

The precarious situation of domestic workers in the light of Turkish labour law and ILO Convention No. 189

Abstract

This article explores and problematises the precarious situation of domestic workers in Turkey from two perspectives: one being the characteristics of domestic workers; the other their exclusion from the scope of Labour Law No. 4857. The first part of this article maps the definition of domestic work and domestic workers. It then describes the characteristics and problems relevant to this field. Afterwards, it examines ILO Convention No. 189, which can be determined as the basic regulation for domestic workers, and analyses which Law regulates their labour rights in Turkey. It concludes with how the law for domestic workers should be regulated. On the basis of this analysis, it is suggested that labour protection for domestic workers should be expanded either by revising Labour Law No. 4857 or by legislating a completely new, and specific, law. Moreover, it is remarked that the problem is not only deprivation from legal regulation but also the existence of a gap between the formal legal entitlements of domestic workers and their treatment in practice.

Keywords: domestic worker, household worker, private home worker, ILO Convention No. 189, precarious workers, vulnerable workers.

Introduction

Domestic workers typically work in private homes, performing various household tasks such as: cleaning; cooking; washing and ironing clothes; gardening; taking care of children, elderly or sick members of a family; guarding the house; driving for the family; and even taking care of household pets (Albin and Mantouvalou 2011: 2). Tasks that may not be strictly determined at the beginning of employment and may differ widely over time.

Some countries prefer terms such as ‘household worker’ or ‘private home worker’ with regard to domestic workers. By contrast with these practices, other countries prefer terms such as ‘maid’ or ‘domestic servant’, which suggests a type of submission on the part of the worker; while others prefer terms such as ‘household helper’ or ‘household aide’, whose disadvantage is that they trivialise the importance of the concept of ‘worker’ and, consequently, tend to devalue the nature of the occupation (ILO 2016: 9). To that end, we prefer to use the term ‘domestic worker’, as indeed also does the International Labour Organisation (ILO).

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;¹ secondly, live-out domestic workers employed full-time by a single employer; and thirdly, live-out domestic workers working for different employers.

Domestic work is widely gendered, but it is also well-known that the majority of domestic workers are women, as can be seen in Turkey. The reason for this can be related to tradition. Participation in the labour market and having a job, did not end the traditional division of domestic tasks in most countries.² Women are still responsible for most domestic tasks.³ More clearly, in order to be able to work while being a mother and taking care of a home, women have to delegate these tasks. To that end, and to the extent that women can afford, she delegates these tasks to other women with less economic resources; for instance, to domestic workers (Gomes and Bertolin 2010: 4). Most domestic workers are women, so the creation of protective standards here are a significant step in improving gender equality in the world of work and in guaranteeing equal rights for women and their protection by virtue of the law (ILO 2010: 6).

The purpose of this article is to shed some precise light on domestic workers and their precarious situation under the Turkish Labour Law. It commences by indicating a definition of domestic work and domestic workers. It then describes the characteristics and problems of work and workers in this area. Afterwards, it examines ILO Convention No. 189, which can be determined as the basic regulation in the field; besides that, it analyses which law regulates domestic workers' labour rights in Turkey. It concludes by commenting on how the situation of domestic workers should be legally regulated.

Definition of 'domestic work' and 'domestic workers'

The meaning of the term 'domestic work' may differ considerably depending on the geographic and cultural context. In other words, it may vary from one country to another (ILO 2016: 9). Correspondingly, the term 'domestic worker' will vary as well.

According to the ILO's Convention concerning Decent Work for Domestic Workers, No. 189, Article 1 (adopted in 2011), the term 'domestic work' means work performed in or for a household or households; while 'domestic worker' means any person engaged in domestic work within an employment relationship – a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.

This ILO definition regarding domestic workers is quite broad. Owing to this definition being drawn up for the purpose of delineating who should be entitled to the rights and protections contained in ILO Convention No. 189 (Erdoğan and

- 1 Live-in domestic work is most likely one of the oldest jobs for women in most countries all over the world (Hobden 2013: 1).
- 2 See Table 1.1 (ILO 2010: 6).
- 3 It has to be pointed out that this is indicated by an author regarding primarily the Brazilian case (Gomes *et al.* 2010: 4).

Toksöz 2013: 16). In the Turkish legislation, there is no definition of domestic workers; the issue is left to the interpretation of lawyers and judicial practice of the High Court of Appeals. Accordingly, they have adopted a narrower definition of who is a domestic worker (Erdoğan and Toksöz 2013: 17).

