

The Au Pair Experience: Contradictions, Challenges and Work Rights

Application of a Rights-Based Approach in Accessing Labor Rights for Non-EU/EEA Au Pairs

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ABBREVIATIONS

CEDAW	Convention on the Elimination of Discrimination against Women
CESCR	Committee in Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CMW	Convention on Migrant Workers
DFA	Department of Foreign Affairs
DOLE	Department of Labor and Employment
EC	European Council
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ESC	Economic, Social and Cultural
EU/EEA	European Union/ European Economic Area
GFMD	Global Forum on Migration and Development
HRBA	Human Rights Based Approach
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
IOM	International Organization for Migration
NGO	Non-Governmental Organizations
OFW	Overseas Filipino Workers
OHCHR	Office of the High Commissioner on Human Rights
POEA	Philippine Overseas Employment Administration
RBA	Rights-Based Approach
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDESA	United Nations Department of Economic and Social Affairs
UNDP	United Nations Development Programme
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
VCLT	Vienna Convention on Law and Treaties

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To God be the glory.

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CHAPTER 1

General Overview of the Study

1.1 Introduction

The increasing demand for domestic work in affluent European countries is reflected by the influx of mostly young women ‘au pairs’ from non-European Union/ European Economic Area (EU/EEA) countries, particularly from the Philippines. Either for a cultural and educational exchange experience or for a purely economic reason, it is in reality that au pairs render domestic work as a prerequisite under the 1969 European Agreement on ‘Au Pair’ Placement. The treaty further provides that an au pair belongs “neither to the student category nor to the worker category, but to a special category which has features of both”. This loose provision plainly disregards ‘au pair work’ as work, thereby explicitly placing au pairs outside the margins of labor rights protections afforded by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labor Organization’s (ILO) Convention on Decent Work for Domestic Workers. However, the European Parliament in a 2011 Resolution acknowledged au pairs as workers when it took notice their status as a “group of domestic workers who are often not regarded as regular workers”. This conflict between concepts of ‘au pairs’ under the ‘Au Pair’ Agreement as cultural exchange participants and of the European Parliament as ‘domestic workers’ demonstrates an au pair’s status of precariousness and high risk for labor exploitations. Moreover, the Council of Europe in its 2004 Recommendation 1663 noted that modern domestic slaves in Europe are predominantly women and work in private households, who started out as migrant domestic workers and au pairs. However, despite recognition of these human rights issues on au pairing in the plenary, the placement of non-EU/EEA au pairs continue to flourish at present.

Interestingly, au pairs from EU/EEA countries are mobile workers entitled to work rights within the EU community law. While non-EU/EEA au pairs remain to be participants under the host countries’ au pair schemes without access to basic labor rights. Thus, this thesis is concerned about how to remedy this gap on equal access to rights protection of au pairs coming from outside the EU/EEA area.

1.2 Research Questions

Why are Non-EU/EEA au pairs not entitled to work rights? Are they at present migrant domestic workers? How can the gap on the equal access to work rights be remedied?

1.3 Objective of the Study

The objective of this study is to identify the gaps in the present European au pair regulation. It also aims to explore the rationale behind the absence of work rights of non-EU/EEA au pairs and to provide immediate remedies on how to obtain these rights. This study further intends to contribute to the limited legal research concerning au pair work rights under international law.

1.4 Methodology and Sources

This thesis attempts to answer the research questions mainly through the analysis of social practices and the interpretation of relevant laws. The legal sources used in this study include the European Agreement on 'Au Pair' Placement and its Explanatory Report, the ICESCR on the right to equal remuneration, applicable treaty provisions of the ILO Convention 189, bilateral agreements between the Philippines and European countries on au pairing and the CJEU ruling in *Payir vs. Secretary of State for the Home Department*. General Comments of the CESCR, relevant legal literatures and sociological scholarships on au pairing, gender and labor migration in domestic work and migrants' precariousness are secondary sources used in this study. Interpretation and construction of the given sources are in accordance with Article 38 of the International Court of Justice (ICJ) Statute and under the pertinent provisions of Part III (Observance, application and interpretation of treaties) of the 1969 Vienna Convention on the Law of Treaties (VCLT).

In order to understand the pertinent legal provisions and the complex relationship between legal and socio-economic rights issues affecting non-EU/EEA au pairs, it is necessary to employ intersectional analysis as a tool to complement the standard method of legal research. Intersectionality is an efficient methodical tool for analyzing, recognizing and responding to the ways in which gender intersects with other identities and how these inter-

sections contribute to unique experiences of oppression and privilege.¹ This approach does not intend to establish that a specific group is more disadvantaged or advantaged than the other but to show significant differences and similarities in order to overcome existing discriminations through recommendations in reforms in law, policy, programs and services.²

1.5 Thesis Structure

The beginning chapter introduces the thesis topic and outlines the research questions, objectives, sources and methodology for the study. The thesis in Chapter 2 sets the context of the study by providing an overview of the 1969 European Agreement on ‘Au Pair’ Placement and its definition of au pairing in order to understand the intention and concept of the law. The latter part of the chapter identifies the present concepts and vulnerabilities of the Agreement, such as on the question of live-in domestic work and cultural exchange. This study concentrates only on ‘au pairs’ from non-EU/EEA states. Chapter 3 deals with the issue of why non-EU/EEA ‘au pairs’ are not protected with work rights. This chapter investigates the intersections between globalization of domestic labor, migration policies on au pairing of both the sending and receiving European countries, and the gender issue in domestic work and how these convergences contribute to the existing dilemma of marginalization and non-protection of non-EU/EEA au pairs from labor rights. This chapter concludes that the nexus of the given factors place non-EU/EEA au pairs under the paradigm of a migrant precariat. Chapter 4 answers the inquiry of whether non-EU/EEA au pairs are migrant domestic workers. A discussion on the question of who is a ‘worker’ under EU law in this chapter is significant, as no definite designation of the term ‘worker’ is provided within community law. The chapter also examined the ruling of the CJEU in the case of *Payir vs. Secretary of State for the Home Department* to establish further the position on non-EU/EEA au pairs as workers in Europe. Chapter 5 discusses the significance of a human rights-based approach in providing remedies for gaining access to work rights by non-

¹ AWID (2004), p.1.

² *ibid.* p.2-3

EU/EEA au pairs. This chapter also includes an analysis on the principle of equal remuneration for work of equal value under Article 7(a) (i) of the ICESCR and its applicability to protect non-EU/EEA 'au pairs'. Moving from a rights-based approach, the last chapter presents the conclusion of the study and offers recommendations towards immediate and practical remedies for claiming non-EU/EEA au pairs' work rights.

CHAPTER 2

The 1969 European Agreement on ‘Au Pair’ Placement³

2.1 Brief History of the Agreement

“Au Pair” placement is the temporary reception by families, in exchange for certain services, of young foreigners who come to improve their linguistic and possibly professional knowledge as well as their general culture by acquiring a better knowledge of the country where they are received. Such young foreigners are hereinafter persons placed “au pair”.

Article 2, European Agreement on Au Pair Placement (1969)

‘Au pair’ placement is not a new trend. It has its history in Switzerland at the end of 19th century Europe, as it was widely known as an arrangement on a mutual and friendly basis between families acquainted with each other or by way of common family contacts. After the Second World War, a growing number of young women regarded au pair placement as a practical opportunity of going abroad to improve their knowledge of the language and culture of another country.⁴ Host families are to treat the young ‘au pairs’ as family members, and in return for light housework and childcare they should provide free “room and board”.⁵ It is believed staying with a host family provide protections for these young people living away from their families and at the same time giving them the opportunity to learn household skills while improving their proficiency of the foreign language.⁶ However, from a cultural exchange purpose in the beginning, it has then shifted more as a domestic and nanny undertaking.⁷

³ Hereinafter referred to as the “Agreement” or the “European Agreement” in this thesis.

⁴ Council of Europe, Explanatory Report (ETS No. 68), p.1.

⁵ Griffith (2006) pp. 9-10

⁶ Øien (2009) p.32; Chuang (2013), p.6

⁷ Griffith and Legg, supra fn. 5, p. 10; Bikova (2010) p.51

The Council of Europe in its effort to resolve the problem of widespread temporary migration abroad of young Europeans as ‘au pairs’ took into account of the situation as a “unique social phenomenon”.⁸ The Council considered the uncontrollable increase in the number of persons involved as an international social problem of European complexion involving legal, moral, cultural and economic consequences, transcending national boundaries. At that time, the states’ public authorities had a huge role in providing regulation and protection for au pairs.⁹ Moreover, the Council has noted the high risk of trafficking and exploitation.¹⁰ From the given considerations, it was shown the European Council’s objective was to protect ‘au pairs’ and regulate their situations so they could gain better experiences for their period of placement through cultural exchange.¹¹ There was then a resounding acknowledgement of the urgency to draft an international regulation to guarantee protections through an agreement among European states. Henceforth, the Council of Europe formalized the European Agreement on ‘Au Pair’ Placement on 24 November 1969 in Strasbourg and was in force 30th of May 1971. However, only few countries ratified the Agreement.¹²

The Agreement has since been an important regulatory source for ‘au pair’ migration schemes in Western Europe and North America whereby au pairing has become a thriving arrangement for employing foreign live-in nannies and house help.¹³

⁸ Explanatory Report, *supra* fn. 4, p.1.

⁹ *ibid*, p.2.

¹⁰ Toth (1967) “Midnight has begun to toll for British wives who have been living high off the ‘pink slave trade’, otherwise known as au pair girls... The concept, which began before the war as a friendly swapping of children, has commercialized, with many girls treated as bad domestics. It is estimated that a quarter of the 40,000 girls here don’t even live in families that speak English.”

¹¹ Explanatory Report, *supra* fn. 4, p.1.

¹² Council of Europe Treaty Office (CETS No. 068). Ratified by Spain, Denmark, France, Italy and Norway. Luxembourg has revoked its ratification in 2002.

¹³ Epstein (1998) pp.1-3: In the US, au pairing was of private sponsorship for decades. In 1985, au pair exchange becomes a government-sponsored program and involves young western Europeans arriving in the US for cultural exchange. They will live and be immersed in the home life... receive a stipend equal to the minimum wage in return of doing childcare. In the US program, au pairing is more of an employment than a cultural exchange program.

2.2 A Scheme for Cultural Exchange

From the outset, the European au pair scheme was on purpose to be a cultural exchange rubric for young people and not an employment one. The 1969 Agreement considers au pairs as one neither belonging to the student category nor to the worker category but to a special category, which has features of both.¹⁴ Countries involved under the au pair scheme are bound to make appropriate measures for them because of this distinct feature. It is also the purport of the Agreement that ‘au pairs’ are placed¹⁵ with host families to strengthen the cultural exchange perspective of the program in return for assistance in the ‘day-to-day family duties’. Though an ‘au pair’ renders childcare and light domestic work, such are not considered work, but instead a ‘sharing in the life of the receiving family’.¹⁶ According to the Agreement, au pairs should have enough time to attend language courses for cultural and professional improvement as a mandatory provision under the Agreement.¹⁷

The money an ‘au pair’ receives is intentionally a ‘pocket money’ and is not a salary from the ‘day-to-day family duties’ one provides.¹⁸ An ‘au pair’ should be ‘on par’ with the members of the receiving family as the host family is not an employer.¹⁹ Legally, ‘au pairs’ are constructed as neither students nor workers. They are temporary guests of the host family²⁰ and are temporary migrants of the receiving state.²¹

¹⁴Extract from the Preamble of the European Agreement (1969)

¹⁵ Explanatory Report, supra fn. 4 at p. 3: Placement consists of reception (that is to say board and lodging).

¹⁶ Art.7, the European Agreement (1969).

¹⁷ Explanatory Report, supra fn. 4, p. 6: European Agreement (1969) on Art. 8(2). In defining the educational activities of the au pair, the word “improvement” was to show that there could be no question of her pursuing a professional activity or full-length training course. The fact that au pairs have the opportunity to pursue cultural activities and studies rules out the possibility of clandestine work. Since placement is not necessarily effected in towns where organized courses area held, the negotiators refrained from too strict a formula – e.g. one makes it compulsory to register for courses.

¹⁸ Ibid.

