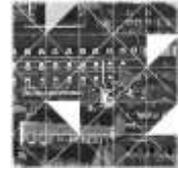

CIDADES, Comunidades e Territórios



Formalisation as a judicial claim: the case of paid domestic workers in Argentina

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Abstract

In Argentina, the majority of domestic workers are not registered. The combination of a lack of regulatory frameworks, limited inspection capabilities on the part of the state, and the culturally entrenched notion of domestic work as “servitude” and “help” has made informality the rule for paid domestic workers. Thus, formalisation is considered fundamental for the recognition of the social and labour rights, at both the policy and individual levels. The latter is evident in the process of labour disputes resolution established by the Domestic Work Tribunal in Buenos Aires. As a consequence, this article seeks to understand how the demand for formalisation appears at the centre of disputes over the recognition of rights at the Domestic Work Tribunal, becoming a judicial claim. How is formalisation used in the context of an individual labour dispute at the tribunal?

This paper, which is divided into two sections, draws on a study of the legal framework for paid domestic work, a quantitative and qualitative analysis of 156 judicial files and 1,000 rulings, and four months of ethnographic fieldwork. The first section analyses the way in which the process of formalisation is discussed, conceived, and implemented at the international and national level, and the way it is appropriated by employers and domestic workers. The second focuses on the dispute resolution process in which the meaning of formalisation changes according to the diverse actors involved.

Keywords: Paid domestic work, formalisation, informality, labour regulation, labour justice.

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As in many other parts of the world, paid domestic work is generally performed informally in Latin America. The majority of domestic workers worldwide have, at best, restricted access to labour rights and social security. Moreover, almost 30 percent are excluded from the scope of national labour laws (ILO, 2013). In fact, domestic work is one of the occupational categories with the highest incidence of informal arrangements. The ILO estimates that about 50 million of the 67 million domestic workers worldwide are informally employed (ILO, 2016).

In Argentina, the majority of domestic workers are not registered. This can be attributed to two factors, the first being the historical servitude model that traditionally helped to structure this type of employment relationship (Kuznesof, 1993). The second factor is the existing regulatory framework and its conditions of implementation. Since paid domestic work is considered an extension of the tasks assigned to women within the household, even today, it is hardly conceived as work. Instead, it is more commonly thought of as ‘help’ for the woman of the household, whether she is a housewife or works outside the home. The logic of replacing one woman with another makes the respective roles invisible (Pérez et al., 2018). What is unique about this employment relationship is that it forges connections between women from different social classes at the intersection between ‘the public’ – that is, labour, money, and the law – and ‘the private’ – the intimacy of domestic life (Gorbán & Tizziani, 2018). Likewise, the proximity and intimacy of working in the employer’s house – and, particularly, of caring for children, the elderly or the sick – allows affective relations to influence – and muddle – the labour relationship.

Regarding the regulatory framework, although most labour laws in Argentina did not apply to paid domestic work, a special regime covering this type of work was established in 1956. Compared to the general labour regime, this special regime was highly restrictive in terms of both its provisions and its scope. Certain provisions such as paid vacations, sick leave and severance pay were included in this regime, but their duration or amount were less than those guaranteed to other employees. In addition, the special regime for domestic workers covered only those who worked four hours, four days a week for the same employer. In 2000, the new Social Security Regime for Domestic Workers was introduced to provide social security benefits for anyone working more than six hours per week for the same employer. However, it was not until 2013, after the approval of a new special labour regime that all domestic workers, even those working just one hour each week for a single employer, became entitled to labour and social security rights. Although the scope of the law has thus expanded over the past two decades, informality remains high in this sector due to the limited implementation of the legislation. Since the employer’s house is the workplace, the supervision of compliance with regulations is complex, if not unfeasible (Loyo and Velásquez, 2009; Rodgers, 2009; Vega Ruiz, 2011). The Argentine state has no legal or institutional capacity to inspect homes.

The combination of a lack of regulatory frameworks, limited state inspection capabilities, and the culturally entrenched notion of domestic work as ‘servitude’ and ‘help’ has turned informality into rule for paid domestic workers. In 2003, only 5 per cent of domestic workers were formal workers. Since then, registration has experienced two spikes, the first in 2005, when tax deductions were introduced, and the second in 2013, after the passage of the new law. However, the group of domestic workers that benefited the most from the rise in formalisation were those working more than 16 hours per week for the same employer. After 2005, informality dropped precisely among these workers because tax incentives were higher for employers of part-time or full-time workers. After 2013, however, registration of those working less than 16 hours also rose slightly. Even so, 75 per cent of all domestic workers are still informally employed (Pereyra, 2017).

Due to the persistently high levels of informality, formalisation is considered fundamental for the recognition of social and labour rights, at both the policy and individual levels. The latter is evident in the process of labour disputes resolution established by the Domestic Work Tribunal in Buenos Aires. This specific court was created by the 1956 Special Regime, and lightly modified by the 2013 law. The main purpose of this administrative body unique to the domestic work sector is to foster conciliation through mediation. Based on the model of other administrative jurisdictions entrusted with resolving individual conflicts among employees, the Domestic Work Tribunal functions as a first-instance court; parties can later appeal its sentences to the Labour Justice.

