate on the employment law regulation of domestic work. The second part starts by giving an overview of the immigration regimes of Cyprus and Spain in relation to migrant domestic workers and then proceeds to analyse the two countries' models and substance of employment law regulation in domestic work. The comparison of these two divergent approaches informs the debate on how the legal regulation of domestic work should be best structured. In Spain there have been recent dynamic legislative changes in the employment law regulation of domestic work. The final part of the article traces these changes and reflects on why such processes have not taken place in Cyprus.

Keywords: Paid domestic labour, vulnerability, models of regulation, legal reform, Cyprus, Spain

Migración, empleo doméstico y vulnerabilidad: modelos de regulación jurídica en Chipre y España

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RESUMEN

Las relaciones que se establecen entre las regulaciones y disciplinas que afectan al género, las políticas sociales y laborales y la inmigración han constituido uno de los centros de un rico debate doctrinal sobre el trabajo doméstico remunerado en Europa. El presente artículo pretende analizar el nexo entre la regulación laboral y la de inmigración para reflexionar sobre el papel que una regulación jurídica puede desempeñar en la reducción de la vulnerabilidad de los trabajadores domésticos. El análisis de la relación entre inmigración y regulación laboral se centra en el estudio de Chipre y España, dos estados que pueden encuadrarse en la tipología de modelo mediterráneo de estados de bienestar y que comparten ciertas características en sus régímenes jurídicos de regulación de la inmigración, pero donde aparecen importantes diferencias en la regulación laboral. La primera parte introduce el debate sobre la regulación laboral del trabajo doméstico. La segunda parte describe el panorama de los régímenes jurídicos de la inmigración en Chipre y España en relación con los trabajadores domésticos inmigrantes para continuar con el análisis de ambos modelos y de la regulación sustancial relevante en materia de empleo doméstico. Mediante la comparación de estos dos modelos divergentes se construye el debate sobre cómo elaborar de manera óptima la regulación del trabajo doméstico. En el caso español, en el marco de una dinámica de reformas laborales, han existido recientes cambios legislativos en la regulación del trabajo doméstico. La parte final del artículo rastrea el origen de estos cambios y propone una reflexión sobre las razones de la ausencia de un proceso similar en Chipre.

Palabras clave: Trabajo doméstico remunerado, vulnerabilidad, modelos de regulación, cambio legislativo, Chipre, España

INTRODUCTION

The adoption of the ILO Convention on Decent Work for Domestic Workers (ILO, 2011) signals a global struggle to improve the working conditions of a sector which has been historically excluded from the scope of labour law. This development at the international level has created momentum to challenge national regimes which determine the vulnerability of paid domestic workers, and to look for adequate models of legal regulation. Against this background, a general debate on whether domestic work should be regulated as “a job like any other” or “a job like no other” is revived. Should the personal scope of generally applicable employment legislation be extended to include domestic workers or should domestic work be regulated under specific legislation applicable only in this sector? I argue that the divisive line between the two approaches seems somewhat flawed because much of the debate focuses on models. We instead need to look beyond the model and scrutinize more carefully the substance of employment law protections and entitlements under each model.

Because domestic work is a generally underpaid and unprotected type of work, studies focusing on only one national context tend to conclude that national law creates conditions of vulnerability for domestic workers *vis à vis* other workers. I do not contest this finding; domestic work is certainly one of the most precarious types of employment. However, juxtaposing both the models and substance of regulation sheds

light to the very different ways in which law structures and, in certain instances, can contribute in reducing domestic workers' vulnerability².

The intersection of gender, welfare and immigration regimes has been one of the main focus of a rich scholarship on migrant domestic work in the European context (Lutz, 2008; Ambrosini, 2013; Williams, 2012; Triandafyllidou, 2013; Isaksen, 2010). This article addresses the nexus of labour law and immigration law regimes in order to examine the role of legal regulation in structuring and reducing the vulnerability of domestic workers. I analyse this nexus by looking at the cases of Cyprus and Spain, two states falling under the cluster of Southern Mediterranean welfare regimes, which share certain key characteristics in terms of immigration regimes, but have substantially different employment law regulation. During the last two decades, both countries have transitioned from having a familialistic model of care to the migrant-in-the-family model (Bettio et al, 2006). They have also responded to their "crisis of care" (Benéria, 2008) by facilitating or actively trying to recruit migrants to be employed in the private sector of domestic work; as a result, the two countries have large domestic work sectors with a high share of migrants. In Cyprus, the immigration regime has shaped a sector where live-in domestic work is taken up almost exclusively by non-EU nationals. In Spain, even though the sector is more diverse, the presence of migrants and recently naturalized migrants is also predominant. The reliance of families and individuals on migrant domestic labour to respond to care needs is stably high in both countries regardless of the current crisis. Spain has enacted a special law to regulate paid domestic work but its model is adapted to provide near-normal protection; in Cyprus on the other hand, while employment legislation makes no specific references to domestic work, the state has crafted a special employment regime to regulate exclusively the working conditions of non-EU migrant domestic workers. In 2011 the Spanish labour legislation on domestic work was modified through a dynamic process of reform with the participation of domestic workers' organizations; the new legislation significantly improved the legal entitlements and protections of the sector's workers. In Cyprus on the other hand, there seem to be no prospects to reform the sector's labour regulation.

