

**‘Welfare system and social protection: can a lack of services be a reason for possible abuses?’**

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## 1. INTRODUCTION

This article aims to further the hypothesis that a lack of welfare services addressed to families in the Italian system may contribute to the fostering of the abuse of au pair placements, and eventually of domestic work in general. This contribution aims, in particular, to investigate whether a lack of welfare services could foster the abuse of au pair placements and domestic work, to analyse the ‘contractual’ rules that may further this abuse, and to propose a different legal classification of the au pair placement in order to avoid possible harms.

In order to support the main hypothesis of a link between the lack of welfare services and the abuse of au pair placements and domestic work, four specific aspects will be considered:

- i- The state of Italian social services addressed to families.
- ii- A legal case, which confirms the theory of possible abuse.
- iii- A comparison of the regulations between au pair placement and domestic work, which shows the stronger rights and consequently the costs of such domestic work.
- iv- The criteria considered by judges to determine the nature of the dependent work.

### *2. Need of Services addressed to families*

In 2008, research by the centre Censis<sup>1</sup> pointed out that the Italian welfare state is largely insufficient in facing national social demand, especially regarding the care of people who are not self-sufficient. Notwithstanding that the debate on this has developed over many years, the Italian system seems still unprepared to face an ageing population, and lacks adequate services for child and disability care.

The 2008 Censis research showed that these services would be worth 10 million euros. The official channels are insignificant and inefficient and Italian families are left alone to deal with the requirements of

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<sup>1</sup> Censis is the main Italian socio-economic research centre. It publishes periodically different types of research together with an annual report on the social situation in Italy, which is the most prestigious piece of research existing in Italy in this field. Censis, *42° Rapporto sulla situazione sociale del Paese*, (Franco Angeli Edizioni, 2008).

care. Moreover, approximately 7000-8000 women workers are employed in the field of caring for those who are not self sufficient, often without a regular contract.

Another piece of research in 2008 highlighted that just one domestic worker in every three has a work contract, whereas others are undeclared workers<sup>2</sup>. Public services seem to be insufficient in both quantitative and qualitative dimensions. Because of the lack of valid alternatives, approximately 3 million people live at home, dependent on their families<sup>3</sup>.

The match between young immigrant women<sup>4</sup>, men, and aged Italians who are not self-sufficient has been defined as a “revolution of low cost assistance” and it shows a “spontaneous process”, characterized by informal channels<sup>5</sup>.

In their 2010 annual report, Censis underlined that families have to face their social needs entirely by themselves regarding the care of children, disabilities and those who are not self-sufficient<sup>6</sup>. The main caregivers are mothers, spouses and children. Those who attend to care cover 10.7% of the families’ needs. Voluntary work also plays a relevant role for the provision of social services to families: more than 26% of Italians are declared to do be undertaking voluntary work, and 39.9% are involved in home assistance for the elderly and other vulnerable people.

In 2009, 1,484,00 care attendants and domestic workers constituted the official Italian ‘micro-welfare’ state. More than 400,000 of them became visible from 2001 until 2009<sup>7</sup>. In 2002, an immigration amnesty allowed illegal immigrants to gain permanent resident permits and

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<sup>2</sup> S Pasquinelli, G Rusmini, *Istituto per la ricerca sociale, Badanti: la nuova generazione. Caratteristiche e tendenze del lavoro privato di cura*, 2008, [www.qualificare.info](http://www.qualificare.info) (last accessed, 1 March 2016), p.10.

<sup>3</sup> G De Rita, Censis, ‘*Un mese di sociale: gli snodi di un anno speciale*,’ in Censis *Il sociale non presidiato*, Roma, 10 giugno 2008/2, (Franco Angeli Edizioni) p. 18-19.

<sup>4</sup> D Gottardi, ‘Dalle discriminazioni di genere alle discriminazioni doppie o sovrapposte: le transizioni,’ (*Giornale di Diritto del Lavoro e Relazioni Industriali*, 99/100, 2003) 23 ff.