The literature on labour legislation in Turkey defines domestic worker as a person who responds to the daily and routine needs of household life including cleaning, cooking, laundry washing, ironing and childcare. In order to consider any work as domestic service, it is stated that it should be directly linked to the house and the living conditions therein. Domestic workers are those engaged in the daily activities of a household (Süzek 2015: 233; Okur 2004: 2-4; Eyrenci *et al.* 2014: 47; Gökçek Karaca and Kocabas 2009: 173). Having said that, some work is excluded from the definition of domestic services. For instance, a nurse who is caring for a sick household member in the house is not considered a domestic worker: she/he is employed by virtue of Labour Law No. 4857.⁴ On the other hand, in some cases workers who perform not only domestic services but also other work may not be considered to be domestic. The status of such a person is determined by the dominant function of the work (Okur 2004: 9-10; Süzek 2015: 234; Gökçek Karaca and Kocabas 2009: 173).

Characteristics and problems of domestic work and domestic workers

Domestic work has often been excluded from employment legislation all over the world, either explicitly or implicitly. One of the reasons for this is that it covers 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, as will be indicated below.

The conditions of work vary from one country to another. Having said that, domestic workers throughout the world share and suffer from the same basic problems. Domestic workers are on the vulnerable side in any employment relationship (Oelz 2011: 1). They not only remain hidden and invisible in society (Ramirez-Machado 2003: 1) but are also undervalued and unprotected by labour law (Johnstone 2013: 2, 17).

The invisibility of domestic workers in the eyes of society, as well as the law and the legislation has to be examined from two sides.

Firstly, not many countries include domestic workers in labour force statistics, in the light of a great majority of them not considering domestic workers as 'full-time workers' (Ramirez-Machado 2003: 69). According to this differentiation, all economic activities are – in law or practice – not covered, or are insufficiently covered, by formal arrangements. The employment relationship is 'atypical' and domestic workers do not have a precise job specification (in terms of working hours, free time or annual leave). Employers can easily infringe national labour laws (Kiss 2015: 2). Potential problems related to this kind of work include: a deficiency of adequate accommodation; a lack of privacy and health insurance; occupational accidents and

4 Civil Department No. 22 of the Supreme Court, 9 March 2015 (Case No: 2013/35095, Decision No: 2015/9308) available at: <http://www.turkhukuk sitesi.com/showthread.php?t=101908> [last accessed 16 August 2016].

workplace hazards; and no protection against illness. Furthermore, there is a deficiency in access to social security benefits. Significantly, domestic workers' wages are often below the national statutory minimum wage while there is no provision for overtime pay. In addition, wage payments may be delayed, improperly calculated or withheld arbitrarily (Kiss 2015: 2).

Besides these, there is plenty of unregistered employment. Unregistered workers are not located in the official statistics and child domestic workers are ignored by household surveys. It is hard to ascertain accurate data concerning domestic worker numbers; while estimating the number of domestic workers is a fruitless task. Therefore, this work remains invisible in national statistics and in the labour legislation.

The second aspect to the invisibility of domestic workers derives primarily from the characteristic of the workplace itself: there is no 'formal' workplace (Triandafyllidou 2013: 2). Domestic workers are working in houses, which are difficult to control and inspect, not to mention that they are working closely with their employers. In other words, labour inspection and the enforcement of legislation are difficult in private households; and, even more importantly, so is the organisation of collective action (Ramirez-Machado, 2003: V, 1).

Most domestic workers have had to leave their own families behind to migrate either from rural or economically less-favoured areas within their countries of origin to urban centres in their own countries or even to wealthier countries (Blackett 1998: 4; Triandafyllidou 2013: 1). Later on, especially for migrant workers, a temporary work and residence permit makes it difficult to change job and employer (Dejardin 2011: 7; Ramirez-Machado, 2003: 4).

The domestic worker's historical background, related as it is to slavery and to servitude, composes a low social value for domestic work. These challenges are, at the same time, associated with other factors, such as the deficiency of the legal recognition of domestic work as an occupation and the existence of discriminatory social and legal practices (ILO 2016: IX).

The truth is that, as we have reported above, domestic workers' characteristics are: invisibility; marginalisation; uncertainty about future employment; and a deficiency in social and legal recognition. Wherever it occurs, domestic work is prone to precariousness for social, psychological and, furthermore, economic reasons (Albin and Mantouvalou 2011: 2; Kiss 2015: 2).

