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WOMEN DOMESTIC WORKERS
(*TRABAJADORAS DEL HOGAR*)

CASE: *Amparo Directo* 9/2018

REPORTING JUDGE: Alberto Pérez Dayán

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice

DATE OF DECISION: December 5, 2018

KEY WORDS: Right to social security, principle of equality, gender discrimination, home workers, domestic workers, IMSS, voluntary regime, mandatory regime.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo* 9/2018, Second Chamber, Alberto Pérez Dayán, J., decision of December 5, 2018, Mexico.

The full text of the decision may be consulted at the following link:
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SUMMARY OF THE *AMPARO DIRECTO* 9/2018

BACKGROUND: In 2016, a woman domestic worker sued her employers, the Mexican Social Security Institute (IMSS) and the National Workers Housing Fund Institute (INFONAVIT) for certain relief in a labor lawsuit. The local board of Mexico City issued an award in which it held that the employer was not obligated to register the worker in IMSS. It also absolved IMSS and INFONAVIT of the relief sought from them. The worker filed an *amparo directo* proceeding against that ruling, which was heard by the Second Chamber of Mexico's Supreme Court of Justice (this Court) through exercise of its power to remove a case from a lower court.

ISSUE PRESENTED TO THE COURT: Whether the fact that employers do not have the legal obligation to register domestic workers before IMSS constitutes discriminatory treatment, as well as a violation of the human right to social security.

HOLDING: The *amparo* was granted for essentially the following reasons. Article 13, section II of the Social Security Law (LSS) causes domestic work to be excluded from the mandatory Social Security regime, which disproportionally harms women since, in spite of having been drafted in neutral terms from the gender point of view, domestic work is done primarily by women, and so its effects have a negative impact that principally affects women workers. Article 12, section I of the Social Security Law permits various workers subject to the special work regime, which includes domestic work, to be registered in the mandatory regime of IMSS, and therefore no reason is seen that justifies that domestic work remain excluded from the mentioned social security regime. On the contrary, it was considered that this differentiation implies in itself a violation by the Mexican State of the principle of accessibility to the human right to social security. It was considered that, with this discriminatory treatment, excluding the domestic worker from the mandatory regime of Social Security has generated and permitted an increase in the condition of vulnerability of a group that is vulnerable as such: women domestic workers. In that regard, it was deemed that for the State to be able to mitigate the exclusion and poverty that domestic workers frequently suffer, the means necessary must be generated to provide this vulnerable group adequate, accessible and sufficient social security coverage in order to achieve

greater formality in the labor sector and to make it possible for domestic workers to develop a dignified life project through full access to the human right to social security. In view of the above, the Supreme Court held unconstitutional article 13, section II of the Social Security Law (LSS) which excludes domestic workers from the mandatory IMSS regime, because this Court considered it discriminatory and in violation of the human right to social security in equal conditions. Therefore, it ordered its non-application in the specific case.. Additionally, addressing the systematic and structural importance of the discrimination problem detected, this Court, in its decision, proposed to IMSS to create a pilot program, following certain guidelines, in order to design and execute a special social security regime for women domestic workers.

VOTE: The Second Chamber ruled on this matter by a unanimous five votes of the judges Alberto Perez Dayan, Javier Laynez Potisek, Jose Fernando Franco Gonzalez Salas (issued his vote with reservations), Eduardo Medina Mora I. and Margarita Beatriz Luna Ramos (issued her vote against certain considerations).

The votes issued may be consulted at the following link:
http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DeallePub.aspx?AsuntoID+232168

EXTRACT OF THE *AMPARO DIRECTO* 9/2018

p.1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of December 5, 2018, issues the following decision.

BACKGROUND

p.4 By brief filed on April 28, 2016, MRGG sued her employers for the following relief: constitutional indemnity; payment of wages accrued since her dismissal, year-end bonus (*aguinaldo*), vacations, vacation premium, seniority premium and overtime; as well as the retroactive registration before the Mexican Social Security Institute (IMSS). MRGG also sued IMSS and the National Workers Housing Fund Institute (INFONAVIT) for the determination of the fees and application of social security liability for negligence.

p.5 On February 9, 2017, a Conciliation and Arbitration Board in Mexico City issued an award in which it considered that it was proved that the domestic worker voluntarily resigned, and therefore it absolved the defendants from the payment of the constitutional indemnity and wages accrued since her dismissal. However, it ordered them to pay vacations, vacation premium and year-end bonus, but only with respect to the year prior to the filing of the claim. It also ordered the defendants to pay overtime.