¹⁹ Anderson (2000) pp. 23-24

²⁰ Cox (2007) p. 282; Bikova, supra fn. 7, at p.51

²¹ Stenum (2011) p.131; Art. 2(1), the European Agreement (1969).

2.3 ‘Au pair’ Work Under the Agreement

2.3.1 Service to the Host Family

A person placed ‘au pair’ shall render the receiving family services consisting in participation in day-to-day family duties. The time effectively occupied in *such services shall not be more than five hours per day*. (Emphasis added)

Article 9, European Agreement on Au Pair Placement (1969)

Formally prescribed under the European Agreement, the work tasks of an ‘au pair’ are limited to light domestic work and childcare. ‘Au pairs’ should not be employed for more than five hours a day and must include at least one full free day a week.²² They should not be in charge for the everyday child minding and for the daily management of the household. The European Council clarified the phrase ‘participation in day-to-day family duties’ under Article 9 of the Agreement includes ‘housework’²³, cooking, and looking after the children even ‘during the night’.²⁴ The host families thereby expect all these duties from the person of the ‘au pair’ despite the Agreement’s limited ‘five hours-a-day’²⁵ work limit.

The absence of delineating the term ‘housework’ in the Agreement creates conflict and ambivalence between the ‘au pair’ and the host family. For example, cleaning and pol-

²² Article 8 (3), the European Agreement (1969): “The person placed ‘au pair’ shall have at least one full free day per week, not less than one such free day in every month being a Sunday, and shall have the opportunity to take part in religious worship.”

²³ Explanatory Report, *supra* fn. 4, pp. 6-7: During the deliberations, it was recommended that Article 9 should identify ‘heavy work’ like window cleaning, laundry and the likes to be excluded from the services au pairs are required to do. Yet the negotiators of the Agreement did not adopt the proposal because it is not simple to gauge what is ‘heavy work’ and what is not. Likewise, the modernity of using household machines modifies the nature of such work.

²⁴ *Ibid*, p.7: “It was agreed that the services required of the ‘au pair’ person could include looking after children, *even at night*.”

²⁵ Article 9, the European Agreement (1969).

ishing all the huge glass windows and doors of the host family's house, gardening, snow plowing or taking care of three small children aside from making meals while the host parents are at work may be considered as heavy work on the part of an 'au pair' but not the receiving family. The family considers such work as regular daily work performed for the upkeep of the household; hence, the 'au pair' should adapt and conform with these responsibilities even if such are plainly heavy work. It is in this situation the 'au pair' standard contract²⁶ between the host family and the 'au pair' become a necessity with regard to household duties. Yet, it is in this same contract au pairs are found to be in a weak position to discuss and bargain about their duties for fear to be ousted by the host family. This arrangement is a patent disregard of the intent of the Agreement whereby both the 'au pair' and the host family should be 'on equal terms'.

Therefore, the ambiguities found in Article 9 of the European Agreement created justifications for rights protection against overwork. The 'day-to-day family duties' designated by law in reality requires more time and effort, thereby is practically in conflict with the 'five hours-a-day' threshold if the provisions of rules will be closely adhered to.

2.3.2 Payment of a Certain Sum of Money

The person placed 'au pair' shall receive a certain sum of money, as pocket money, the amount of which and the intervals at which it is paid shall be determined by the agreement referred to in Article 6.

Article 8 (4), European Agreement on Au Pair Placement (1969)

The Council of Europe intentionally used the term pocket money to avoid considering the amount paid as remuneration or salary for the services an 'au pair' rendered. The sum varies from the customs of the countries and the shared services rendered by the host

²⁶ See the European Agreement on Au Pair Placement (ETS No. 068) Model Text Agreement.

family and the au pair.²⁷ Thus, a well-defined written agreement (standard contract) concerning the amount and services between the person placed ‘au pair’ and the receiving family is of paramount importance under Article 6 of the Agreement.

However, the host family and the ‘au pair’ in most cases settle verbal work agreements for additional time and house help services.²⁸ This is an explicit dereliction from the law on au pairing. The migrant ‘au pair’ looks at it as ‘overtime money’ and it lessens the concerns of the ‘au pair’ of being dismissed from service for reason of dissatisfaction by the host family.²⁹ ‘Au pairs’ who came from poor countries usually spend a large amount of money from the beginning of the migration process. Hence, to have ones contract terminated without even recovering the money invested places an ‘au pair’ at the mercy of the host family.³⁰

2.4 Present Concept of Au Pairing

2.4.1 Vulnerabilities of the Agreement

The cultural exchange aspect of the European Agreement has greatly deteriorated from the time of the law’s conception in 1969. The provisions of the law itself and of the explanatory report submitted to the Council of Europe evidence shows the Agreement functions well in another societal perspective and not in modern-day Europe. Due to the current deregulation and globalization of labor regimes, young women cross borders as ‘au pairs’ from the global south where there is an abundant supply of labor to the global north where there is a high demand for commodified domestic work³¹. Consequently, the Agreement seems to already lose the subjects of which it has mandated to protect since it

²⁷ Explanatory Report, *supra* fn. 4, pp. 6-7. “It should be noted that the negotiators abstained from specifying the amount of pocket-money.”

²⁸ Øien, *supra* fn. 6, at p.73.

²⁹ Bikova (2008), pp. 55-56

³⁰ *ibid.* p. 12. It is also a common arrangement that host families pay for the transportation expenses and later deduct these from the au pair’s allowance.

³¹ Bosniak (2008) p. 3

does not reflect and cater anymore to the present realities of ‘au pairing’ in general. Making it worst, majority of the European states employing the ‘au pair’ scheme have not ratified the Agreement at present.

The core dilemma of construing ‘au pairs’ as cultural exchange participants and not recognizing them as workers sets them under the concept of ‘precariousness’³². This problem is acknowledged by the European Parliament as it recognized ‘au pairs’ as a “group of domestic workers who are often not regarded as regular workers.”³³ This paradox created an enormous challenge when it comes to safeguarding ‘au pairs’ from labor exploitations such as overwork and underpayment.

Owing to the domestic work aspect of ‘au pairing’, the scheme is now recognized in the international labor market as an activity whereby young women are employed as stay-in domestic workers minus the costs normally required from employers of migrant workers.³⁴

2.4.2 ‘Au Pairs’ in Europe

In the past, au pair placements were carried out by states having economies akin to each other, but the past decades showed majority of the au pairs come from non-EU/EEA countries particularly those from economically disadvantaged states. Global capitalism has greatly contributed to the growing number of new middle-class families in affluent European countries. The same has created a new sub-class of migrants outsourced from poor countries to render domestic service in their homes. The emerging demand for this type of care service sets a global employment market for low-paid women migrant workers through application of the European Agreement.

European countries admitting au pairs vary considerably in their policies on au pair migration and not all allow non- EU/EEA nationals as ‘au pairs’.³⁵ Those countries allow-

³² Rodgers (1989) p.3, “The concept of precariousness involves instability, lack of protection, insecurity and social or economic vulnerability... It is some combinations of these factors which identify precarious jobs, and the boundaries around the concept are inevitably to some extent arbitrary.”

³³European Parliament resolution 12 May 2011 on the Proposed ILO Convention supplemented by a recommendation on Domestic Workers, (C 377 E/16 2012), par. G.

³⁴ Gil (2012)

ing non-EU/EEA au pairs also differ as to immigration regulations and strategic protection mechanisms. However, what is common among these countries is the differential treatment between EU ‘au pairs’ and non-EU/EEA ‘au pairs’.

EU/EEA nationals employed as ‘au pairs’ in Europe are ‘mobile workers’ under community law.³⁶ The freedom of mobility as a worker applies to all citizens of EU/EEA member states regardless of their occupation under the assumption they undertake legal economic activity. EU/EEA ‘au pairs’ are entitled to rights and protections under the TFEUs right of free movement. They are generally not required to apply for work permits, and resident visas in the receiving countries.

However, non-EU/EEA ‘au pairs’ have higher vulnerabilities as to rights protections compared to their counterparts from Europe. According to an in-depth study conducted by the European Parliament in 2011, requiring non-EU/EEA ‘au pairs’ to mandatory conditions under the immigration rules for residence entitlement increases their exposure to vulnerabilities and abuse. It continued to argue that the stipulations in the ‘au pair’ program such as the attachment of the residence permits to a particular host family or agency; the compulsory stay-in arrangement at private homes; and strictly categorizing their immigration permits solely for residence complicate the non-EU/EEA ‘au pairs’ circumstances particularly when problems of mistreatment arise in the receiving country.³⁷ These stipulations lead to the construction of non-EU/EEA au pairs as migrant ‘precaris’.³⁸

2.4.3 International Rules on Au Pairing

³⁵ European Parliament Committee on Women’s Rights and Gender Equality (2011) p. 111

³⁶ Ibid. Article 45(1), Post-Lisbon Treaty TFEU: “Freedom of movement of workers shall be secured within the Union.” Article 45(2); “Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.”

³⁷ European Parliament, *supra* fn. 35 at p.112.

³⁸ Trimikliniotis (2013) p. 61, “...the precariat consists of people who lack the key forms of labor-related security... in its industrial citizenship agenda. The precariat is largely, but not exclusively, made up of migrants.”

As mentioned earlier in this paper, the Agreement is the single international regulation for ‘au pair’ migration and only few states have ratified it. The pertinent issue on whether or not ‘au pairs’ are workers or cultural exchange participants has been the subject of discussion since its inception. This ambiguity has shaped different international responses from countries on the subject of ‘au pairing’.³⁹

Sending countries such as the Philippines, issued a ban on ‘au pair’ emigration to Europe in 1997, due to the reported exploitations of Filipino ‘au pairs’ such as unfair compensation, excessive working hours, discrimination and sexual abuse.⁴⁰ Certainly, this ban was a step by the Philippine government to protect its citizens from exploitation of the scheme and mistreatment. However, the prohibition did not stop the hiring and departure of Filipino ‘au pairs’ to Europe.⁴¹ The prohibition thereby further exposed Filipino ‘au pairs’ to a higher risk of abuse through corruption and an irregularized market without protections from the Philippine authorities and the receiving governments.⁴² Hence, the Philippines in 2010 lifted the ban for ‘au pair’ migration through bilateral agreements between some European countries such as Denmark, Norway and Switzerland.⁴³

In 2012, the Philippines lifted permanently the ‘au pair’ ban to all European countries, thereby the issuance of a new regulation for ‘au pair’ diaspora to Europe.⁴⁴ The bilateral agreements and the permanent lifting of the ban, nevertheless, do not guarantee a safe migration route and non-exploitative ‘au pair’ system at present. As long as ‘au pair’ host countries in Europe do not have a standard and well-defined rules on ‘au pairing’; and non-EU/EEA ‘au pair’ work is not recognized as productive work, they will continue to be outside legislative labor protections.⁴⁵

³⁹ European Parliament, *supra* fn. 35, p. 116. Canada has prohibited au pair schemes due to the risk of using an au pair as a domestic worker.

⁴⁰ DFA Philippines, Circular Note No. 981289, 20 April 1998.

⁴¹ Tal og Fakta, Udlændingetjeneste (June 2009), p. 62: An example is Denmark and its issuance of au pair residence permits to Filipinos despite the ban on au pair deployment from 2003 (211 permits) to 2008 (2,163 permits).

⁴² Stenum, *supra* fn. 21, pp. 189-190, 192.

⁴³ Governing Board Resolution No. 07, POEA (Series of 2010).

⁴⁴ Press Release from the DFA (Philippine Official Gazette, 22 February 2012).

⁴⁵ European Parliament, *supra* fn. 35, p. 116.

2.5 Conclusion

This chapter acknowledges the rights dilemma posed by the present au pair scheme in Europe under the 1969 European Agreement to non-EU/EEA au pairs. The provisions on work time and payment under the au pair scheme do not guarantee protection against overtime and underpayment. These inconsistencies between the policy regulations of au pairing and the practical realities of the scheme have created gaps in defining au pair individual work rights in sending and receiving countries. Moreover, the categorical treatment of au pairs in Europe as EU/EEA au pairs and non-EU/EEA au pairs has marginalized the latter from claiming and accessing work rights from their host countries. Despite of these irregularities, policymakers both in the regional and national levels remain to overlook the discriminatory effects of the scheme and continue to maintain the au pair arrangement. This discussion therefore leads to the next chapter's examination on the exclusion of non-EU/EEA au pairs to work rights by using an intersectional analysis.