<sup>5</sup> S Pasquinelli, G. Rusmini, *Istituto per la ricerca sociale, Badanti: la nuova generazione. Caratteristiche e tendenze del lavoro privato di cura*, 2008, [www.qualificare.info](http://www.qualificare.info) (last accessed, 1 March 2016), 10.

<sup>6</sup> Censis, Quarantaquattresimo, *Rapporto sulla situazione sociale del Paese* (Franco Angeli Edizioni 2010)

<sup>7</sup> Censis, ‘*La società solida degli invisibili*,’ *Oltre L’Adattamento, Un Mese Di Sociale* (Franco Angeli Edizioni 2009) 27.

transform undeclared work into regular employment<sup>8</sup>. Since 2010, undeclared work has been considered the main ‘shock’ that is absorbed in times of crisis.<sup>9</sup>

One Italian in every four belongs to an informal network made by friends, relatives, colleagues or neighbours. This is a network of approximately 14 million people who provide care services to persons who are not self-sufficient.

The situation has worsened in recent years as the economic crisis has led to a cut in social investments and a decrease in social services<sup>10</sup>. The 2015 Censis report shows that 3,167,000 people are not self-sufficient. The relevant role played by families in welfare services is confirmed, but the traditional model is facing increasing difficulties. In order to cope with their social needs, Italian families have had to use all of their savings, have had to sell houses, and have had to go into debt<sup>11</sup>. Economic conditions have thereby been worsened, exacerbating the need to face the lack of social services, even with less available economic resources.

### 3. Au Pair placement and job relationship

The previous paragraphs provided some useful elements to understand the sizeable need for current social welfare services in Italy and the lack of adequate public answers. Given this picture, is it plausible to presume that these kinds of conditions could foster an incorrect and distorted use of the ‘au pair placement’? Is it possible to provide a formal legal appearance, here the au pair contract, to hide an employment relationship that is in fact a domestic work relationship?

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<sup>8</sup> In 2002 there were two immigration amnesties: one provided by the law called Bossi-Fini (law 30 July 2002 n.189, art.33); the other provided by a decree law *ad hoc* (decree 9 September 2002 n. 195). The first one regards the care attendants and domestic workers; the second one regards the other employees.

<sup>9</sup> G Roma, ‘La società solida degli invisibili’, in Censis, *Oltre L’Adattamento, Un Mese Di Sociale* (Franco Angeli Edizioni, 2009), p. 27-55.

<sup>10</sup> Istat, *49° Rapporto annuale sulla situazione del Paese*, 2015, <http://www.istat.it/it/files/2014/05/Rapporto-annuale-2014.pdf>, (last accessed 10 April 2016).

<sup>11</sup> Censis, *49° Rapporto sulla situazione sociale del Paese* (Franco Angeli Edizioni 2015)

It is currently not possible to verify this hypothesis through social or legal studies because such studies do not exist in considerable number<sup>12</sup>. What is possible to do is to underline the differences in the regulation of au pair contracts and domestic work contracts together with a relatively recent legal case that could strengthen the thesis that would argue that this abuse can occur.

### 3.1. Au pair placement and Italian regulation

In Italy the Law 18 May 1973, n.304 ratified the European agreement on 'Au Pair' placements, signed by the Council of Europe in Strasbourg on the 24<sup>th</sup> of November 1969. According to this act, Italy should promote to the greatest extent possible the implementation of its provisions and supervise the application of its principles.

The person placed as an au pair is "neither a student nor a worker", but belongs to a *specific* category, which needs a *specific* regulation and adequate social protection inspired by the principles of the European Social Charter<sup>13</sup>. The au pair contract can be signed between a family in the EU and a citizen of a European Union Member State, or a citizen who comes from a country outside of the EU.