Thus, this article seeks to understand how the demand for formalisation appears at the centre of disputes over the recognition of rights at the Domestic Work Tribunal. That requires analysing the meanings of formalisation at

public policy level and within individual labour conflicts. During the standard-setting process at the International Labour Organisation resulting in the approval of Convention 189 and Recommendation 201 in 2011, formalisation was presented as a crucial mechanism to ensure enforcement of the law. Moreover, in Argentina, since 2005, formalisation has been the principal strategy to extend domestic workers' access to labour and social security rights. This paper thus aims to analyse the way in which formalisation became a judicial claim. How is formalisation used in the context of an individual labour dispute at the tribunal?

The paper, which is divided into two sections, draws on a study of the legal framework for paid domestic work, a quantitative and qualitative analysis of 156 judicial files and 1,000 rulings, and four months of ethnographic fieldwork. The first section analyses the way in which the process of formalisation is discussed, conceived, and implemented at the international and national level, and the way it is appropriated by employers and domestic workers. The second focuses on the dispute resolution process in which the meaning of formalisation changes according to the diverse actors involved.

1. Informality as a problem, formalisation as a solution

In recent decades, formalisation has been treated as the solution to informality. The elaboration and dissemination of this concept can be attributed to the ILO, which has also promoted different strategies to achieve formalisation. For over four decades, the meaning of the term informality has shifted with the times. Studies on the topic note that the definition of 'informal sector' proposed in 1972 by the employment mission to Kenya gave rise to the concept. In the context of a wide-ranging debate on the evolution of labour markets in developing countries that followed Arthur Lewis's 1954 article, Hans Singer and Richard Jolly's mission into Kenya showed that there is a traditional sector of the economy capable of creating employment and thus reducing poverty (Trebilcock, 2006, Chen, 2012). Shortly after, the concept of 'informal sector' became a key topic in developing countries. In the years since, different actors with ties to the ILO have proposed new definitions to unriddle the meaning of the concept (La Hovary, 2015). In some cases, the purpose of such clarifications was to develop statistical measures of informality; in others, it was to draft recommendations for formalisation policies.

In 1991, according to the report *The Dilemma of the Informal Sector* (ILO, 1991) the informal sector was comprised of small-scale production units and independent unskilled workers with little capital, limited technological capabilities, and low and erratic income (Neffa, 2008). This definition was mainly the outcome of the Latin American debate, particularly the studies by the PREALC ILO.² The activities of the urban poor within this heterogeneous sector are considered a survival strategy in developing countries. In keeping with this definition, the ILO International Conference of Labour Statisticians (ICLS) clarified in 1993 that the 'informal sector' refers not to the personal characteristics of informal workers or the jobs they do but to the companies where informal jobs are done. The focus is on an economic sector, not on mechanisms to regulate work arrangements on the labour market (Husmanns, 2004a).

In 2002, the notion of informality broadened under the ILO "Resolution Concerning Decent Work and the Informal Economy". This resolution described the concept of informal economy, which "refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements" (ILO, 2002). A year later, the ICLS added the concept of 'informal jobs' in an attempt to evaluate and measure the informal economy. According to the organisation's definition, "employees are considered to have informal jobs if their employment relationship is, in law or in practice, not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave, etc.)" (ILO, 2003). In the ILO's approach, informal economy and informal jobs are thus considered complementary concepts (Husmanns, 2004b).

In 2015, the "Transition from the Informal to the Formal Economy Recommendation" (R204) updated the 2003 definition of informal economy. In this more precise characterisation of economic units, they are described as

² Regional Employment Programme for Latin America – ILO.

“units that employ hired labour; that are owned by individuals working on their own account – either alone or with the help of contributing family workers; cooperatives and social and solidarity economic units.” Among these units, Recommendation 204 highlights households (article 4), because domestic workers are considered among the most vulnerable workers.

Through these myriad definitions, the ILO frames informality as two different problems. On the one hand, informality refers to the exclusion of certain worker categories from the law; this reveals gaps in existing legislation, which does not cover all of the positions on the labour market. On the other, informality is presented as a question of noncompliance with the law – or even fraud (Davidov, 2005). Therefore, state intervention must take two very different paths: while expanding the legal framework, it is also necessary to implement effective enforcement mechanisms. In Argentina, since 2000, the expansion of the scope of the legal framework for domestic work has been accompanied by innovative enforcement mechanisms (Poblete, 2019).

For the implementation of the legal framework, the ILO recommends two possible strategies that certain countries like Argentina have utilised simultaneously. One of these strategies involves dissuading informality, and the other, enabling formalisation. With a view to discouraging informality and pressuring employers to register workers, the deterrent approach includes measures like public information campaigns, labour inspections, complaint mechanisms, dispute resolution systems, and support to the parties engaged in an employment relationship (ILO, 2016). Several articles in the ILO Convention 189 Decent Work for Domestic Workers include the provisions to guarantee legal enforcement. In Argentina, a specific labour court provides complaint mechanisms and dispute resolution systems under the first labour regime for domestic workers introduced in 1956. Although the jurisdiction of the Domestic Work Tribunal is limited to the city of Buenos Aires, other provinces have developed similar systems since 1956, and the tribunal remains a model in guaranteeing access to labour justice.

The second strategy to promote compliance with the law, the enabling approach, focuses on removing barriers to formalisation and introducing incentives for formal labour relationships – like tax deductions, simplified registrations, and lower social security contributions and exemptions (ILO, 2016). Although employers are the main target of the incentives, the Argentine state also offers benefits for registered domestic workers, including public transportation subsidies and access to social security. In addition, informal workers with a formal labour contract no longer have to forfeit other social benefits – like the Universal Allowance for Children – as a condition for holding formal employment (Poblete, 2018). However, some incompatibilities with other social security schemes remain that prevent domestic workers from being formalised (Pereyra, 2017).