The discussion is organised as follows. Section 1 sketches the general debate on the labour law regulation of domestic work. Section 2 gives an overview of the immigration regimes of Cyprus and Spain in relation to migrant domestic workers. Section 3 proceeds to analyse the crafting of a special employment regime in Cyprus which regulates exclusively the work of non-EU domestic workers. Section 4 outlines the Spanish approach to the labour law regulation of domestic work. Section 5 discusses the process of legislative reform in Spain and reflects on why such reforms have not taken place in Cyprus.

² I use the term domestic work to refer to waged work carried in and for a private household without distinction between care work and general domestic tasks. This is because, contrary to other countries such as Italy, the law and policy in Spain and Cyprus do not differentiate between care and other types of domestic work.

1. DEBATING THE REGULATION OF DOMESTIC WORK: “WORK LIKE NO OTHER” OR WORK “LIKE ANY OTHER”?

Overall, domestic workers have been either excluded or only partially included in the personal scope of protective labour legislation across many different jurisdictions³. Mantouvalou has aptly termed the sum of these exclusions and partial inclusions as “legislative precariousness” (Mantouvalou, 2012). A typical example is the exclusion of domestic workers from the personal scope of occupational health and safety legislation⁴. Domestic workers are also very often excluded from certain provisions of working time regulation such as protections in relation to night work, maximum working time and remuneration for overtime (Albin, 2012; Mundlak and Shamir, 2011). The regulation of wages is another area of disadvantage for domestic workers; in the UK, for example, live-in domestic workers can be exempted from the minimum wage entitlement if they are treated “as family members” (Mullaly and Murphy, 2014). It is also often the case that the rules on dismissal are more flexible for domestic workers than for other workers⁵.

The justification for domestic work’s exceptional treatment under labour law has been formally premised on two grounds: the special character of the employment relationship which supposedly entails a higher degree of trust and the exceptionality of the household as workplace which is thus unfit for labour law regulation. Feminist scholars across disciplines have challenged this exceptionalism which results in substandard labour rights and protections for domestic workers⁶. They have argued that the foundations of exceptionalism are ideological and draw attention to the fact that the public/private binary and the notion of non-intervention of the state into the private sphere are constructed ideas, so strongly embedded in legal culture, that mainstream scholarship seldom questions. Exceptionalism stems indeed from deeply rooted societal ideas that caring and domestic labour are expressions of love and affection, part of the innate duties of women as wives and mothers, and as such they cannot be commodified and regulated on labour market terms.

Apart from being an expression of the public/private division in law, Catharina Calleman argues that the exemption of the employer’s household from the scope of labour law, essentially reflects the low value the legislator assigns to work within the household for being traditionally women’s work (Calleman, 2012). For her, the exceptionalism of domestic work is premised on the fact that the tasks are associated with women’s unpaid reproductive labour and that both the worker and the employer are often women (Marchetti and Triandafyllidou, 2015) which undervalues their employment relationship even more (Calleman, 2012). Similarly, Guy Mundlak and Hila Shamir argue that there is nothing essentially exceptional in domestic work which can justify its regulation on different terms. On the contrary, they consider that the

³ For a global overview see ILO, 2013.

⁴ See for example, article 3 of the EU Framework Directive on Health and Safety 89/391/EEC.

⁵ For a discussion of the Swedish case see Calleman, 2011.

⁶ For a comprehensive account of these critiques see Fudge, 2014.

legal construction of domestic work as exceptional with less labour rights is dictated by states' socio-economic interests to keep care private and affordable (Mundlak and Shamir, 2008). In their analysis, they further illustrate how law has both a reflective and a constitutive role: law reflects social perceptions around care work, but law also constructs and perpetuates such perceptions by according them legitimacy and solidifying them (*ibid*).

When designing employment laws in order to remedy domestic workers' historical disadvantage the question that arises is whether domestic work should be regulated as "work like no other", i.e. under tailored-made legal instruments, or as "work like any other", i.e. inclusion in the personal scope of generally applicable labour law. In other words, should we strive for equality of treatment or for specific measurers? Scholars like Einat Albin and Virginia Mantouvalou argue that separate statutory instruments which take into account the specificities of domestic work are necessary in order to make employment rights meaningful to domestic workers; by merely including domestic workers into the personal scope of generally applicable employment norms, they argue, would not solve the problem because of enforcement difficulties (Albin, 2012; Mantouvalou and Albin, 2012). The counter-argument, however, is that the enactment of special employment instruments for domestic work exacerbates the sector's disadvantage because specially tailored models tend to grant substandard rights and protections (Mundlak and Shamir, 2011; Ramirez Machado, 2003).

Domestic work is indeed "work like any other" but making employment law norms fully applicable to this type of work may require adaptations of the generally applicable legislation; as we shall see in the case of Spain, the two approaches are not necessarily mutually exclusive.

2. IMMIGRATION REGIMES IN SPAIN AND CYPRUS: SECTOR-SPECIFIC OPENNESS TO DOMESTIC WORKERS BUT DIVERSE TREATMENT AFTER ENTRY

According to the latest statistical data of the Cypriot social insurance services, in 2014, there were 20,303 foreigners registered as household employees, out of which only 300 were EU migrants, while the number of nationals was 250⁷. 54.2% of the total employment of non-EU migrants is in the domestic work sector; this makes domestic work by far the largest sector of employment for non-EU workers⁸. State authorities do not make available disaggregated data on the nationality of visa holders; secondary sources, however, report that there are approximately 30,000 female migrants on a domestic worker visa and the main countries of origin are the Philippines, Vietnam, Sri

⁷ Department of social insurance registry, Ministry of Labour, *Total aliens and Europeans Data*, 2014.