A report published by Kalayaan⁵ in 2010 focused attention on the workplace situation of domestic workers. It highlighted the following facts:

- some 60 per cent of domestic workers who registered with it were not allowed out unaccompanied; while 65 per cent had their passport withheld
- 54 per cent suffered psychological abuse, 18 per cent suffered physical abuse or assault and three per cent had been sexually abused
- 26 per cent did not receive regular/sufficient food
- 49 per cent did not have their own room

5 Kalayaan is a non-governmental organisation (NGO) working on migrant domestic worker issues in the UK.

- 67 per cent worked seven days a week without time off, 58 per cent had to be available ‘on call’ twenty four hours a day and 48 per cent worked sixteen hours or more per day
- 56 per cent received a salary wage of £50 or less per week.⁶

Unfortunately, domestic workers – especially those who live-in – tend to accept these harsh conditions of employment. Despite such facts, they mostly evaluate such conditions as positive in comparison with conditions in their country of origin (Peterson 2007: 274-275). 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.

Regulation of domestic work

Basic regulation: ILO Convention No. 189

Labour law coverage for domestic workers is often weak or absent almost all over the world. However, it should be noted that some countries have already taken legislative steps in this regard (Oelz *et al.* 2012: 10, Kiss 2015: 3).

Improving conditions for domestic workers has been a concern of the ILO for decades. As early as 1948, it adopted a resolution concerning the conditions of employment of domestic workers (ILO 1948: 545-546). In 1965, it adopted a resolution calling for normative action in this area (ILO 1965: 20-21). Furthermore, in 1970, the first survey ever published on the status of domestic workers across the world made its appearance (ILO 1970: 391-401).

In the 100th Session of the International Labour Conference, in June 2011, the ILO adopted Convention No. 189 and supplementing Recommendation No. 201 regulating terms and conditions of work for domestic workers (Mantouvalou 2012b: 9). Accordingly, and for the first time, domestic workers’ participation in the paid labour market and specific working conditions were recognised. It was a landmark moment for domestic workers (Mantouvalou 2012b: 9; Albin and Mantouvalou 2011: 1). Thereafter, it helped improved national domestic work laws and practices among member states with a view to promoting decent work⁷ in the sector. At present, Convention No. 189 and Recommendation No. 201 have been the most important instruments on domestic work. We should not neglect to indicate that these regulations put the terms of the basic principles and minimum labour standards applying to domestic workers on the map (ILO 2016: 6).

ILO Convention No. 189 strives to guarantee that domestic workers have equal conditions and labour rights as other types of workers. Domestic workers are, like other workers, entitled to decent work even if they work for a family or someone else. Domestic workers deserve to work like any other; even if they work like no other (ILO 2010, 13; McCann and Murray 2010: V). ILO Convention No. 189 regulates

6 Kalayaan database, via Lalani (2011: 12); also see Ramirez-Machado (2003: 2); for an overall view on violence against domestic workers, see United Nations Report of the Special Rapporteur on Violence Against Women – Its Causes and Consequences, Economic and Social Council, Commission on Human Rights, Document E/EC.4/1997/47, 21-23.

7 For more information on ‘Decent Work’, see ILO (2010).

the basic rights of workers; terms and conditions of employment; working hours; remuneration; and occupational safety and health. It also regulates child labour and migrant domestic workers, as well as setting out guidelines on social security for domestic workers (ILO 2016: 6). Up to 2016, a total of 23 countries had ratified ILO Convention No. 189, the majority of which belong to the region of Latin America and the Caribbean.⁸

In addition to this, the European Union (EU) has paid particular attention to the problems of domestic workers since 2012. A study covering precarious work and social rights in member states was carried out for the Commission in 2012. In June 2012, in the context of the EU Strategy towards the Eradication of Trafficking in Human Beings, the Commission urged member states to ratify all relevant international instruments and legal obligations. In March 2013, the Commission submitted a proposal for a Council decision authorising member states to ratify ILO Convention No. 189. Parliament endorsed the proposal in December 2013 and the Council adopted Decision 2014/51/EU;⁹ thereby authorising member states to ratify it.¹⁰

To date, this Convention has been ratified and is now in force in six member states (Belgium, Finland, Portugal, Germany, Ireland and Italy).¹¹ The EU cannot ratify ILO Conventions; only states can be parties to them. Due to the numbers of EU countries which have ratified the Convention, it will not be negligent to indicate that, unfortunately, EU member states continue to allow domestic workers to work in the grey economy, as is also common practice in Turkey.