p.6 Furthermore, it considered that in terms of article 338, section II of the Federal Labor Law (LFT), the employer is obligated to provide to domestic workers, in case of illness that is not work-related and is not chronic, medical assistance until she is cured; which rules out the possibility that the employer is obligated to register such workers in IMSS. That conclusion is also supported in article 13, section II of the Social Security Law (LSS). Therefore, the employer is not obligated to register such employees before IMSS.

p.6 It also considered that the employer is not obligated, in the case of domestic workers, to pay the contribution to INFONAVIT. Therefore, the defendants were absolved from the retroactive registration, as well as the payment of the contributions claimed before IMSS.

Finally, the board absolved IMSS and INFONAVIT from the payment and compliance with all the relief sought.

p.7 Disagreeing with the decision, MRGG filed an *amparo directo* proceeding before a collegiate court in Mexico City, which requested this Court to exercise its power to remove this case from a lower court and resolve it.

STUDY OF THE MERITS

p.10 The problem of constitutionality raised consists of determining if the fact that employers do not have the legal obligation to register domestic workers before IMSS constitutes discriminatory treatment proscribed by article 1 of the Constitution, as well as a violation of the human right to social security.

p.11 In order to resolve the problem, the content and scope of the human right to social security under equal conditions will be examined, as well as the problems that domestic workers confront with respect to access to and enjoyment of the mentioned human right. From there, this Court will determine the constitutionality of the exclusion of domestic employees in the mandatory regime of IMSS.

I. Right to social security in equal conditions

p.11-12 The principle of equality is complex in nature in that it underlies the entire constitutional structure and it becomes positive law in multiple provisions of the Federal Constitution, which impose specific obligations or duties on the public powers. However, such powers, in particular the legislative, are linked to the general principle of equality, established in, among others, article 16 of the Constitution in that acting with an excess of power or arbitrarily is prohibited.

Thus, from this principle two rules are derived that specifically bind the ordinary lawmaker: (I) on the one hand, an order of equal treatment in situations of equivalent facts, unless there is an objective and reasonable basis that allows giving unequal treatment and; (II) on the other hand, a mandate for unequal treatment, that obligates the lawmaker to establish differences between situations of different facts when the Federal Constitution imposes them.

p.12 The cited human right, as a principle, has two forms conceptually: (I) formal or legal equality and (II) substantive or factual equality. The first is a protection against arbitrary

distinctions or treatment and it is composed in turn of equality before the law, such as uniformity in the application of the laws by all the authorities, and equality in the law. This is directed to the legislative authority and it consists of the control of the content of the rules in order to avoid legislative differentiations without constitutional justification or violating the principle of proportionality in the broad sense.

p.12-13 The second form lies in reaching a parity of opportunities in the real and effective enjoyment and exercise of the human rights of all people, which means that in some cases it is necessary to remove and/or diminish the social, political, cultural, economic or any other kind of obstacles that prevent members of certain vulnerable social groups from enjoying and exercising such rights.

p.13-14 Furthermore, the Second Chamber of this Court has reiterated that in order for the differences in the law to be considered in line with the principle of equality it is essential that there is an objective and reasonable justification for making such differentiation; that seeks a constitutionally valid purpose and is adequate for achieving the legitimate end sought, and there must be a relationship of proportionality between the means employed and the end pursued.

p.15-16 Now, with regard to the application of the principle of equality in the specific case of the human right to social security, it should be kept in mind that social security includes the right not to be submitted to arbitrary or unreasonable restrictions of the existing social coverage, whether of the public or the private sector, in the understanding that the mentioned right must be implemented under standards of availability, accessibility and affordability.

p.16-17 In this regard, as was indicated in General Observation 19 of the Economic, Social and Cultural Rights Committee of the United Nations, while a progressive application exists of the right to social security in which the obstacles that establish the limited resources available of the State to fulfill the rights recognized in the International Covenant on Economic Social and Cultural Rights (ICESCR), it is also true that the State has immediate obligations with respect to the right to social security, like to guarantee the

exercise of this right without any discrimination; the equality of rights of men and women; and the obligation to adopt measures to achieve the full application of the referenced right to social security.

p.17 This is why, as indicated in the mentioned General Observation, within the essential core or minimum essential levels of the human right to social security, the State must ensure "the right of access to the social security systems or plans without any discrimination, especially for disfavored and marginalized people and groups."

p.18 This is so because the right to social security is of fundamental importance to guarantee all persons their human dignity when they face circumstances that deprive them of their capacity to fully exercise the economic, social and cultural rights.

p.19 In addition to the above, this Court considers that the analysis with respect to compliance with the human right mentioned in this case, cannot start merely from a general conception of the scope of the right to social security, but rather it is also essential to take into account the particular situation domestic employees face, regarding the protection and enjoyment of this social right. This will be developed in the following section.