⁸ The data of the social insurance services include only workers who have a legal migrant status and are registered with social security.

Lanka and India⁹. There are no figures or indications regarding irregular migrants in domestic work.

In Spain, a significant component of the sector is formed by non-EU nationals from former Spanish colonies, primarily from Latin America, but there are also high numbers of Moroccans and Ukrainians in the sector. Recently, there has been a shift with Romanian nationals becoming the most representative migrant group. According to social security data, in March 2015 there were in total 431,282 contributors registered as household employees. About half of them (207,414) were foreigners: 156,670 non-EU and 50,744 EU nationals¹⁰. When it comes to migrant workers, the most representative countries of origin were Romania (38,343) Bolivia (27,328), Paraguay (19,352), Morocco (14,905), Ecuador (13,985), Ukraine (10,444) and Colombia (8,010). The immigration regimes of both countries can be characterised by openness in relation to immigrant domestic workers in the sense that the regimes grant routes to independent and legal entry for domestic workers. Such openness is however sector-specific because entry is granted under the condition that the migrant will be employed in domestic work as change of sector is not permitted.

Cyprus' immigration regime in relation to non-EU domestic workers can be characterised as employer-driven and open-entry. Since the early 1990's the state has been explicitly targeting migrants to be employed in domestic services through a specific visa scheme for domestic workers. The scheme is sponsorship-based¹¹ and employer/demand driven in the sense that employers may request permission to recruit a migrant domestic worker without the need to carry out an effective labour market test¹². The immigration regime is exceptionally open to domestic workers while it is very restrictive towards other types of labour migrants. A non-EU national has indeed very limited options to enter the country for the purpose of employment. Against this background, the domestic worker visa is often the only option of independent entry for a labour migrant, especially a female one.

But while entry is relatively easy and straightforward, the conditions once the migrant is in the country are particularly onerous. Several restrictions are attached to migrant domestic worker visa. First, the right to stay is limited to a maximum of four years. Second, domestic workers are tied to their employer; and change of employer is allowed only in very exceptional circumstances following a formal complaint and

⁹ Immigration Department data cited in Ombudsman, 2013.

¹⁰ Ministry of Employment and Social Security, total and foreigners affiliation, March 2015.

¹¹ Employers must deposit a bank guarantee which the state authorities withhold throughout the stay of the migrant domestic worker in Cyprus.

¹² According to the Community Preference Rule, EU Member States are obliged to offer any vacancy to nationals, EU nationals and Third-Country National (TCN) residents before recruiting any TCN from outside the EU. See, The Community Preference Rule Council Resolution [1996] OJ C274/3. There is however no obligation to recruit a specific individual and Member States apply this principle in divergent ways. The principle is implemented in Cyprus and ads for domestic workers are published in local newspapers. However, there is no data regarding the people who reply to these ads and whether they are rejected.

approval of the Migration Department. Third, following a decision of the Supreme Court, migrants on a domestic worker visa are also barred from accessing permanent residence¹³. Subsequently, they cannot qualify for family reunification because one of the requirements is that the applicant has reasonable prospects to acquire long-term residence. Thus, domestic workers in Cyprus pay a high price for having access to a regular migration status because the very same migration status subjects them to conditions of subordination vis-à-vis the employer and denies them paths to citizenship.

Similarly, the Spanish immigration regime is also welcoming when it comes to the right of first entry for domestic workers as it establishes paths to regular migration such as the Catálogo de ocupaciones de difícil cobertura- the list of occupations in shortage of labour. Every three months, the Public Employment Services of each autonomous region assess the needs of the national labour market and then release a list of occupations which face a workforce shortage. Based on this list, non-EU nationals may be granted permits to work in those occupations. The domestic work sector is occasionally included in the list. The permits, which are in principle renewable, have an initial duration of one year and during this first year, the migrant worker is restricted in the sector and the geographical region for which the permit was granted.

But when compared to Cyprus, in Spain the treatment once the migrant is in the country is overall much more liberal. The permit does not restrict the domestic worker's right to change employer and there are no legal restrictions on qualifying for long-term residence and family reunification¹⁴. Also, at least until recently, it was relatively easy for migrants from former Spanish colonies to access citizenship through facilitated naturalisation processes. The easier paths to naturalisation in Spain have turned many non-EU workers into nationals; as nationals, these domestic workers, face no additional immigration restrictions limiting their bargaining power at work and are shielded from deportability and its side effects.

