HUNGARIAN LABOUR LAW
E - J O U R N A L

Domestic Workers' Working Hours in Turkey

In light of ILO Convention No. 189 *

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1. Domestic workers' precarious situation

Domestic work is one of the world's oldest working areas, which has traditionally been assigned to women in the vast majority of societies[1]. Domestic work entails tasks, such as cleaning the house, cooking, washing and ironing clothes, taking care of children, elderly or sick members of a family, gardening, guarding the house, and driving for the family[2]. It is worth emphasizing that domestic workers in Turkey are in a precarious situation from two perspectives: one being the characteristics of domestic workers; the other is their exclusion from the scope of Labour Law No. 4857, as it is similar to the almost world-wide accepted laws[3].

Among the 67 million estimated domestic workers globally, approximately 80 percent are women. Furthermore, approximately 11.5 million of them are international migrants. Most of these domestic workers are from disadvantageous groups and many lack adequate access to basic protection[4]. More clearly, domestic workers are vulnerable in contrast with other workers, since domestic work has often been excluded from employment legislation almost all over the world, either explicitly or implicitly.[5]

* This research prepared while the author was a visiting fellow at Max Planck Institute for Comparative and International Private Law, Hamburg, Germany (April 2016- March 2017). This study was funded by The Scientific and Technological Research Council of Turkey (April 2016 - November 2016) and also funded by Istanbul Technical University (January 2017-March 2017).

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1 ILO: *Effective Protection for Domestic Workers: A Guide To Designing Labour Laws.* Geneva, 2012. 1.; ILO: Social Protection for Domestic Workers, Key Policy Trends and Statistics. *Social Protection Policy Papers,* No. 16, Geneva, 2016. 1.

2 ILO (2012) op. cit. 1.

3 For the details of domestic worker's precarious situation see Gizem Saribay Öztürk: The Precarious Situation of Domestic Workers in the Light of Turkish Labour Law and ILO Convention No. 189. *Journal for Labour and Social Affairs in Eastern Europe,* Vol. 19, 2016/2. 171–180.

4 ILO: Implementation of International Labour Standarts for Domestic Workers. *Research Brief*, No. 9, 30. 08. 2017, 1 (http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_572156.pdf).

5 One of the reason for that is covering the same kind of tasks that women perform "for free" on a private basis within their own houses. Other reasons derive from the characteristics of domestic work itself. They work closely with their employers. Domestic worker's workplace is employer's private home which makes it difficult to control and inspect. Moreover their isolation makes difficult to contribute in an organization which would allow them to improve their condition. Not many countries include domestic workers in labour force statistics, in light of the fact that a great majority of them did not consider domestic workers as "full-time workers"

As of 2010, only 10 percent (5.3 million) of domestic workers are covered by the general labour laws to the same extent as other workers and only 2.8 percent (1.5 million) of domestic workers are covered by subordinate regulations or specific labour laws. Additionally, 29.9 percent (15.7 million) of domestic workers are excluded from the scope of the country's labour laws, 47.8 percent (25.1 million) of domestic workers are covered in part by the general labour laws and in part by subordinate regulations or specific labour laws and 9.5 percent (5.0 Million) of domestic workers live in a federal country with provisions that differ between states[6].

At the present moment, ILO Convention No. 189 and Recommendation No. 201 are the most important international legal instruments on domestic work. In the 100th Session of the International Labour Conference, in June 2011, the International Labour Organization adopted Convention No. 189 and supplementing Recommendation No. 201 regulating the terms and conditions of work for domestic workers[7]. Afterwards, it improved national domestic work laws and practices of Member States with a view to promoting decent work[8] in the sector.

Unfortunately, ILO Convention No. 189 has not been ratifed by Turkey yet. Currently, domestic workers are excluded from the scope of Labour Law No. 4857 by the virtue of Article (4): "The provisions of this Act shall not apply to the activities and employment relationships mentioned below". Consequently, domestic services are one of the employment relationships mentioned in Article 4 (Article 4/(e)).

Therefore, domestic workers are exempted from coverage under Labour Law No. 4857 and are only protected by the Turkish Code of Obligations No. 6098. The provisions of the Turkish Code of Obligations No. 6098 on service contracts and its general provisions are applicable to domestic workers. In other words, domestic workers are not completely unprotected by legislation. The Turkish Code of Obligations defines rights and obligations as well as working conditions of these workers. It covers, and in certain respects, it entitles workers to rights that are comparable to those in the labour law.

However, it would be negligent not to indicate that Labour Law No. 4857 protects domestic workers better than the Turkish Code of Obligations No. 6098. In terms of severance pay and job security Labour Law No. 4857 has defined regulations; whereas, Turkish Code of Obligations has no regulations for either severance pay or job security. What is more, according to the Turkish Code of Obligations,

(Jose Maria Ramirez-Machado: Domestic Work, Conditions of Work and Employment: A Legal Perspective. [Conditions of Work and Employment Series No. 7] Geneva, ILO, 2003. V, 1. 69.; Ursula Huws – Sarah Podro: *Employment of Homeworkers: Examples of Good Practice.* Geneva, ILO, 1.1, 1995. 15.