CHAPTER 3

Why are Non-EU/EEA ‘Au Pairs’ Work Rights not protected? Intersections: Globalization of Domestic Labor, Migration Policies and Gender Issue on Domestic Work

3.1 Globalization of Domestic Labor

We strongly support *fair globalization* and resolve to make the goals of *full and productive employment and decent work for all, including for women and young people*, a central objective of our relevant national and international policies... to achieve the Millennium Development Goals. (Emphasis added)

2005 World Summit Outcome UN General Assembly, ⁴⁶

The concept of globalization refers to the rising interrelation and integration of national economies mainly through international trade and financial markets. It has affected social and economic processes within domestic markets, thereby widening disparities among industrialized and developing countries⁴⁷. Consequently, globalization has also profoundly influenced local labor markets such as on employment arrangements and relationships, remunerations and working conditions, opportunities for men and women through their involvement to labor processes.⁴⁸ It has given countries an access to human resources all over the world as global competition to labor expands.

International migration has become the human attribute of globalization as most people migrate to improve and secure socio-economic development for one's self, as well as the well-being of his or her family. Highly skilled regular migrant workers often are able to acquire favorable secured jobs with decent working conditions. However, irregular mi-

⁴⁶ UNGA A/RES/60/1 at par. 47; (emphasis added)

⁴⁷ Ann Stewart, Gender, Law and Justice in a Global Market (2011), p.4.

⁴⁸ Dejardin (2008) p. 1

grants end-up on low-skill and informal jobs with poor working circumstances, albeit many of them are fully educated in their countries of origin.

The high demand for migrant domestic workers is a consequence of globalization. This demand resulted from factors such as demographic and social trends⁴⁹, and the emergence of economic uncertainty and insecurity within countries in the global north and global south that are outcomes of the globalization process.⁵⁰ The International Labor Organization (ILO) in its recent statistical report estimated at least 52.6 million domestic workers around the world in 2010 compared to 33.5 million in 1995.⁵¹ However, there is no available estimate for migrant domestic workers due to data limitations for irregular and undocumented workers are prevalent in this sector.⁵² The global estimate substantiates the thriving demand for domestic work, as global inequalities prepared many migrants to acquire labor with unfavorable conditions and low salaries.

The shift from the traditional paradigm of a 'single wage earner head of the household' to the neo-liberalistic standard of 'dual income earners'⁵³ brought about by the global economic restructuring has resulted in new challenges for modern families on how to attain

⁴⁹ Examples of demographic and social trends are: ageing populations in a number of developed countries (in comparison with the younger populations and relatively higher fertility rates in developing countries), high labor participation of women in the formal labor sector, unequal division of domestic labor responsibilities in households, insufficient state-run childcare facilities or costly private day care for children, and the unwillingness of locals to take on a 'low-status' domestic work job

⁵⁰ ILO Declaration on Social Justice for a Fair Globalization, ILC 97th Session (2008), p. 5: It is a fact that globalization brought social and economic insecurities and instabilities, as it can be observed on the rising percentage of unemployment rates in countries, both in the North and South. Globalization has also put on pressure in the working conditions and appropriation of basic labor standards, as global competition in trade and industry prevails. "... Income inequality... and the growth of unprotected work and the informal economy, which impact on the employment relationship and the protections it, can offer."

⁵¹ ILO Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection (2013), pp.19 and 25: An accurate number of domestic workers are possibly higher than the given ILO estimate, which is only a conservative minimum estimate. The estimate does not include children domestic workers under the age of 15 years old.

⁵² Ibid., p. 24

⁵³ Einat (2012) p.68, "Feminist scholars have long argued that women need to be fully integrated in to the labor market in order to achieve full and equal citizenship. This scholarship stresses meaningful integration as the route to citizenship: women must enjoy equal access, with men, to desirable occupations, and equal pay, respect, and recognition on the job."

flexibility in their daily lives. This major change in the basic unit of the society initiated the increasing demand for domestic labor in the global north to enable parents, specifically women, to work in the formal labor market. According to United Nations (UN) Women, domestic workers “sustain and renew families, including their ‘working members’, who in turn keep the wheels of society moving”⁵⁴ and “[they] facilitate women’s labour force participation and contributes to economic growth and social well-being in all countries, including the least developed countries.”⁵⁵

It is significant to observe the demand for domestic work in Europe, particularly in developed countries, is steadily increasing. The new flexible labor market obliged both men and women in these countries to engage in the paid labor market as individual workers to be able to support households.⁵⁶ Hence, the need for house help and nanny care develops into a necessity for them and their families. Contrastingly, as the demand for domestic work increases the statistical number of female domestic workers employed in some developed countries is decreasing.⁵⁷ The ILO admits there are reasons to believe there is an underestimation of the published number of domestic workers. Factors like illegality and informal work, and the hiring of ‘au pairs’ by families are considered valid explanations for the decrease in statistical count.⁵⁸

There are no significant changes in the number of domestic workers in recent years in Nordic social welfare countries; while in the United Kingdom, there is a decrease in the number of domestic workers. This, according to recent studies in domestic work, showed the popularity of employing au pairs from outside the EU/EEA as becoming a trend in these countries instead of hiring regular domestic workers.⁵⁹ Therefore, the cultur-

⁵⁴ Michelle Bachelet, “Opening Address” (Fourth United Nations Conference on the Least Developed Countries, Istanbul, May 11, 2011).

⁵⁵ Stewart, *supra* fn. 47, at p.4.

⁵⁶ Fudge (2006) pp. 3, 12. The new flexible labor market includes precarious work, associated with “part-time employment, self-employment, fixed term work, temporary work, on-call work, home working and telecommuting... all of which tend to be distinguished by low wages, few benefits, the absence of collective representation, and little job security.”

⁵⁷ International Labor Office, *supra* fn. 50, p. 25.

⁵⁸ *Ibid*, p. 37.

⁵⁹ *Ibid*.

al/educational scheme for non-EU/EEA au pairs becomes the only option offered by these countries to their citizens to acquire live-in household and nanny help in an inexpensive manner.⁶⁰

‘Au pairing’ is considered as an occupation in sending countries, as the functions of an ‘au pair’ to its host family are strikingly similar to those of live-in domestic workers. The host governments’ information on the ‘au pair’ scheme as an inherently cultural exchange program is not sufficient to convince ‘au pair’ applicants that it is not a temporary labor engagement. Developed countries in Europe are preferred, because the currency valuation of the ‘au pair’ pocket money is more than the value of migrant domestic workers’ remuneration in other countries.

Non-EU/EEA countries are flooding of educated unemployed or underemployed young women who are willing to migrate as ‘au pairs’. The motivation to migrate and to earn temporarily in a European country is strong for these young women, rather than to struggle in their home countries in finding work. Moreover, several non-EU/EEA ‘au pair’ applicants who have worked as domestic workers from other countries with poor labor laws enforcement are also motivated to migrate in Europe for better employment treatment as nannies and househelpers.

Despite the benefits ‘au pair’ migration provides for both the sending and the host countries, international and national domestic work legislations do not protect ‘au pair’ rights as workers. During the deliberations of the ILO Convention on Decent Work for Domestic Workers, the question of whether or not an ‘au pair’ will be included in the provisions was intensely deliberated. Some European states argued the cultural exchange purpose of au pairing and the “limited number” of work time compared to regular workers, demands exclusion from the treaty. Thus, the ILO Convention explicitly left ‘au pairs’ from its provisions.⁶¹ ILO constituents opted to treat the ‘au pair’ relationship as an exception to the definition of domestic worker in the new international standard. This exclusion is re-

⁶⁰ Cox (2012), p.34

⁶¹ International Labor Conference, 99th session, Report IV (1) (2010), p. 34.

ardless of the recognition that au pairs are also workers worthy of labor protections and at the same time young people on a cultural exchange.⁶²

In the present global economy, the ratification and implementation of ILO conventions by states in the global north has been reserved and in many instances circumvented. Non-EU/EEA au pairs right are left to commercialized private agencies and recruiters operating along globalized labor market forces of sending and receiving states. Acknowledging the ‘au pair’ scheme as a service business distinct of its own and not recognizing ‘au pair’ work as under the decent work umbrella of the ILO further aggravates the vulnerabilities of ‘au pairs’ to non-protection of worker rights.

3.2 Migration Policies Governing Non-EU/EEA ‘Au Pairs’

3.2.1 ‘Au Pair’ Sending Countries

3.2.1.1 Labour Migration Strategy

Labor migration has become an established foreign and economic policy for many developing countries. The export of short-term labor has become the unequivocal answer to the problems on soaring unemployment and underemployment, particularly among the youth; and to the national financial setbacks brought by the adverse instability in the global economic system. The UNGA in its Resolution 61/208 has steadily acknowledged the link between international migration and development.⁶³ The establishment of the state-led GFMD⁶⁴ further promoted the policies of Resolution 61/208, which aims to respond to is-

⁶² *ibid.*; (italics emphasis added)

⁶³ UNGA A/RES/61/208 (6 March 2007), p.2

“*Acknowledging* the important nexus between international migration and development and the need to deal with the challenges and opportunities that migration presents to countries of origin, transit and destination, and recognizing that migration brings benefits as well as challenges to the global community,”

“*Acknowledging* also the important contribution provided by migrants and migration to development, as well as the complex interrelationship between migration and development...”

⁶⁴ *Ibid.*

sues of international migration and its intersection to development. The recognition and substantiation of the advantages of labor migration by the UN has strengthened its promotion among governments from developing states. Foreign labor agreements with other countries have become the dominant national agenda by these states to achieve economic vigor in the local economy through foreign exchange remittances.

An example of a country where active labor migration has become an intensive long-standing government strategy is the Philippines.⁶⁵ The country's managed labor exporting system dates back from the 1970s and continues to be on top of the government's labor and fiscal department's major priorities. As part of the national economic development plan in 2001, it emphasized the role of overseas employment as a "legitimate option for the country's workforce" and subsequently summarized strategies for the promotion of Overseas Filipino Workers.⁶⁶ Migration (regular/irregular) and a sustained inflow of foreign remittances has become the Philippines' dominant economic driving factor. In 2012 alone, the country has registered a remittance of 23.98 billion dollars from Filipinos abroad through legal channels.⁶⁷ It is also identified that majority of OFW's are women, they comprised three-fifths of the annual deployment of new hires from 2001-2009. According to statistics, 55.7% of women OFWs employed in the services category are domestic workers and carers⁶⁸ - which are well-recognized vulnerable and marginalized labor sectors.

Ironically, the positive effects of this institutionalized policy of migration have its drawbacks from a human and social rights viewpoint. While the government is exerting more focus and effort to protect the rights of regular migrants, it is silently ignoring the abuse and trafficking of irregular migrants.⁶⁹ This labor export policy has also created a pattern of "exploitable and expendable cheap labor force in the receiving countries"⁷⁰

⁶⁵ The Philippine Labor Plan & Employment Plan 2011-2016, (2011), p. 12; O'Neill (2004)

⁶⁶ *ibid*, O'Neill.

⁶⁷ Migration and Development Brief, p. 3.

⁶⁸ The Philippine Labor Plan & Employment Plan 2011-2016, *supra* fn. 65, pp. 12-13.

⁶⁹ O'Neill, *supra* fn. 65, pp. 12-13.

⁷⁰ Lindio-McGovern (2007) p. 24

which results to migrant deskilling,⁷¹ gender and racial stereotyping and class discrimination. Hence, migrants' rights organizations and women rights defenders resiliently criticize the government's continuous promotion of this policy.⁷²

3.2.1.2 'Au pairing' - The Philippine Context

'Au pairing' is an overseas domestic work in many sending countries whereby labor export is strongly promoted. The term appears to be more appealing for a house help and nanny job in Europe than to do domestic work in Asian and Middle East countries where reports of physically abused and low-salaried domestic workers are common. The Philippines is one country, which regards au pairing as foreign work employment.⁷³ According to country statistics of European countries where non-EU/EEA nationals are allowed to apply as 'au pairs', the Philippines tops the list in terms of the number of 'au pairs' hired from outside the EU/EEA.⁷⁴

As mentioned in the previous chapter, the Philippine government issued a temporary ban for all 'au pairs' bound to Europe by reason of reports of abuse and exploitation by host families. This move is to protect its citizens from further possible risks of the au pair scheme. However, this ban did not prevent Filipinos to apply as 'au pairs' in Europe as some of the receiving countries ignored the ban and continued issuing 'au pair' visas thus the number of Filipino au pairs increased rapidly despite the temporary ban.⁷⁵

⁷¹ IOM Crushed Hopes: Underemployment and Deskilling among Skilled Migrant Women (2012), p. 14. Deskilling defined broadly as a situation which migrant workers occupy jobs not commensurate with their qualifications and experience.