Although formalisation is presented as the first step to recognising domestic workers’ labour and social rights, its effectiveness has been questioned. Some authors, like Adelle Blackett (2019), are cautious about whether formalisation can actually result in legal formalism when it is built on a legal fiction. Treating formalisation as synonymous with access to social protection may conceal historical forms of marginalisation, exclusion, inequality and social invisibility (Blackett, 2019: 37). If public policies focus exclusively on the legality of the labour relationship – registered or unregistered in social security systems or other labour institutions – the unlawful and exploitative dynamics that shape domestic work labour relationship are rendered invisible. Other scholars, such as Francisca Pereyra (2017), point out that compliance with other rights – like wages, paid vacations, severance payment, etc. – may be an offshoot of formalisation. Based on empirical research conducted in 2011 and 2017 in Argentina, Pereyra shows that when domestic workers work formally, recognition of a basic set of rights is more likely (Pereyra, 2017: 62). However, some of these rights are entrenched in the country’s work culture – like the annual bonus and vacations – and thus, workers both registered and unregistered tend to benefit from them (Pereyra, 2012).

Beside the controversies surrounding the notion of informality, and its antidote, formalisation, Argentina has followed ILO recommendations in an effort to guarantee domestic workers the same rights as other workers.

1.1 Local formalization policies

In Argentina, the scope of the law and noncompliance with the law are the two key issues in the ILO's conception of informality addressed in local policies. The overarching aim of the law is to guarantee that all workers receive basic social protection or, at the very least, health insurance and retirement pension.

Informality was initially viewed as an issue arising from the limited scope of existing legislation, which excluded more than half of domestic workers. Under the Special Domestic Work Regime established by the Presidential Decree 326/56³ – the sole regulation to govern domestic work between 1956 and 2000, only workers who resided in the employer's household or performed activities in the same household at least four hours a day, four days per week, could be registered. According to the Ministry of Labour, the law covered just 47.2 per cent of domestic workers, since half of all workers with a single employer worked less than sixteen hours a week; and the majority of the workers with more than one employer did not work sixteen hours for any of them (MTEySS, 2006).

In order to expand the legislation to cover more of these workers, Law 25,239⁴ was enacted in 2000. Under this law, the Special Social Security Regime for Domestic Workers extended social security benefits to all domestic workers performing at least six hours of work per week for a single employer. In the expanded legal coverage of the new regime, the 1956 statute was not repealed, however. Due to the nature of the contributory system, the two coexisting regimes created certain inequalities among workers in the same occupation. While domestic workers covered by the more recent social security regime only had the right to social security benefits, the domestic workers covered by the 1956 regime benefitted from nearly the same labour rights as employees in other economic sectors. In addition, under the newer regime, access to social security benefits depend on a worker's capacity to make contributions (Poblete, 2015).

Once the new regime was introduced in 2000, 90.6 per cent of domestic workers qualified for formal employment under one of the two regimes (MTEySS, 2006). With the aim of integrating the remaining 9.4 per cent, in 2004, an Executive Order⁵ established that all domestic workers working less than six hours per week for one or more employer could enrol as self-employed workers under the Single Tax Regimen⁶. Since the domestic workers in this situation are considered independent service providers, they are responsible for making their own social contributions and paying their own taxes. However, it seemed doubtful that many domestic workers would enrol in this system because those working just a few hours for several employers rarely end up working full days; therefore, they earn considerably less, and are unlikely to prioritize the payment of social contributions over more basic needs. In addition, hourly domestic work generates unsteady income since the households where such domestic workers are employed have changing needs. Despite the full gamut of enrolment options starting in 2004, only seven per cent of domestic workers were in fact legally registered as formal domestic workers in 2005 (Groisman and Sconfienza, 2013).

While the first decade of the twenty-first century entailed a significant drop in informality, it remained persistently high. In 2012, only sixteen per cent of domestic workers worked as formal workers. Legislators thus began working to draft a bill that would successfully formalise domestic work. Passed in 2013, Law 26.844⁷ was a milestone in legislation on domestic work, as it granted labour and social rights to all domestic workers providing at least one hour of service a week. Domestic workers were now entitled to a limited number of working hours, weekly rest, worker compensation, a trial period, severance pay, overtime, annual mandatory bonuses, and paid holidays, sick leave and maternity leave. Although the new law was put into effect through yet another Special Regime, the rights of domestic workers are now comparable to those conferred by the Labour Contract Act that regulates the work performed by private sector employees.

The different regulations aimed to formalise this type of work, that is overwhelmingly done informally. By doing so, they gradually amended the very definition of domestic worker. In 1956, the usual form of domestic

³ Presidential Decree 326/56, January 14, 1956, Argentina.

⁴ Law 25239, December 31, 1999, Argentina.

⁵ Presidential Decree 804/04, June 23, 2004.

⁶ The Single Tax Regime is a Special Tax and Social Security Regime for low-income taxpayers established in 1998.

⁷ Law 26844 (Special Regime of Employment Contract for Domestic Workers), April 12, 2013, Argentina.

employment – that is full-time or live-in work – defined this category but, by the turn of the century, very few domestic workers had such arrangements with their employers. For that reason, the 2000 law considered a domestic worker to be any person cleaning in a household at least six hours a week for a single employer. As with ILO Convention 189, the aim was to exclusively include domestic workers who do this type of work on an ‘occupational basis’. Later, in 2013, legislators acknowledged the myriad work arrangements and the rise in hourly work in the sector, resulting in a law that did not set a minimum number of work hours. At that point, a domestic worker was now defined as any person cleaning or providing personal care in households, regardless of how many hours she worked. Thus, domestic work regulation goes from selectivity to universalism in terms of labour law coverage (Davidov, 2014). The 2013 law has effectively covered all domestic workers since then.