6 ILO (2017) op. cit. 2.

7 Einat Albin – Virginia Mantouvalou: The ILO Convention on Domestic Workers: From The Shadows to the Light". *UCL Labour Rights Institute On-Line Working Papers,* (Forthcoming in the Industrial Law Journal March 2012), 2011/1. 9.; Adelle Blackett: *Making Domestic Work Visible, The Case for Specific Regulation.* [Labour Law and Labour Relations Programme Working Paper No. 2] Geneva, ILO, 1998. 6.; Seyhan Erdoğdu – Gülay Toksöz: *The Visible Face of Women's Invısıble Labour: Domestic Workers in Turkey.* [Conditions of Work and Employment Series No. 42] Geneva, ILO, 2013. V.-

8 Decent work for domestic workers means recognizing that they are real workers, that is, like other workers with labour rights (Deirdre McCann – Jill Murray: *The Legal Regulation of Working Time in Domestic Work.* [Conditions of Work and Employment Series, No. 27] Geneva, ILO, 2010. V.). For more information about "decent work" see, ILO: *Decent Work for Domestic Workers, Report IV(1), International Labour Conference, 99th Session.* Geneva, ILO, 2010.; ILO: *Decent Work for Domestic Workers, Convention 189 and Recommendation 201 at a glance.* Geneva, ILO, 2011.

annual leave is two weeks; in contrast, and according to Labour Law No. 4857, annual leave is a minimum of two weeks while it increases in relation to workers' length of service. Importantly, the Turkish Code of Obligations gives employers permission to reduce annual leave in certain conditions; in comparison, there is no possibility to reduce annual leave in Labour Law No. 4857[9].

The truth is that, domestic worker's characteristics are: invisibility, marginalization, uncertainty about future employment, as well as deficiency of social and legal recognition. Wherever it occurs, domestic work is prone to social and psychological precariousness, as well as in economic terms[10]. This is vital while designating domestic worker's working conditions as well. Working hours are long for all workers; nevertheless, domestic workers have frequently the longest and most unpredictable working hours relative to other workers.

In analysing the scholarly literature on domestic work, it has come to light that there are three forms of employment:

– firstly, live-in domestic workers;[11]
– secondly, live-out domestic workers employed full-time by a single employer; and
– thirdly, live-out domestic workers working for different employers[12].

Conspicuously, live-ins are usually on call twenty-four hours a day, seven days a week, and are forced to accept the most harsh conditions of employment. On the other hand, from the perspective of almost all domestic workers, based on their uneducated position, domestic work is the only option for them whether they work in precarious conditions or not[13]. With this in mind, the purpose of this article is to shed some light on domestic workers' vulnerable situations, in regards to working hours, while focusing on the comparison of Turkey to other selected countries and the ILO Covention No.189.

The article commences by defining normal hours of work. Next it examines working times, standby and analyses the linkage between them. It continues with the definition and limitations of overtime, overtime pay and time off in lieu. Afterwards, it concludes by evaluating night work and record keeping which are not regulated by the Turkish Code of Obligations. While scrutinizing all the above issues, Turkey is the main focus of the research, while comparing and contrasting with selected countries, Directive 2003/88/EC of the European Parliament and of the Council (Working Time Directive) and especially ILO Convention No.189 provisions.

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9 Saribay Öztürk op. cit. 177.

10 Albin – Mantouvalou op. cit. 2.; Monika Kiss: *Invisible Jobs, The Situation of Domestic Workers.* Briefing. European Parlimentary Research Service, 2015. 2.; Leah Johnstone: *Organising Domestic Workers: For Decent Work and the ILO Convention No. 189.* Master Thesis. Oslo and Akerhus University College of Applied Sciences, Faculty of Social Sciences, 2013. 17.

11 Live-in domestic work is most likely one of the oldest jobs for women in most countries all over the world (Claire Hobden: *Working Time of Live-in Domestic Workers.* [ILO Domestic Work Policy Brief 7] Geneva, 2013. 1).

12 Saribay Öztürk op. cit. 172.

13 Saribay Öztürk op. cit. 175.

2. Hours of Work

2.1. Normal hours of work

The notion of "normal hours of work" refers to a maximum number of hours worked over a specified period of time, beyond which overtime standards will be applied. Particularly normal hours of work establish how long the normal workweek can be[14].

ILO Convention No. 189 determines that "Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work"[15]. Namely, Convention No. 189 assigned member states a duty towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work. However, Convention No. 189 did not regulate strict rules corresponding with normal hours of work or other working hours. Therefore, each Member will regulate their own system with regards to working hours.

At the same time, Directive 2003/88/EC of the European Parliament and of the Council (Working Time Directive) determines that 'working time' means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice[16]. Additionally, the Working Time Directive limits the normal hours of work as the average working time for each seven-day period, including overtime, does not exceed 48 hours[17]. The maximum weekly working time is calculated over a four-month reference period[18] [19].

Despite the fact that, an eight hours working day is the universally valid legal norm, live-in domestic workers are frequently exempted from this standard[20]. The main reason for this exemption is that their tasks are not the same as in standard office and factory jobs. The heterogeneity of domestic work and the requirements of the households make it difficult to regulate working hours. Some household

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14 ILO (2012) op. cit. 50.; McCann–Murray op. cit. 26.; Malte Luebker – Yamila Simonovsky – Martin Oelz: Coverage of Domestic Workers by Key Working Conditions Law". *ILO Policy Brief,* No. 5, 2011. 3.

15 Article 10 (1).

16 Article 2 (1).

17 Article 6 /2 (b).

18 Article 16 (2).

19 For detailed evaluations about Directive 2003/88/EC of the European Parliament and of the Council, see Catherine Barnard – Simon Deakin – Richard Hobbs: Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive on the UK. *Industrial Law Journal,* 2003/32. 4. 223–252.; John Fairhurst: SIMAP – Interpreting the Working Time Directive. *Industrial Law Journal,* 2001/30. 2. 236–242.; Jeff Kenner: Re-Evaluating The Concept of Working Time: An Analyses of Recent Case law. *Industrial Relations Journal*, vol. 35, no. 6, 588–601.