In a comparative perspective, the immigration regimes in Spain and Cyprus are welcoming in terms of entry but the treatment and conditions once the migrant has entered vary significantly between the two countries. The Cypriot regime attaches very restrictive conditions to the migrant domestic worker visa; it is the paradigmatic regime which allows the employers of migrants to have “additional means of control” over labour (Anderson, 2010:310). Spain on the other hand, has a relatively welcoming approach after entry as well. This variation shapes two distinctive profiles of the domestic work sector. Thus the relatively liberal immigration and citizenship regimes in Spain have shaped a sector which is much more diverse when compared to the one in Cyprus; the domestic work sector in Spain is comprised of non-EU migrants, together with high numbers of EU nationals and national workers. On the contrary in

¹³ In *Crescencia Cabotaje Motilla vs. The Republic of Cyprus*, (Case no.673/2006, 2008) the Supreme Court of Cyprus ruled that a Filipino domestic worker, who even though had been legally and continuously residing in the country for more than five years, is not eligible for long-term residence on the ground that her initial residence permit was temporary.

¹⁴ Though factual barriers certainly do exist.

Cyprus, non-EU migrants are disproportionately employed as domestic workers in private households since EU migrants, who are not conditioned by their immigration status, are not legally restricted to find employment in other sectors. This of course does not mean that there are no other factors, such as race and nationality, channelling even EU migrants to specific precarious sectors; however, the legal restrictions imposed on non-EU migrants leave them with no other option but to congregate in domestic work. Thus we see that in Spain, alongside temporary migrants, there are significant numbers of nationals and EU nationals working in domestic work; the presence of workers who do not face the legal restrictions that temporary migrants do, creates more favourable conditions for mobilisation and legal change.

3. MIGRANT DOMESTIC WORKERS UNDER THE CYPRIOT EMPLOYMENT LAW REGIME: A VERY SPECIAL VULNERABILITY

The interplay of the immigration and employment regimes in Cyprus creates what I suggest is a very special situation of vulnerability for migrant domestic workers. Crucially, migrants on a domestic worker visa are subjected to a unique employment law regime with state-designed conditions of work. The state has crafted a separate employment regime which regulates exclusively the work of migrants on a domestic worker visa. The source of this regime is a model contract of employment, designed and distributed by the Immigration Department. As a source of employment law, this contract is exceptional and problematic; it was drafted by immigration authorities to regulate a private law relationship, while diverging from the generally applicable employment regulatory framework, i.e. statutory legislation and collective agreements, in many respects. Contrary to the model contract of employment that the state prepared for other categories of labour migrants, the contract for migrant domestic workers has not been reviewed by the Labour Department for its compliance with employment legislation¹⁵.

In terms of content, the contract includes provisions unsuitable to an employment contract. First, there are abundant references to immigration rules and controls emphasizing in the most explicit way the status of the employee as a migrant. A prominent example in this respect is the inclusion in the contract of the prohibition to change employer¹⁶. In some instances references to immigration rules have even a threatening tone. For example, clause 5 (c) adverts that: “breach of any clause of the contract will automatically cause the termination of the contract as well as the validity of the Employment and Residence Permit.” In fact, it is clearly established that the

¹⁵ The Labour Department is responsible to examine the model employment contracts, prepared and disseminated by the Immigration Department, for their compliance with employment legislation. However, domestic workers' contract has never received any input from the Labour Department. In practice, the Migration department is the sole authority regulating *both* the entry rules and the employment conditions of migrants on a domestic worker visa.

¹⁶ “[the Employee] shall not be allowed to change Employer and place of employment during the validity of this contract and his Temporary Residence/Work Permit”, Clause 2 (a).

terms of the permit form an integral part of the contract¹⁷. Second, equally unusual are also certain clauses concerning the worker's obligations which go beyond setting normal disciplinary rules relevant to the employment relationship. These include provisions requiring the worker to "in all respects and all times conduct himself with propriety and decorum" and to abstain from participating in any "political action or activity" (Clauses 2f and 5h).

Third, the contract limits the worker's bargaining power by ruling out the right to negotiate a better salary. Clause 2(g) states in the most categorical way that the employee "shall not be entitled in any way and for any reason to any increase of his fixed salary [...]" . Fourth, what one would expect to find in an employment agreement but is remarkably absent from this particular one, is at least a brief description of the tasks the worker is expected to carry out. Instead, the contract makes a vague reference to the obligation to "obey and comply with all orders and instructions of the Employer and faithfully observe the rules, regulations and arrangements for the time being in force [...]" (Clause 2(c)). Fifth, the contract lowers the level of protection in relation to working time because, contrary to the framework for other sectors, there is no provision for daily rest breaks, no guarantees in relation to night work and no provision on maximum overtime hours or any guidance on how should overtime hours be remunerated.

Finally, the contract even restricts migrant domestic workers' freedom of association, a constitutionally protected freedom. The provision in question is clause 5 (h) which states that the employee

"shall not engage, contribute or in any way directly or indirectly take part in any political action or activity during the course of his stay in Cyprus [...]" (Clause 2(h))

Notably, the Greek version of the contract imposes an even more general prohibition because the word "political" is omitted. Hence, according to the Greek version, the migrant is prohibited from taking part directly or indirectly in any kind of action or activity. In essence, the way this provision is articulated, prohibits TCN domestic workers to take part in any kind of political, trade union or even social activity. The Ombudsman addressed this issue in a 2005 and urged the Immigration Department to remove this provisions from the contract; the Ombudsman highlighted the peculiarity of a constitutional freedom being restricted by the contract of employment which is a private law document but which was nonetheless prepared by the state (Ombudsman, 2005). Regrettably, even though ten years have passed since then, there was no compliance and the prohibition is still included in the contract. Given the constitutional, international and European guarantees of the freedom of association, the prohibition imposed in the contract, is not valid and as such it could not be invoked against the migrant to withdraw her residence permit. However, one should not underestimate the symbolic connotations of this prohibition as well as its effects in discouraging domestic workers from forming their trade unions or

¹⁷ Clause 5 (f) states that: "The conditions included in such Permit [Residence/Work] shall form part of this contract and shall be binding on both parties".

participating in existing ones. This prohibition is crucial when one considers that the contract clearly states that any violation of its terms can lead to deportation.