II. Problems with respect to the coverage of domestic labor by social security

According to the International Labor Organization (ILO), domestic work "has been traditionally subject to inadequate work conditions, long hours, low wages, forced labor and scarce or no social protection; in other words, exposed to conditions that are far from the concept of decent work".

p.19-20 It has also established that those who carry out domestic work "are a group with a high level of discrimination in its various forms, including the fact that, with great frequency, they are outside the scope of coverage of the social security systems, which makes them a highly vulnerable population".

p.21 There are notable differences in the configuration of social security regimes for domestic work, principally in aspects related to the design of the programs and their functioning. The principal differentiating aspects are related to: the type of regime used to cover workers, the enrollment system – mandatory or voluntary – the quantity of contingencies

or branches of social security subject to coverage, the financing, the availability of provision of coverage for migrant domestic work and the effective coverage of the regimes.

p.21-22 The process of enrollment of domestic workers in the Social Security regimes can constitute a complex task, due to the atypical nature of the occupation, since the work is done in a private house, which inhibits in certain aspects the application of the workplace inspection; the labor relations are not usually established through an employment contract; the employers in general do not know their responsibilities or how to comply with the law; there is a high variability in the quantity of hours worked; in-kind wages are common (food, transportation, housing); in some cases the workers have their workplace as their domicile ("inside door"); and, in some cases the workers are in an irregular migratory situation, among other reasons.

p.22-23 Access to social security is a right that every worker should have, but this is not always the case. Voluntary coverage, according to the ILO, "is ineffective, since the burden falls on the domestic worker of the difficult task of convincing the employer to register in Social Security". The international evidence seems to indicate that "the mandatory nature of the enrollment plays a fundamental role in the extension of coverage".

p.23 In addition, this Court considers it important to mention that the vulnerability and the labor and social security problems that domestic employees face primarily affect women. In the case of the Mexican State, according to data of the National Statistics and Geography Institute, in 2008 it is estimated that 2.3 million people are domestic workers and nine out of ten are women.

The above is relevant not only with respect to the focus on gender that should be adopted at the time of analyzing the violations that arise in the case of domestic workers, but also implies recognizing that a large part of society does not consider domestic work as a "real" occupation, but rather as part of the "normal" or "natural" work of women.

p.24 Therefore, having an underlying question of gender in the problem of domestic workers with respect to their work conditions and social protection, it is essential that the analysis

of the differentiated treatment that is claimed by MRGG address not only the character or the nature of the work performed, but also the disproportional harm that the distinction in the law challenged here produces on women, which, of course, involves a possible intersectional discrimination that increases the vulnerability of such persons.

III. Constitutional regularity of the differentiation challenged

p.24-25 The direct understanding of the duties generated by the principle of equality – in its formal and material component – implies that the Mexican State is obligated to ensure that women domestic workers enjoy the human right to social security, without any discrimination. This fundamental right is directed, evidently, to "every person" and covers, of course, the disfavored groups, such as women employees that perform domestic work.

p.26 In this regard, the State can generate differentiated social security regimes to address the different needs of the population, including the vulnerable or marginalized groups. This means that the State has a margin of discretionality or configurative freedom necessary to determine, according to the resources it has available and given its specific circumstances, the different manners in which people can access social security, according to the different plans, regimes or existing public policies.

Thus, this Court concludes that the fact that women domestic employees are not contemplated in the mandatory regime of IMSS does not violate in itself and by itself the human right to social security, unless that exclusion is based on discriminatory criteria, or that, depending on the situation of vulnerability of such group, this exclusion generates that in practice such workers lack adequate coverage with respect to the various state welfare benefits they require to have a dignified life project.

a) Constitutional regularity of the exclusion of domestic workers from the mandatory regime of Social Security

p.26-27 In order to examine if it is discriminatory that employers are not obligated to register their domestic workers before IMSS, it is necessary to analyze the legal regulation of such workers for which both the Federal Labor Law (LFT) and the LSS should be examined harmoniously.