20 The ILO Constitution and its first standard, The Hours of Work Convention, 1919 (No.1), identify eight in the day and forty-eight hours in the week is the acceptable limit (Art. 2). Accordingly the The Forty-Hour Week Convention, 1935 (No. 47) declared the principle is working forty-hour a week. Thus, the two Convention dominated standard working hours of the twentieth century is forty hour a week an it can be maximum forty-eight hours a week.

needs can be predicted and scheduled, such as preparing meals, cleaning the house and doing the laundry. However, it may entail tasks outside standard "normal hours" of work; for instance involving young children, the sick and elderly. To put it another way, the needs of household members are frequently variable, unpredictable, and have no defined limits. Therefore, it is truly hard to regulate live-in domestic workers' normal working hours. With this in mind, States regulate working time arrangements in completely different ways[21].

One national approach is establishing only the aggregate number of hours worked per day without mentioning a maximum amount of hours per week[22], the alternative approach sets limits for both daily and weekly hours[23]. South Africa's Sectoral Determination 7 prohibits employers from requiring or permitting their domestic workers to work more than 45 hours per week; and, if the worker works five days or less in a week, not more than nine hours a day, or if a worker works more than five days in any week, not more than eight hours a day[24]. Not to mention the fact that, some countries have more than one limitation, for instance on agreement between the parties and secondly a normal limit to the number of excess hours[25]. Additionally, national laws may also take into account other criterias, such as live-in or non-resident status of the worker[26]; the worker's age[27]; or a combination of different criteria[28].

Out of the 71 countries whose national laws were surveyed by the Conditions of Work and Employment Programme of the ILO in 2009, almost half did not impose a mandatory limit on normal hours of work for domestic workers[29]. As a basic norm, eight hours a day and forty hours a week can be worked before overtime remunerations are due[30]. This limit was found in just over twenty percent of the countries. Around fifteen percent had set an intermediate limit of forty-one to forty-seven hours per week; four cases stipulated a forty-eight hours limit; and five cases, above forty-eight hours[31]. Thus, the average weekly hours of domestic workers varies from one country to another. The lowest average working hours can be found in Australia, New Zeland and industralized countries in Europe. In contrast to Asia, which has the highest average of more than forty-eight hours a week[32].

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21 Amelita King Dejardin: Working Hours in Domestic Work. *ILO Domestic Work Policy Brief,* No. 2, 2011. 8.

22 Ramirez-Machado op. cit. 20., see footnote 132.

23 For instance in Malta, Swaziland, Tanzania, Viet Nam and Zimbabwe, see Ramirez-Machado op. cit. 20., footnote 133.

24 "South Africa's Basic Conditions of Employment Act (BCEA), enacted in 1993, provides basic protection for all employees, including domestic workers, in respect of conditions of work, such as working hours, leave and dismissal, but not minimum wage. The Sectoral Determination 7, published in 2002, included clauses on all issues of terms and conditions of employment, including provisions unchanged from the BCEA", Dejardin op. cit. 8., footnote 5.

25 For the details of different country's regulations, see Dejardin op. cit. 8–-9.

26 For instance in Saint Vincent and the Grenadines and Chile, see Ramirez-Machado op. cit. 21., footnote 138.

27 For instance in Colombia, Dominican Republic, Ecuador, Finland, Mexico, Panama and Venezuela, see Ramirez-Machado op. cit. 21., footnote 139.

28 For instance in Austria, see Ramirez-Machado op. cit. 21., footnote 140.

29 Dejardin op. cit. 6.

30 ILO (2012) op. cit. 50.; McCann–Murray op. cit. 26.

31 Dejardin op. cit. 6.

32 For the details see Dejardin op. cit. 2–8.; ILO (2016) op. cit. 5.; Luebker–Simonovsky–Oelz op. cit. 3.

In France, the National Collective Agreement of Employees of Individual Employers, Article 15 (a) sets the normal working hours for domestic workers at forty hours per week at full time. In Kazakhstan, the Labour Code provides, at section 215 (1) that "The working time and rest time duration standards set by this Code shall apply to domestic staff". Accordingly, amongst other working time rules, normal working hours must not exceed forty hours per week (Article 77), eight hours a day (Article 82). The United Republic of Tanzania's Employment and Labour Relations Act, Section 19, which covers domestic workers, provides that the maximum number of ordinary days or hours that an employee may be permitted or required to work are: (a) six days in any week; (b) forty-five hours in any week; and (c) nine hours in any day[33].

As it was mentioned before[34], domestic workers are excluded from the scope of the Labour Law in Turkey by virtue of its Article 4 (e)[35], in comparison they are covered by the Turkish Code of Obligations. However, there is no provision in the Turkish Code of Obligations for normal weekly working hours. The Turkish Code of Obligations, Article (398) regulates that: "overtime work is the work done over normal time of work specified in relevant norms and with consent of the worker." The word "relevant norms" has to be specified in order to denote an exact definition. Despite the fact that Labour Law No. 4857 is the basic labour law, there are more than one related norms in Turkish legislation. For instance, Maritime Labour Law No. 854 and Press Labour Law No. 5953[36]. The term "relevant norms" is not clear[37]. In the literature, this term is regarded as Labour Law No. 4857. With this in mind, the normal working hours can be inferred that it would be at optimum forty-five hours a week as stated in Article (63) of Labour Law No. 4857[38]. Having said that, the clause should be regulated and enlightened. It can be regulated by either changing the word "relavant norms" with "Labour Law No. 4857" or indicating the normal working hours as an exact hour per week[39] [40].

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33 For these and more examples see ILO (2012) op. cit. 50–51.