Finally, a highly problematic aspect of migrant domestic workers' employment regime in Cyprus is the regulation of wages. In Cyprus there is no statutory national minimum wage; wages are set in collective agreements at the sectoral or enterprise level and in individual employment contracts. The state only intervenes annually to set minimum wages for certain professions which are low paid and not collectively organised. The minimum wage applies *inter alia* to caretakers in elderly and nursery homes, private safety guards, clerks. Domestic workers employed in private households are not covered, but the government sets a wage for migrants on a domestic worker visa. For 2013 the gross salary for domestic workers was set at 460 Euro per month (314 Euro net) which corresponds to approximately 2 Euro (1.40 net) per hour provided that normal working hours are respected. In case of overtime work the hourly rate will of course be even lower. The two groups of workers covered by the statutory minimum wage and with tasks comparable to those of domestic workers in private households, are caretakers and cleaners. For example, in 2012, the monthly minimum salary for caretakers in nursing homes was set at 870 Euro per month and at 924 Euro per month after six consecutive months of employment with the same employer. For cleaners employed in business and corporate premises the hourly minimum rate was set at 4, 55 Euro and at 4, 86 Euro after six months of continuous employment.

The disparity between the remuneration of domestic workers in private households and that of workers with comparable tasks employed by businesses is significant and highly problematic. The Ombudsman has considered this differential treatment racial discrimination given that the vast majority of domestic workers in private households are non-EU nationals. One can of course further argue that it also constitutes discrimination on the basis of sex given that statistically the vast majority of domestic workers are women. The exceptionally low wage the state sets for migrant domestic workers clearly determines their accommodation options and explains the high percentages of live-in employment in Cyprus. Thus we see that in the case of Cyprus, the state through legal regulation exercises an active role in keeping migrant domestic labour very cheap as a way of providing private and affordable care.

4. SPECIAL REGIME BUT NEAR-NORMAL PROTECTION IN SPAIN

Domestic work for a private household (*servicio del hogar familiar*) is one of the employment relationships article 2 of the Spanish Workers' Statute considers to be of a "special character" and thus subjects it to a separate regulatory regime. The provisions of the special regime, which are left to be set through a separate legislative instrument, precede those of the Workers' Statue which are applicable only when the matter in question is not dealt with in the special regime. Historically, the recruitment of domestic workers in Spain was conceived outside the scope of Labour Law as a contract for services; it was thus regulated under the corresponding provisions of the Civil Code (Cueva Puente, 2005). The first legislative instrument to regulate paid domestic work as an employment relationship was Royal Decree 1424/1985 (Miñarro

Yanini, 2013). While that first instrument did acknowledge the employment character of the relationship between domestic worker and employer, it was more orientated towards upholding the autonomy of the parties than setting employment protections for the worker. As a result, labour law rights in the domestic work sector were significantly lower than in other sectors. Royal Decree 1424/1985 regulated paid domestic work in private households for 26 years. In 2011 Spain reformed the labour and social security legislation on domestic work responding to long-standing claims to improve the conditions of sector and end the discriminatory treatment (López Gandía and Toscani Giménez, 2012; Miñarro Yanini, 2012). The objectives of the reform were to progressively equalize the employment rights and social protections of domestic workers with those of other sectors and to put an end to the perennial problem of informality by facilitating domestic workers' affiliation to social security (Rodríguez Fernández, 2014). The new employment legislation, Royal Decree 1620/2011, introduces significant improvements for the sector's working conditions¹⁸. Here I will focus on the new labour legislation and examine selected provisions which can reduce the vulnerability of domestic workers: the right to receive written information on the conditions of work, the regulation of wages, provisions on working time and provisions strengthening the domestic worker's autonomy.

An important new aspect of the employment legislation is the employer's obligation to provide the worker with written information regarding the conditions of work including wages, the regulation of standby time and its remuneration as well as the regulation of night work (art. 5(4)). This provision flows from EU law and in particular Directive 91/533/EEC¹⁹. When Spain implemented the Directive it enacted an exemption in relation to the employers of domestic workers. The exemption is now lifted and thus the employers of domestic workers are under a binding obligation to provide workers with written information on essential aspects of the employment relationship.

Lack of information is a major source of vulnerability for domestic workers, especially migrants who may face additional linguistic and other barriers, when trying to navigate complex legal systems in order to make sense of their rights and obligations as employees. Having no accurate information on important aspects of their employment relationship can lead to lax enforcement of protective legislation and to exploitation. The Spanish legislation takes an important step to diminish domestic workers' vulnerability in this respect by entitling them to written, timely and accurate information. The provision has also an important symbolic value which should not be underestimated. A binding obligation on employers to provide workers with written statements helps to formalize an employment relationship which is often not regarded proper employment by the very parties participating in it. Employers tend not to view themselves as real employers and workers are often not aware of their status as workers, and of the full

¹⁸ For a comprehensive comparison between the previous and current legislation see León, 2013.