Regulation in Turkish labour law

It is a fact that domestic workers have been historically excluded from the ambit of labour laws in Turkey. That is to say, at the beginning of Labour Laws No: 3008, 931, 1475 and 4857, domestic workers were not determined as a real worker. Nonetheless, in comparison, the first Turkish Code of Obligations No. 818 and, afterwards, Turkish Code of Obligations No. 6098 did regulate domestic workers' rights.

More clearly, there are two major characteristics of the legal framework as it applies to domestic workers in Turkey: its complicated content and its ineffectiveness (Erdoğan and Toksöz 2013: X).

It is complicated in that Article 4 of Labour Law No. 4857 excludes domestic workers from the scope of this legislation. In contrast, the provisions of Turkish Code of Obligations No. 6098, on service contracts and their general provisions, are applicable to domestic workers. The Turkish Code of Obligations does define the rights and obligations as well as the working conditions of workers; it covers and, in certain respects, it entitles workers to rights that are comparable to those in the Labour Law. However, we should note that Labour Law No. 4857 protects workers better than the Turkish Code of Obligations No. 6098. That is to say: severance pay and job security are regulated in Labour Law No. 4857, whereas neither severance

8 To see the countries which have ratified Convention No. 189, see ILO (2016: 8).

9 Adopted on 28 January 2014.

10 For this and further information, see Kiss (2015: 4).

11 www.ilo.org [last accessed: 9 August 2016].

pay nor job security are regulated in the Turkish Code of Obligations. What is more, according to the Turkish Code of Obligations, 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 ability to reduce annual leave in Labour Law No. 4857.

In the face of the disadvantages caused by the exclusion of domestic workers within the scope of Labour Law No. 4857, different opinions have emerged regarding what the legal framework for domestic workers should be. One of them is coverage by the Labour Law. This could be supported via some special provisions while it is arranged within the law. The inclusion of domestic workers within the scope of the Labour Law would have positive practical effects, but it would not solve all the problems in this area. The second opinion, which appears to us more persuasive, is to conduct a more comprehensive arrangement just for domestic workers.

Both sides can be defended; the point is that the international standards get through to the domestic legislation. Having said that, until a new law is enacted for domestic workers in Turkey, it is proper to indicate that the loopholes in the law do not mean that domestic workers can be worked by their employers without limit. In terms of Turkish Civil Law Article 1, if there is no applicable provision, the judge shall decide in accordance with customary law; and, in its default, in accordance with the rule that he/she would enact as if he/she was the legislator himself/herself.

Besides, the other characteristic of the legal framework relating to domestic workers in Turkey is its effectiveness. The reason for this is that almost no domestic worker actually benefits from the rights recognised by the Turkish Code of Obligations in the context of individual labour relations. Neither the unqualified and overwhelmingly female domestic workforce, nor their overwhelmingly female employers, are even aware of this law and its provisions. Informality is a predominant feature of domestic work in Turkey (Erdoğan and Toksöz 2013: V, X).

More importantly, there are lots of unregistered domestic workers in Turkey, and this situation is not only the preference of the employer but also of that of the domestic worker.

Conclusion

Almost all over the world, domestic workers are excluded from protective laws or have a lower degree of legal protection compared to other workers. This may be described as 'legislative precariousness' (Mantouvalou 2012a: 2-3).

In Turkey, domestic workers are excluded from Labour Law No. 4857; in contrast, however, they do fall within the scope of the Turkish Code of Obligations. We have reported that the protection available under Labour Law No. 4857 is better than it is under the Turkish Code of Obligations. Furthermore, Turkey has not ratified ILO Convention No. 189, which can be regarded as the most primary instrument anywhere providing regulation of the work of domestic workers.

There are lots of employers who treat their domestic workers fairly and humanely. On the other hand, the opposite also exists. Accordingly, the absence of legal standards makes the working conditions of domestic workers dependent on the goodwill of household members (Dejardin 2011: 7). Domestic workers' employment situation is *sui generis*, but there is no doubt that domestic workers deserve to have the same rights as other workers.

My expectation is the ratification of ILO Convention No. 189 by Turkey and the realisation of the necessary amendments in the domestic legislation. More clearly, new laws are necessary to guarantee decent labour conditions. With this in mind, however, the law is not always sufficient to improve conditions for a domestic worker.

Above all, the problem for domestic workers is not only deprivation from legal regulation but also the existence of a gap between the formal legal entitlements of domestic workers and their treatment in practice. Thus, in designing clear legal frameworks for domestic workers, this should be complemented with other actions aiming at increasing awareness of the other needs of domestic worker and indeed of their employers.

Compliance with ethical standards

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