34 For the details see 1. Domestic workers' precarious situation.

35 Article 4, "The provisions of this Act shall not apply to the activities and employment relationships mentioned below". a) Sea and air transport activities, b) In establishments and enterprises employing a minimum of 50 employees (50 included) where agricultural and forestry work is carried out. c) Any construction work related to agriculture which falls within the scope of family economy, d) In works and handicrafts performed in the home without any outside help by members of the family or close relatives up to 3 rd degree (3 rd degree included), e) Domestic services …

36 Sarper Süzek: İş Hukuku. İstanbul, Beta, 2015. 822.; Nurşen Caniklioğlu: *Türk Borçlar Kanununun Hizmet Sözleşmesinin Kurulmasına, Tarafların Hak ve Borçlarına İlişkin Hükümlerinin Genel Bir Değerlendirilmesi"*. Çalışma Hayatı Açısından Yeni Borçlar Kanunu ve Ticaret Kanunu Semineri. İstanbul, 2011. 91.; Arzu Arslan Ertürk: TBK Uyarınca Genel Hizmet Sözleşmesinin Kuruluşu ve Tarafların Borçları, 6098 sayılı Türk Borçlar Kanunu Hükümlerinin Değerlendirilmesi Sempozyumu (3-4 June 2011), Prof. Dr. Cevdet Yavuz'a Armağan, 2012. 541.

37 Polat Soyer: Türk Borçlar Kanunu Tasarısının "Genel Hizmet Sözleşmesi' ne İlişkin Bazı Hükümleri Üzerine Düşünceler, Devrim Ulucan'a Armağan, İstanbul, 2008. 156.; Caniklioğlu op. cit. 91.; Kübra Doğan Yenisey: Hizmet Sözleşmesi, Türk Borçlar Kanunu Sempozyumu (Makaleler-Tebliğler), İstanbul, 2012. 313.; Ömer Ekmekçi: Türk Borçlar Kanunu Tasarısının İş Sözleşmesine İlişkin Belli Başlı Hükümleri. *Sicil İş Hukuku Dergisi,* 3/2009. 21.; Arslan Ertürk op. cit. 541.; Başak Güneş – Faruk Barış Mutlay: Yeni Borçlar Kanununun Genel Hizmet Sözleşmesine İlişkin Hükümlerinin İş Kanunu ve 818 sayılı Kanunla Karşılaştırılarak Değerlendirilmesi, Çalışma ve Toplum Dergisi, No. 30, 2011. 245.

38 Soyer op. cit. 156.; Caniklioğlu op. cit. 91.; Arslan Ertürk op. cit. 541–542.; Erdoğdu–Toksöz op. cit. 19.

39 Soyer op. cit. 156.; Arslan Ertürk op. cit. 542.; Güneş –Mutlay op. cit. 245.

40 Another solution for this uncertainity see Doğan Yenisey op. cit. 313.

2.2. Working times and standby

After defining normal hours of work, it is crucial to designate the meaning of "working times". Unless working times are defined transparently, normal hours of work cannot be detected. However, firstly the workers should be divided as live-ins and live-outs. Since it is extremely difficult to identify live-in worker's start and end time, in parallel with working times. Where a domestic worker exists at the workplace, the distinction between inactive and active hours may not be explicit, and inactive hours are not necessarily deprived of labour[41]. Namely, live-in domestic workers are supposed to be available for work from the time they wake up until they go to sleep at night. The employer even has to grant permission for them to rest in their room, and the employer may require additional work from them at any moment. Therefore, live-in domestic workers are always on standby.[42] Moreover, in the case of domestic workers, who are taking care of young children or sick or disabled persons, they may be requested to be available for work at times other than regular working hours. Compensating and limiting these hours is definetely important in order to provide decent working conditions for domestic workers[43].

By contrast, live out domestic workers have more control over their working time arrangements. Nevertheless, live out workers may work long daily and weekly hours for one or more employers[44], but at least it is easy to calculate their working times.

In practice, most of the time employers remunerate domestic workers a flat weekly or monthly rate, despite the fact that it is not for a defined number of hours of work. Daily hours does not have limits, the notion of overtime work does not exist[45]. The end time for a work day is tough to validate. The start time and end time can vary from day to day. For these reasons, start time and end time must both be openly defined at the beginning[46]. Start time is defined as the time at which the domestic worker commences his/her first task, or is called on for the first time in the day[47]. Similarly, the end time is defined as the time at which the last task has been terminated, and/or in the case of domestic worker will no longer be available to perform tasks at the request of the employer[48].

ILO Convention No. 189 determines that "Periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work to the extent determined by national laws, regulations

41 Mccann-Murray op. cit. 30.

42 Standby is described in the ILO Convention No 189 as "Periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls (Article 10).

43 ILO (2012) op. cit. 61

44 Dejardin op. cit. 2.

45 Dejardin op. cit. 2.

46 Hobden op. cit. 3, 5.

47 Hobden op. cit. 5.

48 Hobden op. cit. 5.

or collective agreements, or any other means consistent with national practice"[49]. In addition, ILO Recommendation No. 201, Paragraph 9 (1) provides that "With respect to periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls (standby or on-call periods), Members, to the extent determined by national laws, regulations or collective agreements, should regulate: (a) the maximum number of hours per week, month or year that a domestic worker may be required to be on standby, and the ways they might be measured; (b) the compensatory rest period to which a domestic worker is entitled if the normal period of rest is interrupted by standby; and (c) the rate at which standby hours should be remunerated".

The Labour Code of the Czech Republic[50] requires the agreement of both parties for the performance of standby and provides that work performed during a standby period should be paid:

(1) The employer may only require standby from his/her employee if standby has been agreed with this employee. The employee is entitled to remuneration [of at least ten percent of his average earnings, unless it has been agreed otherwise in the relevant collective agreement] for his/her standby.

(2) Where an employee performs work during standby, he/she is entitled to a wage or salary […] Work performance during standby above normal weekly working hours is overtime work[51].

In France, the National Collective Agreement of Employees of Individual Employers states, that the number of on-call hours must be stated in the employment contract and must be remunerated at a rate equivalent to two-thirds of a normal working hour[52]. On the other hand, in terms of Finland's Act on the Employment of Household Workers, as amended Section (6) determines that at least one stand-by hour should be equivalent to half of a working hour[53].