p.31 As a result of such study, this Court deduces that the fact that women domestic workers are not contemplated within the mandatory regime of Social Security – directed toward workers in general – is not the result of an objective and reasonable differentiation from the constitutional perspective.

p.31-32 For a differentiated treatment to be in line with the parameter of constitutional regularity, it is necessary: (I) that the differentiation pursue a constitutionally valid purpose; (II) that the different treatment challenged be adequate to achieve the legitimate purpose sought; which means that the measure be capable of reaching its purpose; and, (III) that the legislative measure in question be proportional, that is, be a reasonable relationship to the intended purpose, which presumes a weighing of its advantages and disadvantages.

p.32 From points (I) and (II), it is important to stress that, if the differentiation challenged concerns one of the specific prohibitions of discrimination contained in article 1, first and third paragraphs of the Federal Constitution, “it is not sufficient that the purpose sought be constitutionally acceptable, rather it must be imperative” and that “the measure is directly connected to the purpose sought”.

In this regard, this Court considers that in this case strict scrutiny must be applied with respect to the challenged differentiation. While it is true that the regulatory exclusion of domestic workers was formulated by the lawmaker in “neutral terms”, it is also true that factually, it leads to a legal asymmetry that preponderantly and disproportionally affects one of those groups or categories referred to in the non-discrimination clause contained in article 1 of the Constitution: which is discrimination motivated by “gender”.

p.32 Indeed, discrimination of treatment whether with respect to norms or acts can occur both directly and indirectly. Thus, “direct discrimination” is produced when certain persons receive treatment less favorable than others due to their different personal condition related to a prohibited motive. For example, when the different treatment is based “expressly” on questions of gender, it is understood that there is direct discrimination.

p.32-33 In contrast, “indirect discrimination” means that the laws, policies or public or private practices are neutral in appearance but disproportionately harm a particular group or class

of persons. Thus, there can be indirect discrimination against women when the laws, policies and programs are based on criteria that apparently are neutral from the gender point of view but that, in fact, have negative repercussions on women. The laws, policies and programs that are neutral from the gender point of view can, without intending to, perpetuate the consequences of discrimination.

p.34 In this regard, this Court cannot overlook that the differentiation of treatment challenged here and, therefore, the impact generated by the fact that domestic labor is excluded from the mandatory regime of Social Security, disproportionately harms women, in spite of being drafted in neutral terms from the gender point of view – statistically domestic work is done primarily by women –. Thus, the effects of the challenged law have a negative impact that preponderantly affects women workers and, therefore, generates an indication of discriminatory treatment of women.

p.34-35 On this basis, this Court considers that the challenged norms, by excluding women domestic workers from the protection of the mandatory regime of Social Security, become indirect discrimination proscribed by the principle of equality and equity, since that differentiation does not overcome constitutional scrutiny with respect to its proper purpose, suitability and proportionality.

p.35 This is so because this Court does not find any constitutional justification for excluding women domestic workers from the mandatory regime of Social Security. The fact that under the LFT such workers engage in “special work”, in any way it implies that, for that simple fact, they can be deprived of adequate social security coverage that allows them to engage in such productive activity in dignified conditions.

In fact, by virtue of section I of article 12 of the LSS, it is permitted for various workers subject to the special work regime to be registered in the mandatory regime of IMSS. Therefore, no reason is seen that justifies, from the constitutional perspective, that contrary to other special work, domestic work must be excluded from that social security regime.

On the contrary, this Court considers that this differentiation implies in itself a violation by the Mexican State of the principle of accessibility of the human right to social security.

p.35-36 In this regard, with the mentioned discriminatory treatment, the State authorities far from taking the measures necessary to protect the most disfavored or marginalized groups – such as women domestic workers – by excluding them from the mandatory regime of Social Security, it has generated and permitted an increase in the condition of vulnerability and marginalization of a group of the population that, due to its characteristics, is already sufficiently vulnerable.

The challenged law leaves in a relegated role women that perform domestic work. These women unjustifiably endure an undue obstacle to access the State social benefits that would allow them to be protected against circumstances and unforeseen events that restrict their means of subsistence and income. This prevents them from being able to generate a life project in dignified conditions, which is the ultimate purpose of the human right to social security.