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<sup>12</sup> M Marrucci, 'Colf, Badanti e collocamento alla pari nel lavoro domestico: costituzione e gestione del rapporto, trattamento economico, risoluzione del contratto: aggiornato con il nuovo', (CCNL lavoro domestico in vigore dal 1 marzo 2007, Maggioli, Santarcangelo di Romagna 2007), p. 77.

This is one of the few books that concerns au pair matters. This book provides a classification of au pair typologies: *traditional au pair*, *demi-pair*, *au pair plus* and *mother's help*. It is not understandable where the author took these definitions, or if he created them. These kinds of definitions are used by some au pair agencies. In any case it is difficult to grasp how the *au pair plus*, which includes 40 working-hours per week plus 2/3 evening, and the *mother's help*, which includes 50 plus 2/3 evening, could be considered au pair placement. In both the European Agreement and Italian Legislation there is a specific time-ceiling that is 5 hours per day, for a maximum of 6 days a week. It is true that those articles use the word "generally" to speak about the time ceiling. This seems to admit exceptions. At the same time the classification does not consider the Italian regulation of working time. In any case, the author affirms that the *mother's help* typology could hide dependent work. In our research we consider that an au pair placement could hide dependent work, independently of the number of working hours. On the other hand, we think that Mariucci is right when he says that the more the person has to work, the less independence s/he has, which should be an element of the au pair placement. Overall, the topic is generally not adequately investigated by legal studies.

<sup>13</sup> European Agreement on 'Au pair' Placement, Strasbourg, 24/11/1969.

In the second case, the au pair shall have a permit of stay and a residence permit<sup>14</sup>. The contract has to be deposited to the *Direzione Provinciale del Lavoro*, the Provincial Labour Office.

The EU agreement was based on the acknowledgment that an increasing number of young people, even minors, and especially girls, were going abroad to be placed as an 'au pair'. The agreement specified that no critical assessments of this widespread practice have yet been given. It stressed that it was considered "advisable to define and standardize, in all member States, the conditions that govern such 'au pair' placement."<sup>15</sup>

### 3.2. The Case Law

A 2010 Case Law is particularly interesting as an example supporting the thesis of this article. Specifically, this refers to the decision number 25859 dated the 21<sup>st</sup> of December 2010 of the Italian Supreme Court, in which it is stated as a consolidated rule that: "The au pair relationship (L. 304/1973) must be demonstrated by the host family otherwise the relationship is considered a subordinate domestic employment". The Supreme Court overturned the decision of the Court of Appeal of Rome (decision N. 210/06).

In detail, in front of the inferior Court –the Tribunal of Rome - the claimant gathered that:

- The au pair had been working for two sets of spouses as a domestic worker, from 28/03/1993 to 29/08/1998 and she received a low salary;
- The au pair followed all the spouses' instructions/directives during her stay with them;
- She never took her days of rest;
- She was mistreated by the spouses' daughter and she suffered serious injuries, which caused her to be unable to work for 20 days.

In the Tribunal of Rome's opinion, the relationship *de quo* between the involved parties was not a relationship of employment. The Court of Appeal confirmed the inferior Court's sentence. In particular, the Court of Appeal stated the relationship under analysis had to be classified as an au pair

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<sup>14</sup> The length of the au pair relationship with a no-EU citizen can be maximum three months. Art. 27, c. 1 lett r) Decreto legislativo 25/07/1998, n. 286 (*Testo Unico Immigrazione*).

<sup>15</sup> European Agreement on 'Au pair' Placement, Strasbourg, 24/11/1969.

placement, from a *humanistic perspective*<sup>16</sup>, in which board and lodging were offered in return for providing some help to the family.

The claimant appealed to the Supreme Court for two reasons: (i) for violation and unfounded application of the burden of proof: in the claimant's opinion the family had to prove the existence of the "au pair placement" ex Law number 304/1973; (ii) for a motivation flaw concerning a crucial point of the issue. The judge excluded the onerous nature of the contract because of the low amount of money recognized to the worker.