Stand-by time is named as "on call" time in the United States. It must be calculated into hours worked, based on the assumption that, in the case of workers are 'on call', they are not able to consume the time freely for their own desires and needs, therefore that time is controlled by their employer. Live-out workers who work overnight shifts, on the other hand who work for less than twenty-four hours are legally considered to be working the entire time they are on-site, even though they spend part of that time sleeping or engaging in personal activities[54].

The Turkish Code of Obligations currently lacks a clause related to standby times. Having said that, Labour Law numbered 4857, Article (66) treats some unworked periods as part of the daily time.

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49 Article 10 (3).

50 Labour Code No. 262/2006, Section (95).

51 For this and more examples see ILO (2012) op. cit. 62–63.

52 Article (3).

53 Dejardin op. cit. 9.

54 Harmony Goldberg: *The Contested Exclusion and Inclusion of Domestic Workers from Federal Wage and Hour Protections in the United States.* [Conditions of Work and Employment Series No. 58] Geneva, ILO, 2015. 2.

Article (66) (c) regulates that: "the time during which the employee has no work to perform pending the arrival of new work, by contrast remains at the employer's disposal shall be considered as the employee's daily working hours". With this in mind, since domestic workers are excluded from Labour Law in Turkey, it is not possible to admit standby hours as working hours automaticaly. However, due to the lacuna concerning standby times in the Turkish Code of Obligations, it should be verified from general norms whether or not there is a provision in existence. According to the Turkish Civil Law Article (1), when there is not an applicable provision, the judge shall decide pursuant to customary law, and in its default, pursuant to the rule that he/she would enact as if he/she were the legislator himself/herself. Thus, it would be determined by judges. However, this short-term solution would not solve the main dispute in the future. In practice, domestic workers rarely sue their employers and demand their rights. Therefore, it is not easy to ascertain supreme court decisions.

Above all, it should be mentioned that, standby hours are one of the main problems of domestic workers' working hour issues. This issue should be regulated by the Turkish legislator. While regulating this difficulty, said legislator should utilize comparative law as it is stated above. At this point the French National Collective Agreement would be preferable. Since according to the National Collective Agreement of Employees of Individual Employers, Article (3), it is regulated that not only do the standby hours have to be stated in the contract but also two-thirds of said hours shall be paid as working hours.

3. Overtime Work

3.1. Definition and limitations of overtime

In order to protect domestic workers' health and well-being, overtime must be defined, limited and compensated in some way. Without overtime, setting limits for normal working hours will be less meaningful[55].

It should be indicated that, there is not a definition of overtime work in the ILO Convention No. 189. As we examined before, according to ILO Convention No. 189 "Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work"[56]. Specifically, Convention No. 189 assigned member states a duty to measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work. However, Convention No. 189 does not regulate strict rules corresponding with normal hours of work or overtime work. Therefore, each Member

[55] Dejardin op. cit. 8.

[56] Article 10 (1).

is free to define their overtime work limit, on the condition that norms should be generally equal between domestic workers and other workers.

On the other hand, the Working Time Directive limits the normal hours of work; as the average working time for each seven-day period, including overtime, does not exceed 48 hours[57]. Aforesaid Directive determines that member states may lay down for the application of Article 6 (maximum weekly working time) a reference period not exceeding four months[58].In other words, maximum weekly working time may be calculated over a four-month reference period[59].

The reference period may be extended to six months under a collective or workplace agreement or, on the basis of a derogation available to member states, to 12 months "for objective or technical reasons or reasons concerning the organisation of work".[60] [61] Workers whose working time period is not measured and/or predetermined or can be controlled and decided by themselves, such as managing executives or other persons with 'autonomous decision-taking powers', may be excluded from the regulations on maximum weekly working time[62] [63].

In addition to these, the Working Time Directive allows member states an opt-out from regulation by giving them the option to disregard the average 48-hour maximum limit during a weekly working time 'while respecting the general principles of the protection of the safety and health of workers at work'. In effect, this means that a member state may provide in its national legislation for a worker to work, on average, more than 48 hours per week but only if the worker has given his/her individual agreement to perform such work and the employer has satisfied certain record-keeping requirements. Strictly speaking, the opt-out is intended to be used when the individual workers is assumed to be capable of determining his/her own working time providing the consentual agreement is free and informed[64]. Therefore, some writers[65] conclude that the use of the individual opt-out is widespread and it is regarded as the most convenient and effective mechanism for avoiding the 48-hour limit on weekly working time.

A considerable amount of countries have no regulations on overtime for domestic workers, the reason for this is they either do not manage hours of work related to domestic workers in their laws or they exclude them for the general norms on that matter. On the other hand, the Countries which have regulations on over time, handle it in completely different ways[66].

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57 Article 6/2 (b).

58 Article 16 /1 (b).

59 Kenner op. cit. 590.

60 Article 17 (4).

61 Kenner op. cit. 590.

62 Article 17 (4).

63 Kenner op. cit. 590.; Roger Blanpain: *European Labour Law*. Netherlands, Kluwer Law International, 2006. 543.

64 Kenner op. cit. 590–591.

65 Barnard–Deakin–Hobbs op.cit. 224.

66 Ramirez-Machado op. cit. 25.

For instance in terms of South Africa's Sectoral Determination (7), Section (11), an employer may not require or permit an employee to work overtime without the employee's agreement, and not for more than twelve hours, including overtime, in any day or to work in excess of fifteen hours of overtime during any week. Under France's National Collective Agreement of Employees of Individual Employers covering domestic work, Article (15) (b) (3) limits overtime to no more than ten hours in any one-week period and to an average of eight hours per week in any consecutive twelve week period[67].