However, limited enforcement of legislation is another reason why domestic work is frequently relegated to the informal sector. It is difficult to ensure compliance with the law when the workplace is a private residence, for two reasons. First, the state does not have the legal authority to enter a person’s home without a warrant; second, the state also lacks institutional structure, i.e. a special team of labour inspectors, that such visits would require. Thus, to increase compliance, the government continued to develop different strategies based on the enabling and the deterrent approaches. With a view to removing barriers to formalisation, the state simplified the mechanisms of enrolment, and introduced tax incentives. Seeking to dissuade informality, with different partners – such as ILO and domestic workers unions –, the state developed public campaigns to inform the public on the duties of employers and the rights of domestic workers. Also, a compulsory enrolment system for domestic workers presumed to be working informally was instituted, accompanied with an intensive media campaign and the surveillance of the Public Treasury IT devices.

New information technologies have contributed greatly to simplifying the regime. In 2002, an online system launched by the Public Treasury streamlined both enrolment and the payment of social security contributions. In an additional effort to facilitate the process, the 2013 law allowed for three enrolment options: an employer could register their domestic worker on the public treasury website, by calling a toll-free number, or on home banking websites. The goal was to make the enrolment of domestic workers as easy as clicking a mouse.

Second, Law 26,063⁸ established, in 2005, a tax exemption for employers to further promote enrolment. Subject to the limit prescribed by the Public Treasury (sec.16), employers of a domestic worker can deduct up to the full amount of social contributions – and even the worker’s wages – from income tax returns. Due to their success, these tax incentives have remained in force. In fact, formal employment in the sector almost tripled during the first year following the introduction of the incentives, rising from 52,150 domestic workers enrolled in 2004 to 142,200 in 2006 (Salim and D’Angela, 2006).

Third, with the aim of increasing compliance, the law established an “ex-officio formalisation” in which households with certain characteristics were presumed to have non-registered domestic workers. Established in 2013, the Minimum Domestic Work Indicator⁹ drew on legislation covering social security fraud from 1970 (and its 2004 amendment) and a formula for estimating social security debts of employers in the textile industry and construction sector¹⁰. The indicator was based on gross annual income and the taxpayer’s declared personal assets (especially real estate). In cases in which a taxpayer’s gross annual income and property value exceeded the minimum established by the indicator, there was a presumption of a domestic worker in the home who had not been enrolled. In these cases, the Public Treasury would send a notice to the taxpayers, giving them a deadline to formalise the presumed employee. If the taxpayer did not enrol a domestic worker by the deadline, the Public Treasury proceeded to collect the corresponding social security contributions and taxes. Though controversial, the “presumption of a domestic worker” measure was initially effective. However, when the Executive decided that the indicators were insufficient to presume the existence of an informal domestic worker in 2016, the measure was repealed.¹¹

⁸ Law 26063 (Tax Reform), December 5, 2005, Argentina.

⁹ Public Treasury Resolution 3492/13, April 30, 2013.

¹⁰ Public Treasury Resolution 2927/10, October 21, 2010.

¹¹ Public Treasury Resolution 3828/16, February 19, 2016.

The final strategy for reducing informality in the domestic work sector involved public campaigns on the rights of domestic workers and on employer obligations. The two campaigns – one targeting domestic workers and the other, employers – were designed in a collaboration between the ILO and the Ministry of Labour. In some cases, the campaigns even targeted domestic workers who had recently migrated to Argentina and women in other countries – like Paraguay – with plans to migrate to Argentina.

1.2 The meaning of formalisation from the actors' perspective

Within the domestic work sector, 'the law of the household workplace', to borrow Adelle Blackett's term (2019), takes precedence over the law, which is why formalisation has ambiguous meanings. The domestic work labour relationship is structured by the law of the household workplace, as are the behaviours of both employers and domestic workers: lawful versus unlawful is irrelevant in the face of what domestic workers and employers consider fair or normal.

Although formalisation has been presented as the key to accessing social security benefits from the state, domestic workers and employers have their own ideas about the benefits of a formalised labour relationship. A qualitative investigation conducted by Francisca Pereyra¹² (Pereyra, 2013, 2017) before and after the approval of the 2013 law shows that domestic workers and employers generally consider formalisation a very important issue when speaking about general principles.

However, when employers talk about why they haven't registered a domestic worker, excuses begin to appear: "One of her other employers has already registered her," "She says she'll be forced to abandon some welfare plan if I register her," "She's from Paraguay, and doesn't have work papers," "She's on her husband's health plan". In these accounts, formalisation is treated not as an employer's responsibility, but as an option for the domestic workers. The unlawful behaviour of employers is thus portrayed as merely granting the domestic worker's request.

From the domestic workers' perspective, formalisation is entirely up to their employers. When Pereyra inquired into whether they had asked their employer to register them, all the domestic workers said no. Most added that they feared not only a negative response, but also dismissal: the employer might well respond, "You don't need to come anymore" (Pereyra, 2017, 68).

In both cases, compliance with the law is depicted as the other party's choice instead of both parties' obligation. As domestic workers and employers understand compliance with the law as voluntary, they can choose when to treat informality as a major issue.