⁷² Lindio-McGovern, supra fn. 70, pp. 27-28

⁷³ Binay Sees More 'Au pair' Jobs in Europe for Pinoys (ABS-CBN news 16 February 2012) [italics emphasis added] "The lifting of the au pair program in European countries where it was previously banned will result in *more jobs* for Filipinos. 'The lifting of the au pair program is sure to bring employment opportunities to Filipinos', Vice President Jejomar Binay said in a press release." It is unequivocal that 'au pairing' is foreign employment – specifically domestic work- as perceived by the Philippine government.

⁷⁴ Utlendingsdirektoratet Norge, Årsrapport 2011, p.2 An 'au pair' permit entitles the holder to stay in Norway for maximum two years. ; Tal OG Fakta, supra fn. 41, p. 62: Denmark had the same increase in permits issued to Filipino au pairs.

⁷⁵ These countries are Germany, Belgium, Denmark, Netherlands and Norway. While the countries that respected the ban are Switzerland and Sweden.

It is important to note that the issuance of the ban, although it had positive intentions to protect on the part of the government, produced negative consequences on the part of ‘au pairs’ departing from the Philippines. The Filipino ‘au pairs’ were exposed directly to a corrupt system as they bribe their way out of Philippine territory holding ‘au pair’ visas despite of the ban. They became illegal emigrants by leaving the country as such that it brought uncertainty to appeal for assistance from the embassies of the Philippines when situations of abuse arise in the host countries. They also faced the risk as blacklisted overseas workers that will result to difficulties in obtaining new travel documents from the government agencies.⁷⁶

In 2010, the Philippines entered into bilateral agreements with Switzerland⁷⁷, Norway⁷⁸, and Denmark on the lifting of the temporary ban on the deployment of ‘au pairs’ in these countries amid assurances of protection against abuse and exploitation. The agreements render the inclusion of Filipino ‘au pairs’ within the labor immigration system of the government, thereby are regarded by the Philippine government as workers instead of cultural exchange participants. The bilateral agreements differ from each other, as one was similar to the migrant domestic worker program adjusted to cater au pairs. While the other two are much more similar as they reflect the au pair regulation under the European Agreement. In all instances, the agreements gave ‘au pairs’ legalized migration and support from the sending government.⁷⁹

However, despite the bilateral agreements entered into by the Philippines the problem of rights protections continues to exist. Au pairs covered by the bilateral agreements are mostly treated the same as domestic workers in EU/EEA receiving countries. In addition, the weak governmental support mechanisms and public information on ‘au pairing’, as well as the absence of statistical data regarding au pair exploitations abroad also contribute to rights vulnerabilities.

⁷⁶ European Parliament, *supra* fn. 35, at pp. 34-35.

⁷⁷ Guidelines on the recruitment and deployment of Filipino au pairs to Switzerland and Denmark (2010)

⁷⁸ Guidelines and the selection and deployment of Filipino au pairs to Norway (2010)

⁷⁹ European Parliament, *supra* fn. 35, at pp. 36-40.

In early 2012, the Philippine government lifts the au pair ban to all European countries after issuing new guidelines on the departure of Filipino ‘au pairs’ to Europe.⁸⁰ The issuance of the Guidelines is “to facilitate the departure of ‘au pairs’ bound for Europe and at the same time provide them safety nets and protection without restricting their opportunities for self-improvement.”⁸¹ The new rules simplified the immigration process from pre-departure requirements to post-arrival requirements in the country of destination. ‘Au pair’ applicants, according to the guidelines, need not go through the government’s overseas labor agencies for registration and documentation as they are now by law not under the classification overseas foreign workers. Consequently, the Philippine government has openly endorsed the deployment of thousands of au pairs as it continues to regard ‘au pairing’ as a source of foreign remittance and temporary employment.

Hence, there is no effective guarantee on rights protection for au pairs from the sending state. The new directive regarded au pairs as not under the definition of overseas foreign workers, thereby excluding them under the labor protections of the government.

3.2.2 ‘Au Pairing’ – The European Perspective

3.2.2.1 Managed Migration Regulations

Many developed states in Europe provide for stringent immigration controls under the argument of Labor protectionism - which means prioritizing the national labor force and at the same time providing protections from exploitation of migrant workers. However, this is not the case in practice at present.⁸² Immigration policies function as a mechanism to regulate the flow of migrant workers. This is true with EU/EEA countries that do not grant work permits to citizens from non-EU/EEA countries if there is an abundant supply of labor inside the territory, either from its residents or from EU/EEA citizens. However, ac-

⁸⁰ Press Release from the Department of Foreign Affairs, supra fn. 44; and Guidelines on the Departure of Filipino Au pairs to Europe (2012)

⁸¹ *ibid.*

⁸² Anderson (2010) p. 301.

According to current studies, these policies “... might be more usefully conceived as a mold *constructing* certain types of workers through selection of legal entrants, the requiring and enforcing of certain types of employment relations and the creation of institutionalized uncertainty.”⁸³

Immigration policies play a tremendous role in constructing specific classifications of work as well as specific interactions between employers and the labor market. These interactions facilitate the production of “precarious workers”.⁸⁴ Immigration controls do not protect migrant employment rights, as these regulations create insecurity and dependency on the employers both in work and in residence.⁸⁵ This position is supported by key findings of the UNDESA report that “governments and employers around the world, in their desire to remain or become economically competitive, have taken numerous steps to increase labor-market flexibility, thereby engendering greater insecurity among most groups of workers.”⁸⁶

Migration policies are in nature, gender-neutral. However, they have gendered consequences.⁸⁷ Women are more recognized to work in the care and domestic sector whereby their activity is invisible, while men remains to be seen as the useful high-skilled migrant under the utilitarian rationale which influences present migration.⁸⁸

In many EU/EEA countries, immigration restrictions prevent lawful labor migration for domestic workers. This makes the ‘au pair’ scheme as one of the few opportunities to acquire live-in household and nanny help. Recent studies evidently revealed ‘au pairing’ has already lost the original intention of experiencing foreign culture and learning the lan-

⁸³ *ibid*, p.312.

⁸⁴ *ibid*, p. 301, 308-311, Cox, *supra* fn. 60, p. 33

⁸⁵ *ibid*, p. 313.

⁸⁶ UNDESA (2007) p.6.

⁸⁷ Anthias, et al. (2013) p. 11

⁸⁸ *ibid*.

guage, instead it is now seen as a domestic/care work program for the outsourcing of cheap labor legitimized under the guise of a scheme promoting international goodwill.⁸⁹

The immigration rules of host countries govern non-EU/EEA 'au pairs' under a cultural exchange scheme. The rules provide a standard contract for 'au pair' service, which has domestic work as consideration in exchange for a value referred to as pocket money.⁹⁰ The exclusion of the scheme from labor law reflects the receiving countries' strict migration policies on providing non-EU/EEA 'au pairs' worker status. This legal treatment is a patent contrast from EU/EEA citizen 'au pairs' who possess mobile worker status under community law.⁹¹

As discussed in the previous chapter, the residence permit issued to a non-EU/EEA 'au pair' is directly dependent on the host family's placement application and is conditional in nature. The residence permit impliedly allows receiving families to influence 'au pair' working conditions in ways advantageous to them.⁹² It offers limited or absence of access to law and to social and economic remedies, as 'au pair' visas are under stringent migration policies of the receiving state.⁹³ Moreover, the temporariness of the permit provides restrictions such as segregation from the labor market of the receiving country, thereby creating a scenario of increased economic uncertainties and high work vulnerabilities on the part of the young 'au pair'.

The current migration management in Europe affects the position of non-EU/EEA 'au pairs' within the legal framework of rights discourse. Immigration law continues to

⁸⁹ Cox, *supra* fn. 60, at p.35; Chuang, *supra* fn. 6, at p.4; Williams (2012) p. 369; Smith (2012) p. 21; Sollund (2010) pp. 156-157; Øien, *supra* fn. 6, at p.121; Bikova, *supra* fn. 29, at p. 90; Stenum (2008) p. 58; Cox, *supra* fn. 20, at p. 293; Platzer (2006) p. 219; Hess (2004) p.68.

⁹⁰ The mandatory 'au pair' contract between the host family and the prospective applicant includes provisions similar to a simple contract of employment.

⁹¹ European Parliament, *supra* fn. 35, at p.111.

⁹² Anderson, *supra* fn. 82, at pp. 312-313. Anderson argued the importance of giving close notice to the relation between the labor markets and immigration controls. "Immigration controls effectively subject workers to a high degree of regulation, giving the employers mechanisms of control that they do not have over citizens but effectively create a group of workers that are *more desirable* as employees through enforcing atypical employment relations such as fixed term contracts or self-employment and direct dependence on employers for legal status... In the current conjuncture they (immigration controls) serve to produce, among

⁹³ Stenum, *supra* fn. 21, at p. 131.

produce migrant precariousness which, when merged with the lack of efficient protections afforded by labor law leads to considerable gaps in basic human rights protection. Several European states ignore the potential of immigration policies in weakening rights protection mechanisms, as they are reluctant to accept and extend the ‘positive obligations’ of access to labor rights protection for this category of migrants.⁹⁴

3.2.2.2 The Cultural Exchange Rubric

The argument that ‘au pairs’ have taken a position of contradictions has been present from the inception of the European Agreement. Au pair rules expect them to do ‘work’ done by domestic workers, but at the same time consider them as cultural exchange participants. This ambiguity continues to be disputable in the areas of labor, migration and gender rights in host European countries. As the number of hired au pairs coming from the global south continues to rise in number, the cultural exchange classification of the scheme continues to be a hindrance in accumulating work rights protection for them.

The cultural exchange rhetoric applied in ‘au pair’ regulations imparts vagueness as it results to inconsistencies of defining ‘au pairs’ status within the legal labor framework and in actual practice. ‘Au pairs’ are neither worker nor are students under the system, thus; there is a huge gap for protective rights application. According to a recent study, the legal treatment of ‘au pairing’ as one of cultural exchange brings forth class segregation, gender and racial biases, and tropes that provide society’s stubborn defiance to value domestic work as work worthy of labor protections.⁹⁵

Au pairs mostly from non-EU/EEA states often depart for a foreign country not to travel, nor see another country and learn the language, but as an alternative to earn for their families living in the country of origin. Host families also profit from the scheme, as it provides flexibility and additional time for their careers in the formal market and within their

⁹⁴ Murphy (2013), p. 625.

⁹⁵ Chuang, *supra* fn. 6, at pp. 72-74.

daily family life. On the other hand, the receiving state benefits from the system, as it covers for the inadequacy of its national social welfare services for working families with young children and at the same time deriving taxes from both the host families and ‘au pairs’. Therefore, the au pair scheme has become a loophole to meet the demand for domestic labor as policies concerning labor immigration continue to be restrictive.⁹⁶

A sociological study on ‘au pairing’ shows cultural exchange motivations varies between the relationship of ‘au pairs’ and the host family. The issue is complex due to the variety of motivations and expectations of the persons involved in the ‘au pair’ placement process.⁹⁷ These expectations usually begin from the time of hiring ‘au pairs’ by the host families either through network referrals, by commercialized placement agencies or by ‘virtual agency websites’ in the internet.⁹⁸ If the ‘au pairs’ purpose of going abroad is for economic reasons, most likely one views one’s self as a worker and the host family as an employer. Thus, the receiving family cannot expect a cultural exchange immersion from them even though they consider him/her as a family member.⁹⁹ However, not all ‘au pairs’ are motivated for financial reasons. Some are after for the real intention of the placement, as they want to live temporarily and experience a new country and they are mostly educated citizens of wealthy western countries.¹⁰⁰ Yet conflict between these au pairs and their

⁹⁶ Calleman (2010) p.69

⁹⁷ Bikova, supra fn. 29, at pp. 13-15. The way the prospective au pairs and families present themselves during the hiring process might give an indication on the various motivations and intentions both parties expect on their future relationship.