In Sweden, according to the Working Hours Act, Section (8), overtime cannot exceed forty-eight hours in a four-week period or fifty hours over a calender month with a maximum of two hundred hours over a calendar year[68]. In Finland, according to Act on the Employment of Household Workers, Section (7), overtime must not exceed six hours in any day, tweny-four hours in any two weeks and three hundred-twenty hours in any calendar year[69]. In Spain, overtime must not exceed eighty hours in any year. In Costa Rica and in Iran (Labour Law Article 59), overtime is measured on a daily basis, the limit fixed at a maximum of four hours. In Vietnam, the additional hours of work shall not exceed four hours in a day or two hundred hours per annum[70].

In Turkey, the Turkish Code of Obligations, Article (398), defines that overtime work is the work done over normal time of work specified in relevant laws and with consent of the worker. As it has been mentioned above, the term "relevant norms" is not clear and it should be specified in order to denote an exact definition. Despite the fact that Labour Law numbered 4857 is the basic labour law, there are more than one related norms in Turkish legislation. However, in the Turkish literature, the term "relevant norms" is regarded as Labour Law numbered 4857. Accordingly, normal working hours are inferred as forty-five hours per week under the Turkish Code of Obligations and Labour Law numbered 4857 (Article 63)[71]. With this in mind, in the case of a worker exceeding a maximum of forty-five hours a week, this work should be accepted as overtime. Corresponding with domestic workers, exceeding a maximum of forty-five hours a week is overtime.

Moreover, there is not an overtime limit in the Turkish Code of Obligations. In contrast, Labour Law numbered 4857, Article (41)/(8) regulates an overtime limit per year. According to the Article (41)/(8), aggregate overtime work shall not be more than two hundred-seventy hours per annum. To this end, yearly limits for overtime work cannot be automatically enforced for domestic workers, because the Turkish Code of Obligations lacks a clear overtime limit.

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67 For these and more see ILO (2012) op. cit. 52.

68 http://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0ahUKEwi-u_Kzy8POAhVCaxQKHTJNCtoQFghUMAY&url=http%3A%2F%2Fwww.government.se%2Fcontentassets%2F1b29fd35b2544f13875137beab80911a%2F1982673-working-hours-act.pdf&usg=AFQjCNE8EuGdw-kCZdFKDGlYgtOJcDGbyg

69 http://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwif5uGVzsPOAhVBnxQKHQ3QBB8QFggkMAE&url=http%3A%2F%2Fwww.finlex.fi%2Ffi%2Flaki%2Fkaannokset%2F1977%2Fen19770951.pdf&usg=AFQjCNHkMDSZFIU3otet4nHK18p4ERohnA

70 For the details and more, see Ramirez-Machado op. cit. 26. and footnotes 181, 182, 184, 185, 186.

71 For the details see 2, a. Normal Hours of Work.

In case a domestic worker would sue her/his employer for overtime work and would claim that she/he had worked more than two hundred-seventy hours overtime work per year, the judge could not have enforced Labour Law numbered 4857 Article (41)/(8) automatically. The judge could interfere, evaluate and deliver a judgement similar to how Labour Law No. 4857 would be enforced. Since, according to the Turkish Civil Law Article (1), when there is not an applicable provision, the judge shall decide pursuant to customary law, and in its default, pursuant to the rule that he/she would enact as if he/she were the legislator himself/herself. Thus, it would be determined by judges.

Consequently, an overtime limit should be regulated and determined in the future, not only per year but also per day and per week as it is regulated for instance in Finland. Admittedly, it could also be regulated in another way. It is possible to mix and match solutions from different countries. The key point is that overtime has to be determined and limited gradually.

3.2. Overtime pay (overtime compensation) and time off in lieu (banked time)

Corresponding with overtime, overtime pay is another key issue. Overtime pay (compensation) could be in the form of remuneration of normal wages with a premium, of additional rest or time-off, or a combination of pay and time-off[72]. In all cases, the remuneration should not be inferior to the regular rate of remuneration. Even though the normal rate is a supplement of fifty rates, it can vary from an increase of ten percent to hundred percent[73].

ILO Convention No. 189 determines that "Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to […] overtime compensation, […] in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work"[74]. As outlined before, Convention No. 189 assigned member states to regulate equal treatment between domestic workers and workers, in relation to overtime compensation. However, Convention No. 189 does not define strict rules corresponding with overtime compensation. Therefore, each Member will oversee their own system with regards to this subject.

In France, the National Collective Agreement of Employees of Individual Employers, Article 15 (b) (3) provides for pay or time off at two different increased rates, according to the amount of overtime hours worked. Overtime will be compensated in the form of remuneration or time off, at an increased rate of twenty-five percent (for the first eight hours) and fifty percent (for overtime beyond eight hours).

South Africa's Sectoral Determination (7), part (D), section (12), provides for monetary compensation or for a combination of monetary compensation and time off on the agreement of the parties:

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72 Dejardin op. cit. 8.; ILO (2012) op. cit. 53.

73 Ramirez-Machado op. cit. 26–27.

74 Article 10/(1).

(1) An employer must pay a domestic worker at least one and one-half times the domestic worker's wage for overtime worked.

(2) Despite sub-clause (1), an agreement may provide for an employer to (i) pay a domestic worker not less than the domestic worker's ordinary wage for overtime worked and grant the domestic worker at least 30 minutes' time off on full pay for every hour of overtime worked; or (ii) grant a domestic worker at least 90 minutes' paid time off for each hour of overtime worked[75].

In Turkey, the Code of Obligations Article (402) provides that the employer is obliged to pay overtime, including minimum fifty percent of normal working wage. Namely, in case of an employee who works overtime, the wage for each hour of overtime shall be at least one and a half times the normal hourly rate[76].