2. Formalisation as a legal argument at the tribunal

Informality is the most common cause for individual labour conflicts at the Domestic Work Tribunal. In 57 per cent of the cases files that ended in a judgment between 2015 and 2018, the motive for the suit was the lack of worker registration or partial and/or inaccurate registration. Because the majority of paid domestic workers are informal workers, it follows that this would be the case. Thus, in order to understand the way in which this argument appears over the course of the procedure established by the tribunal, the paper will focus on the analysis of five cases. The assessment of these cases is based on the full legal proceedings, the hearing records, and the fieldwork notes at the conciliatory hearings witnessed as part of fieldwork.

These different sources provide insight into the way in which the procedural mechanisms and legal practices shape the labour dispute. While the records of the hearings and the case files generate a particular form of translation based on legal language (Bourdieu, 1986), the fieldwork reveals another form of translation processes that take place during the face-to-face meetings. At these meetings, the labour conflict is translated into everyday language,

¹² Francisca Pereyra conducted focus groups interviews with employers in 2011 and 2017, and with domestic workers in 2017.

giving it new meanings. The section starts with a description of the legal cases; this is followed by an overview of how formalisation is invoked as a legal strategy by the plaintiffs' attorneys; finally, the question of how the parties to the conflict utilise the legal strategy is addressed.

2.1 Formalisation as an argument in five cases

The Domestic Worker Tribunal operates similarly to the Argentine Labour Courts because the same legal framework applies to all. However, some of its procedural stages were adapted based on the particularities of this type of labour relationship. Once the claim is filed, the tribunal summons the parties to a conciliation hearing. If no conciliation is possible in that first instance, the defendant must respond to the complaint in writing. The court then issues a summons for a second conciliatory hearing. If the parties cannot reach an agreement, the court conciliation officer (essentially a mediator) calls the witnesses. Once the testimonial hearings are over, the tribunal schedules another hearing with the parties in a third attempt at conciliation. As the tribunal seeks to foster conciliation through mediation, the mediators may call for conciliatory hearings at any stage of the legal proceedings. If no agreement is reached, the tribunal staff in charge of judgments evaluate the case file. According to the mediators, the entire process can take about five years. This motivates every actor involved to seek a compromise at some point during the proceedings. However, for the tribunal to accept an agreement and it to become legally binding, it needs to cover at least 70 per cent of the items the worker has detailed in the claim.

The cases analysed here cover only a small part of this legal procedure, since the parties reached a settlement at the first hearing in all five cases. Nonetheless, the cases vary greatly with regard to the duration and intensity of the employment relationship. In most cases, the employment relationship commenced prior to the enactment of the 2013 law. In one case, the employment relationship lasted eight years, in three cases it lasted five years, and in the sole case where it started after 2013, it lasted just seven months. The hourly workload varied between five and fifty-four hours per week. In three of the cases, the domestic worker performed less than sixteen hours per week, and in two, over forty. Thus, the compensations the plaintiffs sought also varied significantly. Beyond these differences, formalisation was the main argument presented in all of the lawsuits examined, despite the fact that all of the reported labour relations were registered.

Formalisation is presented as the main goal when a worker is employed informally, but it becomes a source of suspicion and accusations when a worker is, in fact, registered. The certifications given by the Public Treasure do not constitute valid proof because the assumption is that the employers could have falsified said documents. Consequently, the status of the labour relationship – formal, formalised but inaccurate, or informal – is a matter of dispute at the Domestic Work Tribunal.

2.2. Formalisation as a legal strategy

Once the labour contract is broken, the attorneys representing the domestic workers generally based their arguments on non-registration (or partial and/or inaccurate registration). According to these attorneys, because the employer broke the law by not registering the domestic worker, or not accurately reporting her hours, tasks performed, etc. s/he must pay the full severance established by the law. This strategy is used at every step of the legal process, but especially in the certified letters exchanged prior to filing the lawsuit. The first certified letter sent by the domestic worker – as dictated by her legal counsel – always begins with variations of two legal formulas: “I urge you to clarify the status of my employment” or “I urge you to proceed to (accurately) register the employment relationship”. There is an implicit accusation in these formulas. The employer is the one who put an end to the labour – and also the personal – relationship through his/her crafty and illegal behaviour. The numerous certified letters included in the corpus of 156 legal files describe informality as the greatest possible affront. In the five files analysed here, for example, the second certified letter sent by a domestic worker in response to her employer's response to her first certified letter, stated:

“Your response reveals that you shall not proceed with the legal registration of the employment relationship that binds us according to the information provided in my previous letters. (...) It therefore follows that you shall not proceed to make the social security contributions corresponding to my actual time of service, labour category and working hours. Each of these circumstances constitutes affronts of such magnitude that they prevent me from continuing as your employee. I see this as a serious affront and consider this a dismissal for which you are exclusively to blame.”

The employers’ responses reveal a similar use of a legal vocabulary that appears to have deep moral connotations (from an external perspective). The denial of all claims is a basic legal strategy. For this reason, one employer denied each and every accusation the worker presented in her first and handwritten certified letter:

“I reject the allegations of your telegram as false and inapplicable. I firmly deny any employment relationship with you. I therefore deny the termination of a job that never existed and state that there is thus no employment status requiring clarification. I shall not proceed to register the employment relationship you falsely allege and, in this regard, I reject as false the start date, salary, tasks, and work day described in your allegations. I reject the application of Law 24,013. I reject the notice to deliver salary receipts, proof of social security and health insurance payments. I insist that no employment relationship exists. I deny the existence of overtime. I reject the written warnings. You are hereby notified.”