¹⁹ Council Directive (EEC) 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288/32.

range of employment rights available to them. Thus the provision addresses lack of awareness by framing the relationship between employer and domestic worker in employment law terms. The importance of having access to accurate information regarding working conditions is reflected in the ILO Convention on Decent Work for Domestic Workers which contains a similar provision (art.7, ILO C.189).

Under the new legislation, domestic workers have an enhanced protection in relation to their salaries when compared to the previous legislation. Decree 1620/2011 reaffirms domestic workers' entitlement to the national minimum wage and further sets that it may not be subjected to reductions for payments in kind (art.8(2)). Payments in kind, normally granted in the form of nutrition and/or accommodation, are now subjected to a maximum limit of 30% of the total salary which constitutes a significant improvement from the previous regime and brings domestic work at the same level as sectors under the general regime in terms of payments in kind²⁰. In contrast to Cyprus, the Spanish legislation explicitly gives domestic workers the possibility to negotiate a raise from the minimum wage through a collective or private agreement (art.8(1)). The payment of two extraordinary monthly salaries per year as for other categories of workers is guaranteed also for domestic workers (art.8 (4)).

In relation to working hours, Decree 1620/2011 establishes a maximum of 40 hours of work per week (art.9(1)) which is equal to maximum in other sectors. In addition to the normal working hours, the parties may also agree on certain hours of standby time. The legislation gives no definition of standby time but it is understood that the term refers to the time during which the worker is available to the employer without carrying out any tasks. Contrary to the previous regime, the new legislation sets some standards in relation to standby time that help to reduce the risk of exploitation in this respect (Miñaro Yanini, 2013). In particular, the Decree sets a weekly limit of 20 hours for standby and moreover requires that these are remunerated at the same rate as normal hours or, alternatively, compensated with additional rest time. (art.9(2)). Here, Spanish legislation takes some important steps to address one of the thorniest issues in the regulation of working time in general which is very relevant for domestic workers. The Decree further stipulates a minimum of twelve consecutive hours of rest between work shifts. There is however a degree of flexibility in relation to rest for live-in domestic workers; their daily rest can be reduced to ten hours and the remaining two hours may distributed in the course of four weeks²¹. Some authors consider that the provisions on working time for live-in domestic workers reflect a tendency to encourage flexibility in the distribution of working time as a means of accommodating the employer's needs (López Gandía and Toscani Giménez, 2012). It must be noted however, that the Spanish framework is very much in line with the international standards on working time (McCann and Murray, 2010; ILO, 2011).

²⁰ The previous Decree allowed in-kind payments for up to 45% of the total salary; the National Minimum Wage was not guaranteed.

²¹ This is an improvement from the previous regime which granted ten and eight hours of rest for live-out and live-in domestic workers respectively.

Regarding weekly rest, there is a provision of 36 consecutive hours and a specification that it is customary to enjoy these on Sunday and Saturday evening or Monday morning. The claim to specify the days of weekly rest was successfully put forward by domestic workers' associations. Having a set day off during the week is particularly important for domestic workers who normally work in an isolated workplace without any peer support. Sunday as a full day off gives domestic workers the opportunity to meet and socialize with their peers; this is an essential condition to collective organisation and mobilizing. The Decree also brings domestic workers' entitlement to paid annual leave at the same level as other works, that is stipulates 30 days of paid annual leave of which at least fifteen must be consecutive (art.9(7)).

When it comes to strengthening domestic workers' autonomy we can note the following provisions. Article 9(1) stipulates that once the worker has completed the normal hours of work and the agreed standby time, she is not obliged to remain in the household. This is a good example of a provision aiming at protecting the live-in domestic worker's autonomy; live-in domestics have evidently many challenges when it comes to safeguarding their autonomy (Anderson, 2000). Another important provision to note in this respect is Article 9(7) stating that during her paid leave, the worker cannot be obliged to reside in the household or to follow the family at their place of holiday. This is an innovative provision, introduced for the first time in Spanish legislation; even though still not ratified by Spain, the influence of ILO C.189 which contains a similar provision is evident (López Gandía and Toscani Giménez, 2012).

While the regulation of domestic work is still formally under a separate legislative instrument, the legislation is in fact adapted to deliver nearly the same level of protection as in other sectors. There remain, however, certain issues where domestic workers' protections and entitlements are lower to those of other workers. One is the rules on the termination of contract; the employer with a written declaration of withdrawal may dismiss the domestic worker without just cause, which is a requirement in other employment relationships. The flexibility in the termination of employment reflects the so-called "special character" of domestic work. Another limitation is domestic workers' exemption from the scope of legislation on health and safety at the workplace, as in article 3(4) Law 31/1995. The exemption, however, is certainly not absolute; the second limb of the article introduces the employer's obligation to ensure that domestic workers carry out their tasks in adequate health and safety conditions. Thus, the second limb of article 3(4) opens up the possibility to argue in favour of health and safety measures adapted to the context of the domestic household. Such an interpretation would be in line with article 13 of ILO C.189²². The Spanish law on health and safety may be juxtaposed to the EU Framework Directive on Health and Safety 89/391/EEC which introduces an absolute exemption of domestic workers from personal scope²³.