On the other hand, according to the Turkish Code of Obligations Article (402), in lieu of overtime pay, the employer can bestow a convenient time in proportion with overtime work with the consent of the worker. At that point, it shall be stated that, there is a difference between Labour Law numbered 4857 and the Turkish Code of Obligations. Labour Law No. 4857 Article (41) (4), bestows an opportunity to the worker, for selecting overtime pay or convenient time. By contrast, the Code of Obligations denotes this right to the employer[77]. According to the Code of Obligations, domestic workers do not have an opportunity to select either overtime pay or time off in lieu. That norm inferred as employer's authority in the doctrine[78]. Despite the fact that Article (402) gives this right to the employer, it shall be executed with the consent of the domestic worker, namely both sides are in consensus[79].

Furthermore, Labour Law numbered 4857 obviously regulates that in the case of a worker's desire to use overtime wage as a free time, for each hour of overtime shall be remunerated at one and a half times the normal hourly rate[80]. By contrast, the Turkish Law of Obligations Article (402) lacks a clear norm concerning the aforesaid calculation. Therefore, it is asserted in the doctrine that the convenient time in proportion with overtime work left to the decision of employer. The employer is free to manage the establishment, and it can be used maliciously[81]. However, in the preamble of Article (402) there is a reference to the Labour Law, Article (41). Thus, one hour will be calculated as one and a half times the normal hourly rate. To that end, courts are enacting analogous with this acceptance. With this in mind, in order to be unhesitant about this provision, Article (402) should be rewritten in a similar direction of Labour Law, Article (41)[82].

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75 For these and more see ILO (2012) op. cit. 53.

76 This provision is analogous with Labour Law Article (41/2).

77 Soyer op. cit. 157.; Arslan Ertürk op. cit. 542.

78 Güneş –Mutlay op. cit. 246.

79 Soyer op. cit. 157.; Doğan Yenisey op. cit. 314.; Ekmekçi op. cit. 22.

80 Article (41)/(4).

81 Güneş –Mutlay op. cit. 246.

82 Güneş Mutlay op. cit. 246.

3.3. Overtime work in emergency situations

An important feature of legislative provisions regulating overtime is the consensual nature of overtime. However, simultaniously, some laws allow employers to require workers to do overtime work without worker's admittance in emergency situations, within precisely defined limits[83].

For instance, in Finland, according to Act on the Employment of Household Workers, Section (8), in the event of an accident, sudden case of illness or other similar, unforeseeable event in the employer's household occurs or seriously threatens to put life, health or property at risk, employers can demand work, outside the regular working hours, in order to carry out emergency work as necessary. However, emergency work can only be done for a maximum of a fortnight at a time, and for no more than twenty hours in that period. In such a case, the employer must notify, in writing, the competent occupational safety and health authority, which can authorize, limit or obviate the emergency work. Emergency work is not considered as overtime, by contrast the pay is equal to the overtime pay[84].

On the other hand in terms of the Turkish Code of Obligations, Article (398), in the case where there is a necessity to perform work requiring more than normal working time, and the worker is at a state to perform the work and is capable of doing so, the worker is obliged to perform overtime work and be provided proper wages. Any failure to fulfil this obligation is considered as justified cause for terminating a contract. This means that in the above mentioned case, the worker has no opportunity to reject overtime work.

It is important to highlight that there is not a maximum allowed time or work limit in the Turkish Code of Obligations. In other words, if an emergency arises necessitating work in addition to normal working hours and the worker is capable to perform said work, the worker is obliged to perform the overtime duty indeterminately. However, while the reason for overtime is a necessity, the maximum time and allowable work must be determined in Turkey, just like in Finland. Thereby, decent work can be regulated for domestic workers as it is for other workers.

4. Night Work

Night work is a key issue in the Working Time Directive. This Directive determines that "night time" means any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00 am[85]. "Night worker" means on the one hand, any worker, who, during night time, works at least three hours of his daily working time as a normal course. While on the other hand, a night worker is any worker who is likely to work a certain

83 ILO (2012) op. cit. 52. and for an example see the identical page.

84 For the details see Ramirez-Machado op. cit. 27., footnote 196.

85 Article 2 (3).

proportion of his annual working time during the night. This is defined at the choice of the Member State concerned by national legislation, following consultation with the two sides of industry; or by collective agreements or agreements concluded between the two sides of industry at national or regional level[86].

Despite the fact that night work is usual for several domestic workers, not many countries regulate, explicitly, terms related to night work. In order to protect domestic workers' health and well-being, when night work is to be performed and daily rest is to be interrupted, this should also be set under strict conditions[87].

The Working Time Directive determines that Member States shall take necessary measures to ensure that; (a) normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period; (b) night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work. For the purposes of point (b), work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work[88].

Corresponding with night work, the large majority of countries treat domestic workers in the same way as other workers. Eighty-three percent of countries do not impose any limit, ten percent impose eight hours, six percent six or seven hours and one percent ten hours or more as the set limits[89].

The reasons for night work can be illness of household members, absence of parents, or other unforeseen situations. With regard to situations where the domestic worker's normal duties are performed at night, ILO Recommendation No. 201 provides for measures comparable to those aimed at protecting workers, generally, from the negative effects of standby work. For instance, measures to establish a maximum number of permitted hours of night work, as well as rules regarding rest and remuneration (Recommendation No. 201, Paragraph 9 (2))[90].

Article (8) of ILO Night Work Convention No. 171 provides that "compensation for night workers in the form of working time, pay or similar benefits shall recognise the nature of night work". At the same time, the ILO Night Work Recommendation No. 178 suggests that night work should not normally exceed eight hours and should generally be shorter than the same work by day. National laws prone to set stiffer limits on work at night than those imposed on work during the daytime[91].