Thus, the demand for formalisation serves as the central argument of the misdoings in the certified letters in which the parties vie to intimidate one another, guided by the standardised legal formulas to resolve labour disputes. In the claims presented by domestic worker attorneys, non-registration or partial registration is also a fundamental allegation, especially because it allows the regular amounts due for unjustified dismissal to be doubled, as provided for in Article 50 of the 2013 law. By including a demand for extremely elevated severance pay in the lawsuit, attorneys for domestic worker exert pressure on the defendant during the negotiations at the conciliatory hearing, though these demands rarely result in the highest compensation possible.

During one hearing in which the plaintiff was demanding a particularly high compensation, the negotiation played out as follows:

Employer’s attorney: I can make you an offer, but I can’t offer you that. I will acknowledge the length of service that’s on the record.

Worker’s attorney: Without any fines?¹³

Employer’s attorney: I’m going to talk to my client about that, because he didn’t even know about the lawsuit until Wednesday, when his daughter handed him the notice. I then couldn’t come into court to see the contents of the suit until Friday. If you say she wants 141,000 pesos, I’ll tell you no flat out.

Mediator: According to my calculation, the full amount of the lawsuit without the fine would be 72,000 pesos.

Employer’s attorney: You tell me how much it is... Tell me what you’re thinking...

Worker’s attorney: I’m not willing to let you off without paying the annual bonus.

Employer’s attorney: Not even for 58,000? If you say 58, I’ll see what my client says.

Worker’s attorney: At least the total amount stated in the suit.

Employer’s attorney: If it’s 72,000, I can tell you, that’s not going to fly. I’ll talk to my client, though.

Mediator: But 58,000 would be 70% of the amount of the lawsuit. What does your client think?

Worker’s attorney: My client will accept whatever I advise her to accept. But I am not willing to have you only acknowledge the length of service that’s on the record.

The employer’s attorney exits to speak with his client and when he returns, he says:

Employer’s attorney: I’ve got him up to 45,000. If you come back with 50,000, I could get him to do that in three monthly instalments.

The worker’s attorney shakes her head.

¹³ The fines refer here are the ones of the Article 50 of Law 26,844 (mentioned above).

Mediator: Could it be 60,000 in three instalments?

Worker's attorney: Well, I'll have to see. I had told her it would be 85,000 with interest. I'm going to see what she says.

She exits and when she returns, she agrees to the proposal.

This exchange shows that the amount established in the lawsuit represents only a benchmark for negotiation that the employer's attorney may quickly dismiss as unfeasible. Even the domestic worker knows they are not likely to receive the full amount, though this is rarely stated. In this case, the point of reference was the calculation made by the mediator, which includes only a set of items that there is no need to prove. On other occasions, however – even when it is evident that demanding a high settlement is a strategy and not what they are actually expecting – it can function as an effective bargaining tool if domestic workers refuse to accept considerably less than they are seeking in their demand. However, this legal strategy loses its effectiveness when the parties in conflict translate legal language into everyday language and begin interpreting the proceedings from an emotional point of view.

In the five cases analysed, the final settlement amounts in almost all the conciliatory agreements ranged from 30 to 42 per cent of the amount stated in the lawsuit. In just one case, which we will examine in detail in Section 2.3, the settlement reached 53 per cent of the amount the worker was seeking. In all cases, these percentages covered at least 70 per cent of the categories that there is no need to prove. For the court, 70 per cent of the total for these categories is the baseline, and it will not approve any agreement between the parties that does not reach this threshold. Although the strategy of maximising the amount a worker is seeking can be effective when negotiating a settlement in the conciliatory hearings, the actual amount – generally less than 40 per cent of the original number – is a source of great disappointment for the domestic workers. As it appears during the fieldwork, their attorneys, who often mismanage these expectations and do not give domestic workers the full picture from the outset, are generally to blame. This is especially the case when the settlement is paid in two or three monthly instalments and does not cover the contribution of back dues that allows her access to social security benefits.

2.3. Informality as proof of disregard

Although formalisation is frequently used by lawyers as a negotiating strategy, domestic workers and employers often find it difficult to understand, especially in cases when the worker was, in fact, registered at the time of the dismissal. One particularity of labour conflicts in this sector is that, for the parties in conflict, the focus of the dispute is mainly affective, related to the breach of trust that structures this particular work relationship. Due to the nature of the performed tasks and the proximity between employer and employee resulting from the fact that the workplace is the employer's home, emotional ties and intimacy are embedded in the labour relationship. Thus, the parties view the judicial claim as a violent interruption of the personal and affective agreement which is the basis of this labour contract.

When the domestic worker makes an arrangement understood as part of the private sphere public, this represents a provocation for employers. This is because, on the one hand, it enables third parties to get involved in the relationship, and because – like in these five cases – it involved a false allegation regarding the informal status of the employment. The domestic workers experience the interruption of the employment relationship as the breaking point in the affective relationship. The judicial claim highlights the fact that employment is a contractual relationship governed by the law, not affection. Likewise, the different stages of the administrative procedure increase the upset and misunderstandings, given that the aforementioned legal formulas – such as “I firmly deny any employment relationship with you” or “I reject the allegations of your telegram as false and malicious” – lose the meaning they are attributed in judicial proceedings and take on the sense they hold in everyday language. In the certified letters and written complaints, the refusal to recognise what the plaintiff is describing – and the use of terms such as ‘fallacious’, ‘malicious’ and ‘false’ – are interpreted by the workers as a sign of contempt and a form of aggression that calls into question their honesty. Both parties then feel that the bond of trust that united them has eroded, leading them to express strong, and at times even uncompromising, positions. In these cases, the worker and the employer became unwilling to find a middle ground because they feel personally betrayed. For the

domestic workers, the judicial proceedings are indicative of the employer’s refusal to recognise the work she has performed; for the employers, the lawsuit questions their position as a good employer.