²² Article 13(1) ILO C.189 reads: "Every domestic worker has the right to a safe and healthy working environment. Each Member shall take, in accordance with national laws, regulations and practice, effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers."

²³ Article 3(a) Framework Directive 89/391/EEC on the introduction of measures to encourage improvements in the health and safety of workers at work, [1989], OJ L183/1.

Overall, the reformed labour law regime in Spain has introduced many positive elements for the labour protection of domestic workers and has advanced their approximation to the generally applicable employment law framework (Miñaro Yanini, 2013). It is, however, important to stress that the mere existence of a solid legal framework on paper does not straightforwardly guarantee the enjoyment of these rights in practice. Effective implementation of protective legislation remains a key challenge for the domestic work sector across countries and Spain is certainly not an exception. The difficulties in enforcement are often rooted in the intimate nature of the employer-domestic worker relationship which makes it particularly difficult for workers to denounce abuse, the lack or ineffectiveness of redress mechanisms and dispute resolution mechanisms, the nonexistence of trade union support, and as already noted, domestic workers' lack of awareness regarding the protections and rights available (Fredman, 2014).

The context of the current crisis further exacerbates the challenge of enforcement. The sharp deterioration of working conditions in almost all employment sectors since the beginning of the crisis impacts greatly on the conditions in the domestic work sector as well. While there is no evidence of considerable actual loss of employment in the domestic work sector within the last five years, there is certainly more precariousness and informality due to the crisis and the austerity measures adopted as a response to the crisis (López Gandía and Toscani Giménez, 2012; Rodriguez Fernandez, 2013; Ibañez and León, 2014). As the family budget decreases it becomes harder for households to purchase care and domestic services (Galvez and Torres, 2010). This creates an even stronger claim to keep domestic work low-cost and jeopardizes domestic workers' statutory entitlements as it translates into lower wages, longer hours, informality and general disregard of employment legislation.

Another obstacle to the effective implementation of the legal framework is the inability or reluctance of Labour Inspection authorities to carry out checks in private households. Article 12 of Decree 1620/2011 stipulates that implementation should be monitored by the Labour and Social Security Inspectorate according to the relevant procedures. Law 42/1997 on Labour Inspection states that to monitor the employer's private household, inspectors must obtain prior consent or a court order. The fact that the inspection of a private household is not a straightforward procedure jeopardizes the effectiveness of the legislation as disclosing exploitation becomes more difficult. Provisions limiting the powers of labour inspection authorities to enter private households are the norm in most legal systems. Such provisions are difficult to change because they are premised on constitutionally protected rights to privacy and intimacy. It is thus imperative to think of more innovative ways to inspect domestic workers' working conditions and circumvent the legal obstacles associated with the inspection of private households. In Ireland for example, a migrants' rights association, identified the lack of labour inspection as a vector of domestic workers' vulnerability and in cooperation with the national labour inspectorate they implemented a pilot programme of alternative inspections on a voluntary basis. The inspectors contacted a number of employers and asked to revise written documents such as contracts and pay slips. Most employers consented to the revisions in the household, while those who did not want to admit the inspectors accepted the revision in an alternative location. The inspectors

also interviewed third parties such as neighbors in order to obtain accurate information on working conditions. While the scheme was on a small scale, it was successful because it allowed authorities to identify what aspects of the legislation were not effectively implemented (Murphy, 2013). The role of domestic workers' organisations is crucial in promoting such innovative practices.

5. COMPARING PROCESSES OF REFORM AND THE AVENUES TO CHALLENGE THE VULNERABILITY OF MIGRANT DOMESTIC WORKERS

In Spain the reform of the employment legislation on domestic work emerged in the process of reforming the social security scheme. The reform of the legislation on domestic work was certainly not high on the government's political agenda; the opportunity was rather created by certain individuals in key positions in the government who worked in close cooperation with the Trade Unions and showed determination to advance the project of improving the Social Security protection of domestic workers. The result of these concerted efforts was Law 27/2011 on the update, adequacy and modernization of the social security system integrating the special social security regime for domestic workers which dated from 1969 into the general social security regime albeit under a separate system.

As the project of reforming the social security system was progressing, UGT, one of the two largest Trade Unions, started negotiating with the government for an update of the labour regulation as well. With significantly improved social protection for domestic workers, the provisions of the 1985 Royal Decree which regulated the working conditions now seemed outdated and inadequate²⁴. While the reform was not the product of an over-arching and long-term plan on how to deal with the care deficit, it did bring about significant improvements for the working conditions of domestic workers²⁵.

The process of reform has been particularly important for the mobilisation of domestic workers' groups to actively participate in the debate and articulate concrete proposals for the new Decree regulating their working conditions. A large number of domestic workers' groups across the country formed the National Platform of domestic workers' organisations which was then called to comment and position itself on the proposal for the new employment legislation. At the same time, the adoption of the ILO Convention 189 at the international level created a very much needed impetus for the reforms at the national level (León, 2013). Domestic workers' organisations mobilized, and continue to do so, to convince the government to ratify C189²⁶. The

²⁴ Interview with UGT officials, on file with author.

²⁵ Interview with UGT officials; interview with CC.OO official and interview with representatives of SEDOAC, on file with author.