The exclusion from adequate coverage and social protection causes domestic workers to face a situation of precariousness and social neglect that worsens their condition of marginalization and contributes to the increase of labor and social inequalities between men and women, as well as the perpetuation of stereotypes and prejudices with respect to the “lack of value” of domestic work. This in turn, affects the dignity of the women who engage in such productive activity.

p.36-37 There is a State reticence to generate the strategies and policies for social security that are necessary and adequate so that such highly vulnerable group can have real access to the State social security benefits that would prevent such workers from being unduly and disproportionately affected, from an economic perspective, in case of facing unforeseen events that can result in a risk to their project for a dignified life – such as illness, severance, and aging, among others.

p.38 Thus, there is an unavoidable obligation on the part of the State to mitigate the state of social exclusion and poverty that women domestic workers frequently endure. And that

obligation begins by generating the means necessary to provide this vulnerable group social security coverage that is adequate, accessible and sufficient in order to, on the one hand, achieve greater formality in the labor sector and, on the other hand, allow such workers to develop a dignified life project through full access to the human right to social security.

p.38-39 In that regard, in the judgment of this Court, not only does the exclusion from the mandatory regime of Social Security involve a discriminatory act that perpetuates and strengthens the social marginalization of women domestic workers, but in addition, this violation cannot be remedied or overcome simply because under the legal system such workers can access the so-called voluntary social security regime.

p.39-40 In light of the above, this Court concludes that the fact that women domestic workers are excluded from the mandatory regime of IMSS violates the human right to social security in equal conditions. Thus, it is appropriate to declare the unconstitutionality of article 13, section II of the LSS.

DECISION

p.45 The arguments of MRGG are grounded. Now, what is appropriate is to grant the *amparo* requested for the following effects. Article 13, section II of the LSS is unconstitutional, since excluding domestic workers from the mandatory regime of Social Security is discriminatory and violates the human right to social security.

Now, with respect to the unconstitutionality of the challenged article and, consequently, its non-application in the challenged decision – since it is a *amparo directo* – this Court considers that it is not possible to order either the employer or IMSS to retroactively pay the respective social security fees, or other benefits that are established in the mandatory regime of IMSS, since it is obvious that the challenged rule enjoyed full presumption of constitutionality. Prior to the filing of this *amparo* proceeding, there was no legal obligation that could be claimed from the employer with respect to the “failure” to register MRGG before IMSS and to pay the respective social security fees, nor any debt that could be legally charged to IMSS.

p.46 However, this Court, upon seeing the existence of discriminatory norms that affect the dignity of a vulnerable sector, such as women domestic workers, is obligated to issue guidelines that orient the competent State authorities with respect to the need and duty they have to comply, effectively, with the protection and enjoyment of the human right to social security of women domestic workers.

p.46-47 Indeed, this Court concludes that the unconstitutionality found, generates a structural problem from the institutional point of view that implies that the state authorities, whose power is linked with the granting of adequate, available, accessible and sufficient social security coverage of women domestic workers, must in turn undertake the measures necessary to structurally modify the rules and public policies that concern the social security of this highly vulnerable sector, so that the Mexican State can comply with the obligations related to the full enjoyment of such human right.

p.47-48 Taking into account the systemic and structural importance of the problem of discrimination detected, as well as the obligation derived from article 1 of the Federal Constitution, it is appropriate to convey to IMSS that the exclusion of women domestic workers from the mandatory regime of Social Security generates discrimination. Also, it is important to convey that the voluntary social security regime is ineffective to protect, adequately and with dignity, the human right to social security of such women workers.

Furthermore, to guide the implementation of the public policy that must be undertaken to resolve this social security problem, to this Court suggests IMSS that, within a reasonable period, which could be at the end of the year 2019 – and requesting for this the budget line items that are considered necessary in the exercise of that year – implement a pilot program whose ultimate purpose is to design and execute a special social security regime for women domestic workers, based on the following guidelines:

p. 48-51 1) The special social security regime must have conditions no less favorable to those established for other workers; 2) it must take into account the particularities of domestic work; 3) it must be easy to implement for the employers; 4) it cannot be voluntary, but rather mandatory; 5) it must be viable for IMSS, from a financial point of view; and 6) the

possibility should be explored of administratively facilitating compliance with the obligations that arise from this employers' regime.

Finally, this Court considers that the purpose of the above guidelines or instructions is to ensure that, in a period of no more than 18 months from the implementation of the mentioned pilot program, the IMSS, according to its technical, operative and budget capacities, be able to propose to the Congress of the Union the necessary regulatory adjustments for the formal incorporation of the new special system of social security for women domestic workers gradually and, in this regard, in a period of no more than three years, be able to obtain effective, robust and sufficient social security for all women domestic employees.