In the five cases analysed, the only one in which the domestic worker obtained more than 53 per cent of the amount sought in the lawsuit was where the worker put down her foot when offered less. At the beginning of the hearing, her attorney stated, “She says that they mistreated her and she is furious that they denied the relationship. “They denied I exist”, she told me. And I explained to her that this is what lawyers do...” At the hearing, after several hours of negotiations between the parties and two court mediators, the domestic worker had resoundingly refused to accept payment for only the items that do not need to be proved. Ultimately, the defendant agreed to pay more than that total. The following is an excerpt from the hearing:

Worker’s attorney: This offer is a good one since, as the mediator noted, it covers the items and more. But it’s your decision.

Mediator (1): We’re at the point where the other party still hasn’t proved anything. But the number isn’t too bad, because it covers all the items.

Worker’s attorney: Tell us what you think.

Worker: No.

Worker’s attorney: They aren’t going to be able to make a better offer.

Worker: No, no.

Mediator (1): If this goes to court, you’re going to have to prove everything you’ve said. The court can accept all you’ve said, accept some of what you’ve said, or even throw the case out if you can’t prove everything. The five years this could take many not mean much to you, but the problem is the witnesses. It can be impossible to find witnesses after so much time goes by. Did the witnesses see you working at the house?

Worker: They’re all neighbours and one of them had a car for hire. He would pick me up when they needed me there at seven AM.

Mediator (1): That’s why... The thing is, they can’t testify that you worked there or state your work hours, or the tasks you performed, because they never went into the house and didn’t see anything.

Worker’s attorney: The problem is what happens if they realise that those two witnesses will not be able to establish you worked there... I believe what you’re saying. I believe you, but the court makes its decision based on what can be proved.

Mediator (1): Plus, it’s a very good settlement, and they’re offering to cover all the items.

Mediator (2): Why are you so set against it?

Worker: Because of the way they fired me and what they accused me of. They say I’m a liar, that I never worked for them.

This same situation appears time and again in the different hearings, showing that the legal formulas that attorneys routinely and banally employ are a source of a wide variety of personal disputes. The number of situations in which one of the parties felt unrecognised, or even despised by the other, reappear and come to life in these ‘firm denials’ and these accusations of falsehood and malice. For the workers as well as for their employers, bringing formalisation into the context of court proceedings is a source of great disappointment: what had been a relationship of mutual trust is now a source of mistrust, scorn, and total disregard for one another. During the proceedings, legal formulas are frequently translated into the daily language of emotion. Instead of contributing to resolve the conflicts between domestic workers and their employers, this worsens matters, propelling them into a personal terrain where mistrust prevents any type of conciliation outside of that provided by law. For this reason, the use of formalisation as a central argument for the claims makes it difficult to resolve the conflict in most cases.

Concluding remarks

Formalisation became the cornerstone of labour and social rights starting in 2000, when the newly created Social Security Regime for Domestic Workers indirectly amended the 1956 special regime. Despite the fact that, by 2004,

all domestic workers qualified for formal employment within the existing regulatory framework – vis-à-vis the 1956 regime, the social security regimen specific to the sector and introduced in 1999, or the single tax regime as amended in 2004 – informality persisted as the result of individual decisions to not comply with the law. For that reason, the state has focused on developing mechanisms to encourage registration since 2005. In 2013, although Law 26,844 further streamlined formalisation by allowing all domestic workers to be covered by legislation, the state continued to offer more incentives for both employers and domestic workers to voluntarily register. At the same time, it introduced new mechanisms for enforcing formalisation as well.

Worker organisations supported all of these initiatives and use the different media available to them to keep their members – and domestic workers in general – informed of their rights. In addition, the press has also kept the topic relevant, though it has alternated between praising and condemning the government’s initiatives. Social media has also played a fundamental role. The demand for formalisation has thus become a case in point of legitimate claims for the recognition of domestic workers’ labour and social security rights.

Due to the emphasis on informality over the past two decades, formalisation has also become a legitimate claim in the labour conflicts heard at the Domestic Work Tribunal in Buenos Aires. The most commonly cited cause in litigation at the tribunal is non-registration or partial registration. According to the attorneys of domestic workers, citing formalisation is an effective bargaining strategy, though its impact on the parties to the conflict is not always clear. At the micro-level of the legal process, formalisation is viewed as the key to recognising domestic worker rights but also a time-saving method to affirm the employer’s liability. Because of the characteristics of the workplace, it is almost impossible to establish which rights were respected in the everyday practices at the household. Thus, the best legal strategy for domestic worker attorneys is to denounce complete non-compliance, even in cases in which domestic workers were formally employed. The use of formalisation as a legitimate legal claim can only be understood within a larger framework in which formalisation indisputably become synonymous with domestic worker rights.