⁹⁸ *ibid*, pp.12-13. Bikova’s research shows that the placement agencies costs and are expensive for some prospective au pairs that they turn to “virtual agencies” where they can publish their photos and profiles in the internet for potential employers to view. Bikova refers to this profile collection as “au pair galleries”.

⁹⁹ *ibid*, pp. 62-63. “There is at present a consensus in the literature that the perception of the live in workers as ‘one of the family perpetuates’ unequal power relations between the workers and their employers. As the family ideology conflates domestic work duties with family obligations, employers extract even more labour from their workers.”

¹⁰⁰ Geserick (2012) p. 63. In a qualitative study done by Geserick on young, western, educated ‘au pairs’, a hypothesis was formed that the young women interviewed are deliberately distancing themselves from the ‘traditional’ woman who expresses interest in caring for children and house work. They do not want to be confused with nannies or generally domestic workers from poorer countries. Thus, social class and the global phenomenon of service-labour migration play a big role on how western au pairs present themselves to others.

host families can still possibly arise, as the latter anticipates their au pair to “behave and deliver like maids”.¹⁰¹ Thus, whether they are from rich countries or from poor countries, au pairs are treated in a subordinate status because of the stereotypification of au pairs as mostly domestic workers from the global south. These inequalities take form and have consequences in the everyday interactions with their host family.¹⁰²

In addition, the contention that the categorization of au pair work under the cultural exchange rubric as an “ordinary activity of any family member” provides evidence of the non-impartation of protection to ‘au pair’ work rights.¹⁰³ The labor performed by au pairs in the household of their host families within the private sphere explicitly affects how their rights are regulated under the legal framework. Au pairs are regarded by the formalities of law as ‘members of the family’. Therefore, it is in this view that the exceptional treatment in law of family affairs significantly affects ‘au pair’ regulations in relation to work right. The basic tenet of protecting privacy and family life from state interference¹⁰⁴ also creates a major challenge on how ‘au pair’ work will be included under legal labor protections as to wage, working conditions, and work time.¹⁰⁵

3.3 Gender Issue on Domestic Work

3.3.1 What is Domestic Work?

¹⁰¹ Bikova, *supra* fn. 29, at pp. 75-76

¹⁰² Geserick, *supra* fn. 100, at p. 64; Mellini (2007) p. 61

¹⁰³ Cox and Narula (2003) p. 336, ‘Au pairs’ are officially considered as part of the host family as they are to ‘share the life of the receiving family’, and Article 7, European Agreement (1969).

¹⁰⁴ Article 12, UDHR and Article 17, ICCPR “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...Everyone has the right to the protection of the law against such interference...” Article 8, ECHR sets out the same right to respect ones private and family life, home and correspondence. However, an enumeration of limitations was provided whereby the public authority’s interference should be “in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

¹⁰⁵ Calleman, *supra* fn. 96, at p. 69-70, It suggests that the family is exempted from certain regulations, or that provisions of laws are used in another way in situations concerning the privacy of the family. The protection of privacy of the family and the homes is an essential notion of the legal order.

Domestic work¹⁰⁶ usually takes place in the informal economy, meaning this work is partly wholly beyond government regulation, taxation and observations making such labor as undervalued and discriminated.¹⁰⁷ It is work performed within the privacy of the employer's household making it invisible to the public hence the informality. This attribute exposes the workers to threats of exploitation and abuse by employers, creating a negative high-risk type of employment hidden from law protections. It is also due to this informality domestic workers in most countries are not covered by labor legislations thus producing a situation of "legislative precariousness".¹⁰⁸

Despite the monumental breakthrough for domestic workers rights and protections in the international plane, it is still often recognized as low-class and low-paid work. The social stigma attached to it as labor done by the "poorest and the neediest",¹⁰⁹ and because of the undervalued and gendered domestic tasks continues to be an enormous challenge for the claim on decent work for workers in this category.

3.3.2 Domestic Work as a Reproductive Activity

During the 1970's domestic labor became a feminist issue, whereby attention was focused on the debate about women's unpaid work and its relation to productive capitalism specifically emphasizing remunerations for house duties and women as an economic

¹⁰⁶ Art. 1(a) and 1(b), ILO Convention No. 189 (2011) "Domestic Work is work performed in or for a household or households. While a domestic worker is any person performing domestic work in an employment relationship."

¹⁰⁷ ILO Resource Guide on the Informal Economy, "The term 'informal economy' refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law, or they are not covered in practice which means that – although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs."

¹⁰⁸ Albin and Mantouvalou, *supra* fn 46, at p.69 "It is the special vulnerability faced by domestic workers by reason of exclusions from legal protections or lower degrees of legal protections as compared to other workers in the labor market."

¹⁰⁹ Lutz (2008) p. 49

class.¹¹⁰ Domestic work in economic processes has long been a ‘social reproductive activity’ of no value situated outside the market.¹¹¹ On the other hand, gender studies argue that once this activity transfers to the market and becomes a service, it will attract economic value even if it is not look upon as particularly valuable.¹¹² This leads to the conclusion that a feminist ‘gendered economy approach’ between production and social reproduction in a society is noteworthy to reveal and understand the ways in which gender inequality is associated with the labor market as an institution.¹¹³

According to Stewart, households in present economic patterns are “consumers of goods and public services rather than as producers of valuable inputs to both public and private sectors of any economy”. While the market is reconstructing and including domestic care service as something that can be traded or purchased, households as consumers can now buy this service, which was linked before with caring within the families and communities. As the formal labor market continues to attract professional women’s participation in economic activity¹¹⁴ the service that domestic workers offer proved “vital for the sustainability and function of the economy outside the household”.¹¹⁵

Commodified domestic work has taken into its transnational form within consumer markets and is reconstructing gender identities at present. Women from less developed countries migrate to developed countries, leaving the caring of their homes to their husbands or eldest daughter of the family. This is in consonance with the concept of ‘global care chain’¹¹⁶ or ‘the international transfer of caretaking’.¹¹⁷ It refers to “a series of person-

¹¹⁰ Anderson, *supra* fn.19, at p.9.

¹¹¹ Stewart, *supra* fn. 47, at p.6.” ... social reproduction (is) the biological and social activities necessary to sustain ourselves and essential for any functioning society.”

¹¹² *ibid.*

¹¹³ *ibid.*, p.37; and Barrientos (2007), pp.242-243. “A gendered economy approach focuses on the interrelation between the reproductive and productive spheres, and their combined. This includes not only market-oriented productive activity but also reproductive activity that underpins the functioning of markets and trade...”

¹¹⁴ European Commission: 2009 Report on Equality between Women and Men (2010), p.8: “Female employment in the EU is now close to the Lisbon objective of 60% by 2010, having increased from 51.1% in 1997 to 58.3% in 2007...The average gap in employment rates between women and men is narrowing, and fell from 17.1 percentage points in 2000 to 14.2 points in 2007.”

¹¹⁵ Albin and Mantouvalou, *supra* fn. 46, at p. 68

¹¹⁶ Hochschild (2000) p.1

al links between people across the globe based on the paid or unpaid work of caring”.¹¹⁸ The absence of recognition of the value of social reproduction in the society promotes global gender inequalities by delivering the benefits of globalization to the Global North at the detriment of women and their families and communities in the Global South. As women leave their own families in their respective countries to supply care for foreign families, they initiate a global value chain to motion, which concludes to the advantage of wealthy countries.¹¹⁹

The rising visibility of paid domestic work has proved to be not only a source of individual income, but also is vital to the economy. Positively, migrant domestic work allows these women to earn more than what they can receive in their home country. This type of work allows women of affluent countries to escape housework, yet in conditions almost similar to a present-day form of “state-facilitated slavery” by the state’s own migration and labor employment policies.¹²⁰ Feminist scholars revealed that as the number of women entering the formal, productive labor market increases on the ground of feminist equality in the society, the outsourcing of domestic work has become a major setback for the feminist movement.¹²¹ Nonetheless, the transnationalization of domestic work continues to thrive globally either as a migrant worker or as an ‘au pair’.

3.4 Conclusion

This chapter presented the intersections of the following grounds: the globalization of domestic work, migration policies for au pairing, and the gender issue underlying do-

¹¹⁷ Parreñas (2000) p. 561

¹¹⁸ Hochschild, *supra* fn. 117, at p.1-2. This chain ordinarily involves “an older daughter from a poor family in a third world country caring for her siblings while her mother works as a nanny caring for the children of a nanny migrating to a first world country, who, in turn cares for the child of a family in a rich country”. Every link in the chain conveys an invisible human ecology of care, whereby one care worker is dependent on another along the care chain.

¹¹⁹ Stewart, *supra* fn. 47, at p.6

¹²⁰ Anderson, *supra* fn. 82, at pp. 312-314; Calleman, *supra* fn. 96, at pp. 69, 90-91; Cox, *supra* fn. 60, at pp. 40-44 and Chuang, *supra* fn. 6, at p.1 and 9.

¹²¹ Lutz, *supra* fn. 109, at p. 69

mestic work as reproductive work to address the question why the marginalization of non-EU/EEA au pairs continue when it comes to work rights. This revealed that poverty, technology, poor regulations on au pairing of the sending country, strict labor migration policies in Europe and the increasing demand on the highly gendered paid domestic work all contribute to the current experiences of non-EU/EEA au pairs as a migrant precariat.

Women are the ones who mostly assume care work globally. However, I agree with Anne Stewart when she argued that there is no exact collective group of women that experience deprivation of rights based solely that they are women. The circumstances under which their work is undertaken vary according to local contexts such as the state, society and communities set forth by interactions of the economy and its integration within the global market.¹²² Therefore, the next chapter proceeds to establish that non-EU/EEA au pairs are migrant domestic workers under the law, and are entitled with same rights as any other worker.

¹²² Stewart, *supra* fn. 47, at p.7.

CHAPTER 4

‘Au Pairs’ as Migrant Domestic Workers

Acknowledging the findings from the preceding chapter on why non-EU/EEA au pairs are without labor protections, this chapter will attempt to answer the question: Are ‘au pairs’ at present migrant domestic workers entitled to work rights?

The ILO defined migrant domestic workers as those recruited in one country for domestic work.¹²³ ‘Au pairs’ are not legally addressed as workers therefore they should not have the same work conditions, treatment, and experiences as migrant domestic workers. However, this is not the case at present. Recent studies have established the similarities of the nature of ‘au pair’ work and migrant domestic work, as the former shifts from the cultural exchange arrangement to a commodified service employment.¹²⁴ It is in this view this thesis chapter contends that in legally defining ‘au pairs’ as ‘on par’ with their host families only creates inequality and discrimination.

4.1 Similarities as to Work

Describing domestic work as to the tasks performed is difficult, although ordinarily it includes work such as cleaning, cooking and caring.¹²⁵ It is flexible work in terms of schedules, remunerations and employment conditions. Studies argued that this kind of labor is a highly skilled one because it involves not only just physical work but also mental and emotional work.¹²⁶ Domestic work differs from other employment in the labor market due

¹²³ ILO Convention 189, Article 8(1)

¹²⁴ Williams, *supra* fn. 89, at p.369; European Parliament, *supra* fn. 35, at p.16.; Bikova, *supra* fn. 7, at p. 53; and Sollund, *supra* fn. 89, at p. 144

¹²⁵ Lutz (2008) p. 49, “The 3 C’s of domestic work: cleaning, cooking and caring.”

¹²⁶ *ibid.*, p.50, “Seen from this angle, household work is ‘civilising work’... it requires many skills like a talent for management, accuracy, diligence, psychological knowledge, empathy, intuition and patience, endurance, the ability to endure frustrations, discipline, the capacity to put oneself in perspective, self-reflexivity, emotional intelligence and a good memory.”; and Anderson, *supra* fn. 19, at p. 12.

to the following: First, the intimate character of domestic labor in the work sphere because the employer's house is the workplace and at times the residence of the employee. Second, the sociological work construction of domestic work as a female gendered area. Third, the involvement of a highly emotional relationship as there should be a relationship of trust that exist between the employer and employee, otherwise abuse and exploitations can arise; fourth, the highly personalized mutual dependency of the employment relationship; and lastly, the logic of care work is not the same as the logic of other employment.¹²⁷ These unique attributes of domestic work are all present in 'au pair' work.