86 Article 2 (4).

87 Hobden op. cit. 6.

88 Article 8. Additionaly, for the detailed regulations regarding with night work see Article 9, 10, 11 and 12.

89 ILO (2010) op. cit. 50.

90 ILO (2012) op. cit. 59.

91 ILO (2010) op. cit. 48.

With this in mind, Finland's Act on the Employment of Household Workers, Section (9), limits work between the hours of 11 p.m. and 6 a.m., requiring the worker's consent, except in cases of emergency. Employers can require work to be carried out between 6 a.m and 11p.m. […] At other times of day [that is, during the night], workers can be required to work only in the following cases:

(1) to carry out emergency work […];

(2) with the worker's consent, in a stand-by function or to carry out related work […]; or

(3) with the worker's consent, temporarily if required for a compelling special cause.

In Denmark, night work is considered as an exception like Finland. Domestic workers are not to be employed on night work without a valid reason and, in the case of being employed on such work, the domestic worker shall be entitled to a corresponding rest period the following day[92].

Turkish Labour Law No. 4857 sets some provisions related to night work. According to it, as a rule, night work for employees must not exceed seven and a half hours (Article 69/3). However, as it is repeated several times, domestic workers are excluded from Labour Law No. 4857. To that end, domestic workers are not able to benefit from this provision. Unfortunately, there is not a provision concerning night work in the Turkish Law of Obligations. With this in mind, the aforesaid lacuna in the law does not mean that domestic workers can be obliged to work at night without any limit. The Turkish Civil Law Article (1) provides, that when there is no applicable provision, the judge shall decide pursuant to customary law, and in its default, pursuant to the rule that he/she would enact as if he/she were the legislator himself/herself. However, it has to be indicated that this lacuna should be filled by the Turkish legislator.

5. Record Keeping

Keeping track of a domestic worker's overtime hours is critical to the effective implementation of overtime limitations established by law and ensuring that domestic workers are fairly compensated for any extra hours worked[93]. Therefore after regulating the working hours and its limits, record keeping should be done.

In terms of the ILO Recommendation No. 201, Paragraph 8 (1), hours of work, including overtime and periods of standby consistent with Article 10 (3) of the Convention, should be accurately recorded, and this information should be freely accessible to the domestic worker. Accordingly, Finland's Act on the Employment of Household Workers, Section (31), requires the employer keep track of additional hours worked by domestic workers: Employers shall draw up a work schedule indicating the beginning and end of working hours, the break … and the weekly rest period. Employers shall

92 For the details and more examples see Ramirez-Machado op. cit. 23. and footnote 156.

93 ILO (2012) op. cit. 53–54.

keep a separate register on any emergency work and overtime and the increased wages paid on them. Any Sunday work and the increased wages paid on it, and any work performed during weekly rest period and the resulting reduction in regular working hours or separate remuneration paid for it must additionaly be recorded in the register. The work schedule and register referred to in this section must be kept available for inspection by the worker and, on request, made available for inspection by the occupational safety and health authority. Employers must on request provide the worker or his/her representative with a written report on the records concerning the workers in the said register[94].

Due to the fact that while working hours are not validated, the norms can never be enforced. Legislation that includes a requirement for employers to document domestic worker's work schedule as well as any additional hours worked is an important component of regulating the hours of domestic workers. Such provision can also provide that these records are accessible to the worker and the authorities charged with supervising compliance with the legislation, for instance the labour inspectorates[95]. Unfortunately, there is no provision in the Turkish Law of Obligation analogous with this subject.

6. Conclusion

At the present time, domestic workers are excluded from protective laws or they have a lower degree of legal protection compared to other workers almost all over the world. This can be described as the legislative precariousness[96].

ILO Convention No. 189 and Recommendation No. 201 are the most important legal instruments in the world which regulate the terms and the conditions of work for domestic workers. Regrettably, ILO Convention No. 189 has not been ratified by Turkey yet. Furthermore, domestic workers are excluded from the scope of Labour Law No. 4857 by virtue of Article (4). Domestic workers are in the scope of Turkish Code of Obligations No. 6098, however, Labour Law No. 4857 protects workers better than the Code of Obligations.

Regarding working hours of domestic workers, there are several lacunas in the Turkish Code of Obligations such as indefinite normal hours of work, lack of maximum time and work limits as well as a lack of night work and record keeping norms. Turkish Code of Obligations also gives power to the employer to choose time off in lieu of overtime pay, in comparison to allowing the employee and employer to jointly the choice.

94 ILO (2012) op. cit. 54.

95 ILO (2012) op. cit. 53–54.

96 Virginia Mantouvalou: The Many Faces of Slavery: The Example of Domestic Work. *UCL's Institute For Human Rights Working Paper Series,* 4/2012. 2–3.

Due to the lacunas in the Turkish Code of Obligations, it should be verified from general norms whether or not there is a provision in existence. According to Turkish Civil Law Article (1), when there is not an applicable provision, the judge shall decide pursuant to customary law, and in its default, pursuant to the rule that he/she would enact as if he/she were the legislator himself/herself. Thus, it would be determined by judges. However, this short-term solution will not solve the main issue in the future.

Above all, it should be mentioned that, these issues should be regulated by the Turkish legislator. While regulating, said legislator should utilize comparative law as it is stated above. Since, limits on work hours and the organization of these hours can improve not only the quality of work but also the quality of life.

The expectation is the ratification of ILO Convention No. 189 by Turkey and the realization of necessary amendments in domestic legislation. Despite the fact that inclusion of domestic workers within the scope of the Labour Law would have positive physical effects, it would not solve all the problems in this area. The second opinion which appears to us more persuasive, is conducting a more comprehensive Law for just domestic workers. Both sides can be defended, the point is getting through to the international standards.