References

- Blackett, A. (2019) *Everyday transgressions: domestic workers’ transnational challenge to international labor law*, NY: Cornell University Press.
- Bourdieu, P. (1986) “La force du droit. Éléments pour une sociologie du champ juridique”, *Actes de la Recherche en Sciences Sociales*, 64, pp. 3-19.
- Chen, M. (2012) “The Informal Economy: Definitions, Theories and Policies”, WIEGO (Women of Informal Employment: Globalizing and Organizing), working paper 1.
- Davidov, G. (2005) “Enforcement problems in ‘informal’ labor markets: a view from Israel”, *Comparative Labor Law and Policy Journal*, 27 (3), pp. 3-26.
- Davidov, G. (2014) “Setting Labour Law’s Coverage: Between Universalism and Selectivity”, *Oxford Journal of Legal Studies*, 3 (34), pp. 543-566.
- Gorbán, D. and A. Tizziani (2018) *¿Cada una en su lugar? Trabajo, género y clase en el servicio doméstico*, Buenos Aires: Editorial Biblos.
- Groisman, F. and M. E. Sconfienza (2013) “El servicio doméstico en Argentina. Particularidades y desafíos de un sector relegado (2004-2012)”, *Carta Económica Regional*, 24, pp. 151-172.
- Husmanns, R. (2004a) “Statistical definition of informal employment: Guidelines endorsed by the Seventeenth International Conference of Labour Statisticians (2003)”, *7th Meeting of the Expert Group on Informal Sector Statistics* (Delhi Group).

Husmanns, R. (2004b) “Measuring the Informal economy: From employment in the informal sector to informal employment”, ILO, Policy Integration Department, working paper 53.

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

International Labour Office (ILO) (2016) *Formalizing Domestic Work*, Geneva: ILO.

International Labour Organization (ILO) (1991) “The Dilemma of the Informal Sector”, Report of the Director-General, International Labour Conference, 78th Session, Geneva.

International Labour Organization (ILO) (2002) “The Resolution concerning decent work and informal economy”, International Labour Conference, 90th Session, Geneva.

International Labour Organization (ILO) (2003) “Guidelines concerning a statistical definition of informal employment”, endorsed by the Seventeenth International Conference of Labour Statisticians (November-December 2003).

Kuznesof, E. (1993) “Historia del servicio doméstico en la América hispana (1492-1980)”, in E. Chaney and M. Garcia Castro, *Muchacha, cachifa, criada, empleada, empregadinha, sirvienta y...nada más: Trabajadoras del hogar en América Latina y el Caribe*, Caracas: Nueva Sociedad.

La Hovary, C. (2015) “The Informal Economy and the ILO: A Legal Perspective”, *International Journal of Comparative Labour Law and Industrial Relations*, 30, pp. 391-441.

MTEySS (Ministry of Labour, Employment and Social Security) (2006) *Situación laboral del servicio doméstico en Argentina*, Buenos Aires: MTEySS, Secretaría de Programación Técnica y Estudios Laborales.

Neffa, J. (2008) (ed.) *La informalidad, la precariedad laboral y el empleo no registrado en la provincia de Buenos Aires*, Buenos Aires: CEIL-PIETTE/CONICET-OIT.

Pereyra, F. (2012) “La regulación laboral de las trabajadoras domésticas en Argentina. Situación actual y perspectivas”, in V. Esquivel, E. Faur and E. Jelin, *Las lógicas del cuidado infantil. Entre las familias, el Estado y el Mercado*, Buenos Aires, IDES/UNICEF/UNFPA, pp. 165-199.

Pereyra, F. (2017) “Trabajadoras domésticas y protección social en Argentina: avances y desafíos pendientes”, Serie Documento de Trabajo no.15. Buenos Aires: OIT.

Pérez, I., Cutuli, R., Garazi, D. (2018) *Senderos que se bifurcan. Servicio doméstico y derechos laborales en la Argentina del siglo XX*, Mar del Plata: EUDEM.

Poblete, L. (2019) “The Different Meanings of Formalisation. Experiments from the South: The Case of Argentina”, in D. Ashiagbor (ed.) *Re-Imagining Labour Law for Development: Informal Work in the Global North and South*, London: Hart Publishing, pp. 167-189.

Poblete, L. (2018) “The Influence of the ILO Domestic Workers Convention in Argentina, Chile and Paraguay”, *International Journal of Comparative Labour Law and Industrial Relations*, 34 (2), pp. 177-201.

Poblete, L. (2015) “New Rights, Old Protections: the New Regulation for Domestic Workers in Argentina”, *Labour Law & Development Research Laboratory*, Mc Gill University, Working Papers Series #5. https://www.mcgill.ca/ldrl/files/ldrl/poblete_final.pdf

Rodgers, J. (2009) “Cambios en el servicio doméstico en América Latina”, in M.E. Valenzuela, María Elena and C. Mora (eds.) *Trabajo doméstico: un largo camino hacia el trabajo decente*, Santiago de Chile: ILO.

Salim, J. D’angela, W. (2006) *Evolución de los Regímenes Simplificados para Pequeños Contribuyentes en la República Argentina*, Buenos Aires: AFIP.

Trebilcock, A. (2006) “Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law”, in G Davidov and B Langille (eds.) *Boundaries and Frontiers of Labour Law*, Portland: International Institute for Labour Studies-Hart Publishing.

Vega Ruiz, M.L. (2011) “L’administration et l’inspection du travail dans le domaine du travail domestique: les expériences de l’Amérique latine”, *Canadian Journal of Women and the Law*, 23 (1), pp. 341-358.