Live-in domestic workers who entered the host country as regular migrants accepts 'undeclared work' if they are required by their employers.¹²⁸ This is also true in the case of 'au pairs' who are also regular migrants and by request of their host families do undeclared work either voluntarily or involuntarily. This situation is a result of the highly asymmetrical working relationship in this category of work and is a problematic one.

In northern and western European countries,¹²⁹ home-based care and domestic work is ordinarily employed through the au pair scheme whereby host families are usually from the middle class/ upper middle class and career-oriented dual income parents.¹³⁰ These families are motivated to invite au pairs inside their homes to be able to cope up for the deficiencies of the state-subsidized provision in the childcare system, or the absence of it in the receiving country, as well as for 'flexibility in their hectic daily and professional lives'.¹³¹ It is observed that even in social-democratic welfare states with generous child-

¹²⁷ Lutz, *ibid.*, p. 1.; OHCHR Rights of Migrant Domestic Workers in Europe (2010), p.7

¹²⁸ *ibid.* OHCHR, p. 9

¹²⁹ UN Statistics Division (2013)

¹³⁰ Bikova, *supra* fn. 29, at p. 4; Platzer, *supra* fn. 89, at pp. 215-216; Stenum, *supra* fn. 89, at p.8-9; Øien, *supra* fn. 6, at p. 79

¹³¹ Platzer, *ibid.*, p. 216, Platzer in her study points out that one major reason of employing domestic work is to avoid conflicts between the husband and the wife, as "the gender division of labor in the household has not fundamentally changed, despite that women work outside their homes to a large extent"; Bikova, *supra* fn. 7, at pp. 49, 52-53.

care and family provisions in their laws; the outsourcing of low-paid au pairs is looked at as a valuable and tempting solution to cope with everyday housekeeping and childcare.¹³²

4.2 Similarities as to Vulnerabilities

Au pairs are similarly situated with migrant domestic workers as both are extremely predisposed to exploitation and mistreatment ascribing to a number of issues distinct to their occupation. The vulnerabilities of both au pair work and migrant domestic work are due to the invisible and isolated nature of domestic labor. The degree of dependence on their employers about income, accommodation and status of immigration; the lack of a well-defined legal regulation on the specific labor dilemmas they experience; and the restrictive immigration status in the receiving country all contribute to their precariousness.¹³³

The specific labor dilemmas au pairs share with domestic workers include work time and underpayment, household responsibilities which are often performed in accordance with their host or employers' demands, bargaining relationships, and the feeling of subordinate standing inside the host families' home.¹³⁴ Likewise, both 'au pairs' and domestic workers are dependent on their employing families for a successful stay thereby revealing a power imbalance within the relationship. Thus, the European Parliament in a resolution affirmed that 'au pairs' must receive the same protections equal to other domestic workers as several reports indicate the high potential of abuse taking for example excessive work hours.¹³⁵

Moreover, both 'au pairs' and migrant domestic workers from third countries experience the same precariousness and worker insecurity as both become part of the highly

¹³² Denmark and Norway has experienced a noticeable increase in the number of 'au pairs'. Stenum, *supra* fn. 21, at pp. 24-26; Sollund, *supra* fn. 89, at p. 156; and European Parliament, *supra* fn. 35, at p. 21.

¹³³ Murphy, *supra* fn. 94, at p. 600.

¹³⁴ Anderson, *supra* fn. 19, at p. 23.

¹³⁵ European Parliament, *supra* fn. 33, at par. G.

gendered and racialized informal sector of the European labor market.¹³⁶ The strong racialized and gendered processes cause “... specific and acute forms of discrimination towards different categories of female migrants; these processes often operate as informal constraints which reproduce undocumented and exploitative work regimes.”¹³⁷ Hence, the perpetuation of this structural discrimination and inequality creates a migrant worker precariat.¹³⁸

4.3 The EU/EEA Concept of ‘Worker’

This thesis maintains that the basic work rights of non-EU/EEA ‘au pairs’ in Europe will only be visible if they will be correspondingly regarded as a worker similarly with their EU/EEA counterparts.

Who is then a ‘worker’ under EU/EEA law? The EU/EEA treaties do not have a concrete definition of who is a worker within the internal market. Nevertheless, the concept of a worker has progressed through case law, as its function is to recognize who requires protection against discrimination in securing entry to the community labor market.¹³⁹

The legal interpretations made by the European Court of Justice (“Court of Justice” or “Court”) played an important role in providing the basic tenets in construing who is a worker under Community law. For instance, the case of Hoekstra¹⁴⁰ established that an assessment of the concept of a worker based on national precepts is inappropriate but instead should be within the meaning of Community law.¹⁴¹ The Court further ruled in Levin

¹³⁶ Trimikliniotis, *supra* fn. 38, at p. 62

¹³⁷ *ibid.*, p. 74.

¹³⁸ *ibid.*

¹³⁹ Worker as defined in EU/EEA law is one within the meaning of Article 39, (Art. 45 TFEU) 2002.

¹⁴⁰ Hoekstra vs. the Netherlands, CJEU 1964, p. 184.

¹⁴¹ *ibid.* In a provision concerning social security for migrant workers under Council Regulation No.3, the CJEU established the interpretation of the concept of “wage-earner or assimilated worker” as one outside the definition of national laws as “it would be possible for each Member State to modify the concept of ‘migrant worker’ and to eliminate at will the protection afforded by the treaty to certain categories of person.”

vs. *Staatssecretaris van Justitie*¹⁴² the inapplicability of a strict interpretation of the concept due to its paramount importance within the EU/EEA internal market.

The *Lawrie-Blum* case¹⁴³ irrefutably has become a significant precedent in defining the concept of a worker in Europe. The Court of Justice identified the three indispensable standards in determining who is a worker and whether there exists an employment relationship. The requisites are first, the person must perform services of some economic value; secondly, the performance of such services must be for and under the direction of another person; thirdly, in return the person concerned must receive remuneration. According to the Court in *Brown vs. Secretary of State for Scotland*,¹⁴⁴ the given requisites are comprehensive. The Court further stated that, “Community law does not impose any additional conditions for a person to be classifiable as a worker”.¹⁴⁵ The enumeration provided for by the Court is comprehensive. Thus, it is only but appropriate in this thesis to elaborate in detail the concept of a worker under EU/EEA law and principles.

4.3.1 Services of Economic Value

What are services of economic value? The Court of Justice in the case of *Levin*¹⁴⁶ modified this requisite and underlined that these services must be effective and genuine economic activities. The Court pointed out the rules on the free movement of workers do not apply to small-scale work that appears as minimal and subsidiary or purely marginal and ancillary, but only to those who pursue or are desirous of pursuing an economic activity since this is an essential condition of the free movement provisions for the economically active.¹⁴⁷

The Court further emphasized that the inquiry on whether or not services have economic value must be from the employer’s standpoint. Assuming that an activity has certain

¹⁴² *Levin vs. Staatssecretaris van Justitie*, CJEU 1982, par. 13.

¹⁴³ *Lawrie-Blum vs. Land Baden- Württemberg*, CJEU 1986.

¹⁴⁴ *Brown vs. Secretary of State for Scotland*, Summary, CJEU 1988, par.3.

¹⁴⁵ *ibid*, Grounds, par. 22.

¹⁴⁶ *Levin*, *supra* fn. 142, pars. 18 and 21.

¹⁴⁷ *ibid*, at par. 17.

economic value to someone else, as such, the degree of activity is not too small to be marginal and ancillary, then the activity will be effective and genuine and thus the condition fulfilled. According to the case of Lawrie-Blum,¹⁴⁸ a trainee teacher position is an activity which renders service of economic value because it is required for the position to conduct classes and give lessons to students. Evidently, in the absence of trainee teachers, the school as an employer needs to pay others to give lessons.

4.3.2 Relationship of Subordination

What does the phrase ‘services must be for and under the direction of another person’ under the European Community notion of a worker? It denotes that the services performed must be under the circumstances of a relationship of subordination for a certain period.¹⁴⁹ The doctrine of subordination states that a person performs services of economic value under the direction of another person. Direction may include giving a time schedule on the completion of the activity, controlling the performance of the activity as well as the accomplishment of the pursuit.

Despite the clear and undisputed enumeration in the Lawrie-Blum case on the Community concept of a worker, which is exclusively that of an employed worker, the Court in the case of Meeusen conventionally maintained that ‘[t]he existence of a relationship of subordination is a matter for which it is for the national courts to verify.’¹⁵⁰

4.3.3 Remuneration

Remuneration under community law has a broad interpretation. The term does not connote certain specified levels, or by the form of wages. In the case of Levin,¹⁵¹ the CJEU abandoned the contention that remuneration should reach a particular level before consider-

¹⁴⁸ Lawrie-Blum, supra fn. 142.

¹⁴⁹ *ibid.*

¹⁵⁰ C.P.M. Meeusen vs. Hoofddirectie van de Informatie Beheer Groep, CJEU 1999, par. 16.

¹⁵¹ Levin, supra fn. 147, pars. 18 and 21.

ing a person to be a worker.¹⁵² Similarly, in the case of *The Queen vs. The Ministry of Agricultural, Fisheries and Food*, the Court similarly emphasized that the nature of the remuneration does not matter.¹⁵³ The Court went on by stating, “The sole fact that a person is paid on a ‘share’ and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker.”¹⁵⁴

Moreover, the Court in the case of *Steymann*¹⁵⁵ affirmed that material provisions and pocket money given to a member of a religious community who does plumbing work and general household duties is remuneration for the work carried out.

4.4 The Case of *Payir vs. Secretary of State for the Home Department*

The Court of Justice continuously upheld the principles outlined in *Lawrie-Blum* in its subsequent decisions on who is a ‘worker’ under the EU legal framework. Again, the Court reiterated the *Lawrie-Blum* standards in its decision on the case vis-à-vis the status of an ‘au pair’ as a worker under Community law.¹⁵⁶ This thesis looks upon the importance of this case in its argument that au pairs are workers within the legal perspective.

The case involves a Turkish young woman who had obtained a leave to enter and stay in the United Kingdom as an ‘au pair’.¹⁵⁷ Prior to the expiry of her residence permit,

¹⁵² *Trojani vs. Centre Public d’ aide sociale de Bruxelles*, CJEU 2004, par. 23 and 29. However, this is subject to the activity being effective and genuine and not purely marginal and ancillary.

¹⁵³ *The Queen vs. the Ministry of Agricultural, Fisheries and Food*, CJEU 1989, par. 36. The question lodged with the CJEU was to whether or not Spanish fishermen working on board a British ship were workers as they are paid as “share fishermen”, which means based on the sale proceeds of their catch.

¹⁵⁴ *ibid.*

¹⁵⁵ *Steymann vs. Staatssecretaris van Justitie*, CJEU 1988, par. 11.

¹⁵⁶ *Payir vs. Secretary of State for the Home Department*, CJEU 2008, pars. 28-31.

¹⁵⁷ *United Kingdom Immigration Rules*, House of Commons Paper 395 par. 88 “For the purposes of these Rules an “au pair” placement is an arrangement whereby a young person:

(a) comes to the United Kingdom for the purpose of learning the English language; ...