²⁶ See for example, 18 March 2013 La marea, 'Las empleadas de hogar denuncian que España no protege sus derechos'<http://www.lamarea.com/2013/03/18/las-trabajadoras-del-hogar->

Convention gives these organisations a normative vocabulary to articulate their claims and affords legitimization to their struggles. Ratification is now a fundamental claim put forward by domestic workers' groups; ratification for them is a way to endorse and consolidate their rights at the national level.

Considering that Spanish employment legislation would not need major changes to comply with the Convention's provisions, the government's reluctance to ratify can be interpreted as lack of political will more than anything else. A potential obstacle is Article 14 C189 on state's obligation to afford domestic workers equal conditions as other workers in terms of Social Security protection; Spanish Social Security law as it stands, exempts domestic workers from the right to receive unemployment benefits. The exemption is incompatible with the Convention and would thus need to change. However, the second paragraph of Article 14 gives states flexibility to implement the right to equal social security protection progressively and in consultation with employers' and workers' organisations. Thus, Article 14 should not be seen as an unsurmountable obstacle for the ratification of ILO C189.

Domestic workers in Spain may have not been able to organize collectively in the traditional sense, i.e. in a Trade Union, and this makes their achievements much more volatile to changes (Mundlak and Shamir, 2014); however, domestic workers' groups across the country seized the opportunity of the reform to promote their interests and to consolidate their presence in the debate concerning their sector in alternative ways. The fact that domestic workers in Spain are not all temporary, deportable migrants as in Cyprus, has probably made it easier for them to mobilize as a collective of workers. The organisations became actively involved in the process of reform and may continue to play a significant role in promoting the implementation of the new employment legislation.

In Cyprus no such dynamic processes have taken place. This can be explained by the fact that domestic workers in private households are migrants, on guest-worker type visas, tied on their employers. Moreover, the formal restrictions on their associational rights and the ambivalence of the established Trade Unions towards migrants in general (Trimikliniotis, 1999; PICUM, 2013) and the domestic work sector in particular, can also explain why in Cyprus there is no collective organising and mobilising of domestic workers as workers. The restrictions are structured in immigration law but impact heavily on domestic workers' employment rights and position in the labour market. Due to the legal restrictions they face, domestic workers in Cyprus have only been able to form and participate in nationality-based associations which act as support networks for migrant communities in Cyprus but have no voice in public debates.

The preferred forum for migrant domestic workers' claims has been instead the Office of the Ombudsman. The Ombudsman has issued numerous reports on issues concerning the rights of migrant workers in general and of domestic workers in

denuncian-que-espana-no-ratifica-el-convenio-de-la-oit-que-reconoce-sus-derechos/ (accessed 02 Dicember 2015).

particular. Most reports were issued following individual complaints by domestic workers and migrants' associations. In 2013 the Ombudsman also published a wider study on the legal challenges this group faces in Cyprus, thus demonstrating the Institution's commitment with migrants in domestic work.

While the Ombudsman has steadily been receptive to the claims of migrant domestic workers, there are certain limitations to the improvements this Institution can achieve as it has no legal standing in Court proceedings and no power to produce legally binding decisions. The Ombudsman can only make, what are essentially non-legally binding, policy and legislative recommendations to the relevant state authorities. Despite having no legal effects, these reports and recommendations draw attention to and analyse the problematic aspects of the law and policy concerning the terms of stay and employment of migrant domestic workers in Cyprus. The Office of the Ombudsman with its expertise on human rights has been able to place the language of rights in the heart of the problem and to show the relevance of international and European legal instruments as source of rights for migrant domestic workers and of obligations for the state. However, the fact that this is practically the only forum available to migrant domestic workers can also partly explain why there has been no process of dynamic legislative change in Cyprus.

CONCLUSIONS

The very synchronized way in which the immigration and employment law regimes regulate migrant domestic labour in Cyprus gives an illustrative example of the role of legal regulation in structuring the vulnerability of domestic workers when they are migrants; as immigration law encroaches on employment law, the vulnerability of migrant workers is exacerbated. The state has created a separate and highly problematic legal regime to exclusively regulate the work of non-EU domestic workers. This regime has a profound gender impact since it is women who are most likely to hold a domestic worker visa; it places migrant domestic workers outside the scope of generally applicable labour legislation and essentially denies them any possibility to challenge their working conditions. Seen in a comparative perspective, the Spanish migration and employment law regimes make migrant domestic workers generally less vulnerable. The relatively more liberal immigration regime in Spain has shaped more favourable conditions for domestic workers to mobilize collectively and influence the regulation of their working conditions.

Even though labour law regulation in Spain is under a model of specific regulation, this model is adapted to provide protection that is similar to that of other sectors. This regime could be the basis for designing the employment law regulation of the paid domestic work sector in ways that help reduce vulnerability. Specific regulation, which is nonetheless adapted to provide similar labour law protection as in other sectors, holds the promise of decent work for domestic workers. However, more empirical work will need to be done to show whether it actually delivers its promise and to identify implementation obstacles. Migrant domestic workers suffer multiple, intersecting disadvantages across different countries and jurisdictions. Is law enough to

reduce their vulnerability? Certainly not. However, solid and protective statutory legislation is a precondition to achieve fairer treatment of a sector where collective organizing and bargaining are absent.

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