(b) lives for a time as a member of an English speaking family with appropriate opportunities for study; and

(c) helps in the home for a maximum of 5 hours per day in return for a reasonable allowance and with two free days per week; par. 89 “The requirements to be met by a person seeking leave to enter the United Kingdom as an “au pair” are that he: (i) is seeking entry for the purpose of taking up an arranged placement which

she applied to the Secretary of State for a new one based on Article 6 (1) of Decision No. 1/80 of the Association Council under the EC/Turkey Association Agreement. The application was on the ground that there was an offer for extension of her contract as an ‘au pair’. However, she received a denial of her application after two years of waiting. Thus, an action for judicial review ensued in the High Court of Justice, which subsequently decided in her favor. The Secretary of State appealed against the decision of the High Court before the Court of Appeal of England and Wales. However, the Court of Appeal decided to refer the case to the European Court of Justice. The question submitted is whether a Turkish national who obtained permission to enter the territory of a Member State as an ‘au pair’ deprived of the status of worker under Community law. Provided that an ‘au pair’ is not a worker, the applicant is thereby prevented from being regarded as ‘duly registered as belonging to the labor force’ of that Member State within the meaning of Article 6 (1) of Decision No.1/80, for the purposes of obtaining renewed permission to work and a corollary right of residence.¹⁵⁸

The Court of Justice replied that Payir, as an ‘au pair’, offered services that constitute genuine and effective economic activities. She worked under the direction of an employer and received remuneration in return for the services rendered. She also worked between 15-25 hours per week. According to the Court, the activities of an ‘au pair’ display the characteristics to enable, in principle, those who perform the said activities to be ‘workers’. The essential feature of an employment relationship is that for a certain period, a per-

can be shown to fall within the definition set out in paragraph 88; ... (ii) is aged between 17-27 inclusive or was so aged when first given leave to enter in this capacity; ... (iii) is unmarried; ... (iv) is without dependents; ... (v) is a national of one of the following countries: ... Turkey; ... (vi) does not intend to stay in the United Kingdom for more than 2 years as an “au pair”; ... (vii) intends to leave the United Kingdom on completion of his stay as an “au pair”; ... (viii) if he has previously spent time in the United Kingdom as an “au pair”, is not seeking leave to enter to a date beyond 2 years from the date on which he was first given leave to enter the United Kingdom in this capacity, and (ix) is able to maintain and accommodate himself without recourse to public funds.; and par. 90 “A person seeking leave to enter the United Kingdom as an ‘au pair’ may be admitted for a period not exceeding two years with a prohibition on employment except as an ‘au pair’ ...”

¹⁵⁸ Payir, supra fn. 156.

son performs services¹⁵⁹ for and under the direction of another person, in return for which he receives remuneration. The Court also earlier concluded this in the case of *Birden*.¹⁶⁰

The United Kingdom authorities further argued that ‘au pairs’ should not be given the right to continued employment under Article 6 (1) as they are only allowed to do work to achieve a social objective. The Court abandoned this argument. It ruled that the social purpose in granting leave for residence and work to ‘au pairs’ under immigration laws does not take away the lawful character of their activity as work. Accordingly, au pairs are thereby regarded as ‘duly registered as belonging to the labor force’ of the host member state. Despite the fact that they only work part-time as an attached mandatory condition of their stay.¹⁶¹ The Court resolved in finality that ‘au pairs’ under community law cannot be deprived the status of workers.

4.5 Conclusion

In this Chapter, a clear assumption arises that present-day au pairs corresponds to migrant domestic workers due to its similarities as to nature of work and vulnerabilities. These similarities entitle non-EU/EEA au pairs to have access on work rights the same as any worker in Europe. The case of *Payir* strengthened the argument that ‘au pairing’ is an economically relevant occupation and au pairs are workers within the context of EU migration and labor law. However, there is still at present a growing conflict between the perspectives of national policies and the CJEU case law with regard to au pairing. Despite the recognition of au pairs as workers in Europe, host countries maintain to subject au pair migration as a cultural-educational agenda, which results to systemic discriminatory practices violating ESC rights.

Therefore, in the following chapter this thesis will argue the significant use of a rights-based conceptual framework in claiming their work rights. I will further argue the

¹⁵⁹ Services of genuine and effective activities of some economic value.

¹⁶⁰ *Birden vs. Stadtgemeinde Bremen*, CJEU 1998, par. 25.

¹⁶¹ *Payir*, supra fn. 156, at par 35.

application of the ICESCR's Article 7(a) (i) on the right to equal remuneration for work of equal value as an important right to recognize the value of au pair work as decent work.

CHAPTER 5

Accessing Work Rights: The Rights-Based Approach and the ICESCR's Right to Equal Remuneration

5.1 Conceptual Framework: Using a Rights-Based Approach

There is no single definition for a rights-based approach. However, there are common features that emerged within the different academic and legal theoretical frameworks on RBA, including the UNDP's HRBA. According to Kapur and Duvvury, there are five essential elements in this construct:¹⁶² First, a rights-based approach is established “on a framework of rights and obligations”. It determines the rights-holders and their claims and the corresponding duty-bearers and their responsibilities, and work towards reinforcing the capacities of the rights-holders to build their claims and the duty-bearers to meet their obligations.¹⁶³ All individuals are right-holders and the state as duty-bearers has the obligation to guarantee these rights. A right necessitates positive obligations from the government and their representatives to respect, protect, and fulfill and negative obligations to refrain from violating rights. International human rights agreements and standards provides for the legal and normative character of rights, which are the basis of the corresponding state obligations. In seeking remedies to rights infringements, it is crucial in an RBA to contextualized the connection between the rights-holders and the duty-bearers with respect to obligations thereby filling in the gaps. An RBA therefore is a procedure of empowering those who do not have their ESC rights to assert and claim these rights.¹⁶⁴

Second, a rights-based approach should comprehensively include the breadth of indivisible, interdependent and interrelated rights.¹⁶⁵ In all stages of design, implementation and evaluation of programs and policies in all areas of development, it is important that all

¹⁶² Kapur and Duvvury (2006), p. 7-8.

¹⁶³ UNDP (2003)

¹⁶⁴ *supra* fn. 162, at p.7

¹⁶⁵ *ibid.*, UNDP (2003)

be in accordance to human rights values. This feature promotes a systematic integration of human rights principles and standards at all phase of policy, legislative and programming processes.

Third, a rights-based approach concentrates on advancing “levels of accountability and transparency in the development process” through recognition of rights-holders and their claims, and likewise the duty-holders and their obligations. For accountability to be effective there should be an improvement on appropriate laws, policies, institutions, administrative practices and mechanisms for redress to guarantee the realization of human rights and respond to the violation of rights. It also calls for the interpretation of universal norms and standards to serve as targets for measuring the progress of accountability in the domestic level.

Fourth, an RBA requires a “high degree of participation”, which is a crucial element in the framework. This emphasizes the importance of rights-holders to engage, influence and to partake in all stages of the development process, as well as to give them access to institutions and mechanisms for redress and complaint.¹⁶⁶ Everyone has the right to participate in decisions concerning one’s own human rights. Participation must be active, free, and meaningful and responds to issues of accessibility, which includes access to information in a form, and language that is clear. This feature of the RBA is particularly significant to marginalized rights-holders because this emphasizes the necessity to include them as active rights-holders in the processes of claiming rights.

Lastly, an RBA must provide specific consideration “to issues of discrimination, inequality and vulnerability”.¹⁶⁷ This feature recognizes deep structural issues of discrimination, inequality and vulnerabilities thereby making RBA an effective approach in extending rights protections to those whose rights are violated or are vulnerable. Further, an RBA prioritizes individuals and groups who are in the most marginalized situation, and to those who face huge impediments in realizing their human rights.

¹⁶⁶ supra fn. 162, at p8.

¹⁶⁷ *ibid.*

In view of the foregoing, an RBA is specifically helpful in ensuring that non-EU/EEA au pairs may realize their claim for work rights. The RBA looks into those who are largely marginalized, discriminated and vulnerable such as non-EU/EEA au pairs. It is important to note that they are young women migrant workers who have no labor rights and are facing great challenges on attaining these rights. This approach also encourages them to participate actively in the processes of information, claims for redress and policy-making. Thus, I submit in employing RBA as an operative means to facilitate remedial and claims processes in claiming work rights for non-EU/EEA au pairs.

5.2 The ICESCR's Right to Equal Remuneration

As a principle, equal remuneration has two concepts: equal pay for equal work and equal pay for work of equal value.

The first concept pertains to the more restrictive interpretation of the principle of equal remuneration, since it assesses wage rates between “the same jobs and/or the same enterprise”¹⁶⁸ and involves direct discrimination.¹⁶⁹ This holds the early remnants of the male breadwinner/ female caregiver gender contract¹⁷⁰ and the principle of payment in accordance with need whereby, “the male basic wage was made as a family wage and... the female basic wage was set as a wage for a single woman without dependents.”¹⁷¹ It is a strategy primarily to confront dual pay scales for men and women”.¹⁷² This is the notion realized in the 1919 Treaty of Versailles,¹⁷³ which was established as a principle by reason

¹⁶⁸ Craven (1998), p. 237

¹⁶⁹ Saul (2014) p. 429 ; CESCR General Comment No. 20, par. 10(a) “Direct discrimination occurs when an individual is treated less favorably than another person in a similar situation for a reason related to a prohibited ground... (It) also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation.”

¹⁷⁰ Vosko (2004) p. 11 “This contract assumed a male breadwinner pursuing his employment freely in the public sphere, with access to a standard employment relationship and receiving a family wage. However, it assumed a female caregiver performing unpaid work, and possibly earning a “secondary wage,” and receiving supports such as social insurance via her spouse.”

¹⁷¹ Equal Pay Cases, 1969, 127 CAR 1142, 1152.

¹⁷² Eide (1999) p. 495

¹⁷³ Art. 427. Part XIII, ILO Constitution.

of “supreme international importance” that “men and women should receive equal remuneration for work of equal value”.¹⁷⁴ In 1948, the UNGA adopted the UDHR incorporating the same concept in Article 23 (2) which provides, “Everyone, without any discrimination, has the right to equal remuneration for equal employment”.

By contrast, the notion of the second concept - equal pay for work of equal value,¹⁷⁵ transcends beyond direct discrimination to confront the historical attitudes and stereotypes regarding women’s aspirations, preferences and capabilities on certain jobs where women are primarily or exclusively employed.¹⁷⁶ It is of common knowledge that the so-called female jobs are undervalued in contrast with work of equal value done by men in determining wage rates. Thus, this concept permits a broader scope of comparison, including, but going beyond equal pay for ‘equal’, ‘the same’ or ‘similar’ work, and also encompasses work that is of a completely different nature, which is nevertheless of equal value.¹⁷⁷ Compared to the restrictive ‘equal pay for equal work’, this concept requires objective and extensive comparisons within different “jobs, enterprises, employers, sectors and places” to avoid gender bias assessments.¹⁷⁸

Under Article 7(a)(i) of the ICESCR, both concepts emerged declaring the right of all workers to “...equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”.¹⁷⁹

5.2.1 Significance of the Right for Non-EU/EEA Au Pairs

The CESCR described the right to work,¹⁸⁰ which includes the right to equal remuneration, as a universal and fundamental right interdependent to other human rights for

¹⁷⁴ *ibid.*

¹⁷⁵ Also known as ‘work of equal value’.

¹⁷⁶ ILO Giving Globalisation a Human Face, p. 281; Craven, *supra* fn. 168 at p. 237.

¹⁷⁷ *ibid.* ILO, p. 281.

¹⁷⁸ *ibid.* ILO, p. 291 and Art. 3(1), ILO Convention No. 100.

¹⁷⁹ Also referred hereinafter as the “right to equal remuneration”.

¹⁸⁰ Art.6, ICESCR.

their realization.¹⁸¹ The Covenant defined these rights in a general and non-exhaustive manner through the establishment of clear legal obligations rather than a simple theoretical principle to emphasize the necessity of these rights.¹⁸² Unlike the wider scope of the provision on the right to work when it affirmed in Article 6 ‘the right of everyone’, the right to equal remuneration in Article 7(a) (i) is clearly restricted to ‘all workers’.¹⁸³ Thus, I submit this right as applicable to all, including non-nationals, who receives remuneration in exchange for their labor; either in the formal or informal employment.

As stated earlier, the ICESCR explicitly expresses the principle of remuneration through both ‘equal remuneration’ and ‘equal pay for equal work’ by women, but it does not purport as solely to be utilized on gender pay issues.¹⁸⁴ It is apparent the word “women” is mentioned within the provision, however the language of Article 7 (a) (i) is clear that ‘women’ are only an exemplification (‘in particular’) of the principle that equal remuneration for work of equal value applies “without distinction of any kind”.¹⁸⁵ Therefore, the right does not intend to limit the interpretation only to women, but to similarly extend protection to other groups by reference to Article 2 (2) on the non-permissible grounds of discrimination.¹⁸⁶

It is important to note, the enumerated grounds in Article 2 (2) are merely illustrative and non-exhaustive and other grounds may be incorporated in this category.¹⁸⁷ This corresponds with the CESCR’s praxis that the phrase ‘other status’ allows an interpretation to prevent discrimination on other grounds not explicitly cited in the provisions of the Convention such as age, disability, nationality, sexual orientation, health status and economic and social situation. This similar view is reflected within the precepts

¹⁸¹ CESCR General Comment No. 18, par. 2.

¹⁸² *ibid.*

¹⁸³ Saul, *supra* fn. 169, at p. 400

¹⁸⁴ UN Doc. A/2929, Chapter VIII, par. 6

¹⁸⁵ *ibid.* par. 8; Saul, *supra* fn. 169, at p. 427.

¹⁸⁶ *ibid.* The non-permissible grounds of discrimination cover race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁸⁷ CESCR General Comment No. 20, par. 15.

of the ILO Discrimination Convention¹⁸⁸ in relation with the ILO Equal Remuneration Convention.

Therefore, I concur with Professor Craven when he maintained the principle of equal remuneration is exceptionally significant in terms of rights protection for several vulnerable, marginalized or disadvantaged groups, as the CESCR treats the equal pay guarantee applicable to groups other than women.¹⁸⁹ These other groups may include foreign or migrant workers, casual and part-time workers, those in the informal economy and workers in precarious industries who are systematically discriminated.¹⁹⁰ The guarantee of this principle also covers non-EU/EEA au pairs as they are most at risk and disadvantaged and consequently least able to achieve basic work rights in terms of remuneration and other labor benefits for themselves by reason of the au pair scheme.

5.2.2 Immediate Applicability

The principle of progressive realization, under Article 2(1) of the ICESCR, recognizes the fact states need time to execute the covenant rights to the maximum of its resources. However, this does not mean states should defer indefinitely the steps to ensure fulfillment of these rights as this is inconsistent with international law.¹⁹¹ Rather, it is the duty of states parties to move as expeditiously and effectively towards the realization of the ESC rights no matter what their fiscal standing because the over-all objective of the Covenant is to establish clear obligations for states parties with respect to the full realization of the rights.¹⁹²

Certain rights under the ICESCR entail immediate application in full by all states parties. The guarantee of equal remuneration “without distinction of any kind”,¹⁹³ requires immediate application since it is based on the non-derogable principles of equality and non-

¹⁸⁸ Article 1, ILO Convention No. 111.

¹⁸⁹ Craven, *supra* fn.168, at p. 238; Saul, *supra* fn. 169, at p. 429

¹⁹⁰ *Ibid.* Craven.

¹⁹¹ UN Doc. A/2929 Chapter V, par. 24; General Comment No. 3 (1990), par. 9

¹⁹² *ibid.*

¹⁹³ Art. 7(a)(i), ICESCR.

discrimination. The CESCR interpreted Article 2 (2) and Article 3¹⁹⁴ as “immediate and cross-cutting”¹⁹⁵ obligations in the Covenant, and further emphasized Article 7 (a) (i) as a specific and coherent expression of these provisions. Thus, the apportionment of the burden of economic difficulties must be equitable if equal remuneration is a remedy of immediate effect in the domestic level. This is consistent with the approach of Articles 2 (2) and 3 of the ICESCR, as limitations on economic resources; do not rationalize the continuation of privileges for advantaged groups at the detriment of the disadvantaged groups.¹⁹⁶

The concept of equal remuneration for work of equal value is also reflected in CEDAW¹⁹⁷ and the 1951 Equal Remuneration Convention (ILO C100).¹⁹⁸ CEDAW urges states parties to ratify the ILO C100 for its full implementation and to ensure application of the principle of equal remuneration. It reinforces immediate applicability when it required signatory states to pursue by all appropriate means and ‘without delay’ a policy of eliminating discrimination against women.¹⁹⁹ The immediate applicability of the right to equal remuneration therefore is not only limited within the ICESCR but also converges with other human rights treaties, as it is acknowledged all human rights are indivisible, interdependent and interrelated.

5.2.3 Justiciability and Enforceability

Generally, states parties under the ICESCR are obligated “...to take steps... by all appropriate means, including the adoption of legislative measures” as remedy.²⁰⁰ The Limburg Principles,²⁰¹ in interpreting the provision, asserts this in case the adoption of legislation is indispensable to enforce ESC rights. For example, legislation is appropriate

¹⁹⁴ “States Parties...undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth” in the ICESCR.

¹⁹⁵ CESCR General Comment No. 20, par. 7 and General Comment No. 16, par. 22.

¹⁹⁶ Saul, *supra* fn. 169, at p. 435.

¹⁹⁷ Art. 11 (1) (d), CEDAW.

¹⁹⁸ *ibid.* Under Art. 1(b) the language of the principle was modified to “equal remuneration for men and women workers for work of equal value”.

¹⁹⁹ Art. 2, CEDAW

²⁰⁰ Art. 2(1), ICESCR.

²⁰¹ UN Doc. E/CN.4/1987/17

when existing laws or policies are incompatible and patently discriminatory with the obligations under the Covenant. However, laws alone are not sufficient to fulfill obligations under the Covenant. States parties at the domestic level should utilize all appropriate measures, including administrative, judicial, economic, social and educational means, consistent with the nature of the rights to ensure fulfillment. Thus, aside from legislative actions, states parties are also obligated to provide effective judicial remedies if necessary.

The CESCR stresses, "...among the measures which might be considered appropriate ... is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable".²⁰² It went further in explicitly recognizing Article 7 (a) (i) as capable of immediate application by judicial and other organs in many national legal systems. Therefore, the right to equal remuneration for work of equal value is indubitably a justiciable and enforceable ESC right at present.

The recent adoption of the OP-ICESCR²⁰³ further reinforced the legal accountability of states for violations on the right to equal remuneration and its enforceability for states compliance. Individuals may now present a claim for ESC rights violations to the CESCR. However, the OP-ICESCR's applicability to submit grievances at present is limited only to individuals under the jurisdiction of the fifteen states that ratified the protocol. Nonetheless, the CESCR in its General Comment no. 9 provides the presence of international procedures for individual claims is significant but is merely supplemental to effective judicial and administrative remedies within the domestic level.²⁰⁴ Therefore, ESC rights are enforceable in national courts and, legal remedies and redress should be available to any aggrieved individual or group, which in so doing ensures governmental accountability.²⁰⁵

²⁰² CESCR General Comment No. 3, par. 5

²⁰³ OP-ICESCR May 5, 2013

²⁰⁴ CESCR General Comment No. 9, par. 4

²⁰⁵ *ibid*, par. 2-3.

5.3 CONCLUSION

In this chapter, I submitted the significance of using an RBA in facilitating a claim for access to work rights by non-EU/EEA au pairs. I also submit the application of the right to equal remuneration under the ICESCR Art. 7(a)(i) as a means of protecting non-EU/EEA au pairs against labor exploitation. Its normative features can protect not only against gender biases in employment but also against discriminatory practices and policies on vulnerable and marginalized groups in the labor market. Furthermore, the immediate applicability and justiciability of the right makes it an effective source of rights protection for non-EU/EEA au pairs.

CHAPTER 6

CONCLUSION AND RECOMMENDATION

7.1 Conclusion of the Study

This thesis established non-EU/EEA au pairs at present belong to a vulnerable, unempowered and marginalized group. Their exposure to high-risk human rights exploitations, particularly work related, often results to force labor, and worse slavery. It is in this view this study is significant as a contemporary human rights issue. The 1969 European Agreement by the Council of Europe is not sufficient to regulate and protect the experiences of non-EU/EEA au pairs. The cultural exchange rubric under existing au pair regulations is the main cause of the inconsistencies in defining a non-EU/EEA au pair as a worker with rights. It also confirmed in this study that non-EU/EEA au pairs are not provided work rights protection by receiving states and sending states due to the complex intersections of social factors. The analysis presented not only the gender problem on reproductive care work but also its link across global market processes, specifically on the increasing demand and supply of transnational domestic labor and its effects, which further intersects on current labor migration policies of states involved in the au pair scheme. With regards the main inquiry on whether au pairs are migrant domestic workers, this thesis established non-EU/EEA au pairs are at present are migrant domestic workers in Europe. However, it is important to emphasize despite the given recognition to au pairs, non-EU/EEA au pairs remains to be “domestic workers who are not workers” under the au pair regulation while their EU/EEA counterparts are mobile workers. It is therefore proper non-EU/EEA au pairs should also have equal access to work rights under EU law. Hence, this thesis established RBA as an all-encompassing theoretical approach to claiming rights particularly focusing on the ICESCR’s right to equal remuneration. The right is importantly useful to recognize the value of au pair work as domestic work which is currently protected under international law through ILO Convention 189.

7.2 Recommendations

In view of the foregoing, I recommend for an over-all assessment of the 1969 European Agreement on Au Pair Regulation through the Council of Europe by using the RBA framework. It is the Council's outright duty to align all policies in accordance with main human rights treaties, the ECHR and international law. The Council of the European Union in April 2014 has developed a working document Union (A Rights-Based Approach, Encompassing All Human Rights for EU Development Cooperation) delineating the application of an RBA in all its programs and policy-making. This document follows the principles under the UNDP's HRBA and therefore is a useful tool in lobbying for an examination of the au pair treaty in the regional level. The Council should firmly urge au pair host countries to ratify the European Agreement to signify their concern on this problem.

Under the international legal framework, states parties being duty-holders are bound to respect, protect and fulfill ESC rights. As indication of au pair sending and receiving countries' guarantee and political will to the development of work rights for non-EU/EEA au pairs, they are required to investigate the discriminatory rules and practices critically affecting non-EU/EEA au pairs' labor rights and to find the necessary remedies for these gaps. I thereby propose for an immediate RBA comprehensive examination and revision of their au pair policies through their respective labor, immigration and justice departments, and national human rights institutions.

As part of their legislative actions, au pair host countries should ratify the European Agreement with an intent to facilitate protective measures. The concerned governments should annually allocate specific and sufficient funds for disbursement to agencies handling au pair concerns. Moreover in the judicial level, strengthening the capacity of judicial and law implementation bodies must be given priority such as programs on rights issues on gendered labor migration. Non-EU/EEA au pairs should experience that law enforcement officers are their protectors and not otherwise when it comes to handling their claims in cases of violations on their rights. Addressing and resolving the dilemmas linked to civil/criminal procedures, manpower and budget by the government in bringing claims for remedies in courts will greatly considerably lessen the precariousness of this group.

On the ground, local and international NGOs should be encouraged to take aggressively roles in disseminating information and awareness to the public about the plight of non-EU/EEA au pairs' and their rights. Consistent lobbying could be an effective tool for governments to gain awareness the importance of human rights supervisory mechanisms. NGOs participation in these processes especially on its reporting work is important in pressuring and lobbying for practice and policy reforms. However, active involvement of NGOs in human rights activities somehow depends on the governments' political will to consider the au pair dilemma, as most NGO funding are from state subsidies thus the capacity of NGOs to advocate policy reforms. It is therefore the governments' obligation to create an empowering milieu for NGOs and to encourage greater participation from them.

Labor unions should also assertively participate and advocate on the inclusion of all au pairs within the borders of national labor laws with the help of legal advocates who considers au pairs are lawfully workers. This is an effective catalyst in putting non-EU/EEA au pairs' issues on the governments' discussion table. Moreover, the ICESCR's equal remuneration is an important right to use in advocating labor protections at this point, as it claims equal treatment and value for au pair work.

The aforementioned efforts should be accompanied with positive changes in the society's attitude on commodified domestic work and non-EU/EEA au pairs, particularly from developing countries. The deep-rooted influences of patriarchal constructs linked with discriminatory mindsets and stereotypes on immigrants as "the other" generated barriers on the capacity of non-EU/EEA au pairs to enjoy work rights. In solving this problem, governments and NGOs should inform and educate host families, au pairs, communities and the public about au pairing, its system and possible risks on rights violations by organizing countrywide awareness and advocacy campaigns on non-discrimination. Society must learn that non-EU/EEA au pairs are not second-class residents but decent migrant workers whose labor are valued under international laws. Through this, it is not only the society that will be empowered but also non-EU/EEA au pairs, as they claim their rightful place and value as individuals under the law.

Finally, I propose for an immediate positive action on this study's recommendations.

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