The Supreme Court considered these reasons as justified. The decision was overturned by the Supreme Court, which stated that the relationship was an *employment* relationship. The case referred back to the Appeal Court for determining the salary to be recognized to the claimant-worker. The sentence is particularly relevant because it represents the only Supreme Court pronouncement with reference to the Law n. 304/1973<sup>17</sup>.

### 3.3. Differential regulation of au pair and domestic work contracts

Au pair and domestic work regulations are characterized by both common and similar aspects. Preliminarily, we should consider that these two contracts primarily affect women instead of men, and are characterized by the fact that no relevant attention has been paid to these topics in legal studies<sup>18</sup>. This point highlights the difficulties of adopting a gendered perspective and at the same the difficulties of recognizing care-taking

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<sup>16</sup> This definition is not a legal concept and it is difficult to understand its precise meaning.

<sup>17</sup> G Guarnieri, *Rapporto di lavoro subordinato e rapporto alla pari*, (Il lavoro nella giurisprudenza 3/2011, p. 316)

<sup>18</sup> P Passaniti, 'La cittadinanza sommersa: il lavoro domestico tra Otto e Novecento,' in *Studi in Onore di Remo Martini – III*, (Universita' di Siena, Facoltà di Giurisprudenza e di Scienze Politiche – Collana di Studi "Pietro Rossi", 2008, Vol. XXXIII), p. 29-53. Passaniti undertakes a review of the development of domestic work regulation. He mentions the Royal Decree of 15 March 1923 n. 692, which excluded domestic work from the protection of the working day regulation. The domestic work in the Civil Code of 1942 is viewed as special work, a particular kind of dependent work. Slowly regulations developed taking into consideration the family dimension where it is executed. The main Law was adopted in 1958, which was also the year of the economic boom. P Ichino, 'I primi due decenni del diritto del lavoro repubblicano: dalla meta' degli anni Cinquanta alla legge sui licenziamenti individuali,' (*Rivista Italiana Diritto Lavoro*, 2007). The author stresses the scarce attention shown by legal studies when Law n. 339/1958 was adopted. The same happened in 1963 with regard to the prohibition of dismissal in case of marriage's cause.

activities as work<sup>19</sup>. The au pair placement is regulated by the Law 18 May 1973, n.304, adopted on the basis of the European Agreement; domestic work's regulation refers to the Law 2 April 1958 n.339 and to collective bargaining<sup>20</sup>.

The domestic worker could have a specific vocational qualification or could carry out a general job. Both au pair placement and domestic employment relationships focus on family-oriented activities. An au pair placement is a temporary situation in which a family hosts a person in exchange for certain services<sup>21</sup>. Similarly, domestic work is addressed to families<sup>22</sup> in order to support them in their daily lives.

Despite these similarities, the *quid pro quo* involved in the two relationships is substantially different. The au pair goes abroad “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<sup>23</sup>”. A certain sum of money is also provided as “pocket money”, but this amount is not considered to be the core of the relationship between au pair and family. Domestic workers, on the other hand, receive a wage from their job, in money or in nature, which is paid for punctually by the employer<sup>24</sup>. Thus, the aim of the two contracts is profoundly different.

The amount of the “pocket money” shall be defined by a private agreement between the family and the au pair. In the case of the domestic worker, the contract has to comply with a specific legislative regulation and collective bargaining. As a matter of fact, even if in Italy collective agreements don't have a general effect, the worker's wage is decided in accordance with the Constitutional principle of article 36 and with Civil Code principles. These allow the judge to determine if the amount is adequate or not. Collective

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<sup>19</sup> B Poggio, ‘Pragmatica della conciliazione: opportunità, ambivalenze e trappole,’ (*Sociologia del Lavoro* 2010) 65-77.

With regards to the positive steps of the Italian legislation in the field, see: S Scarponi: ‘*Il lavoro delle donne fra produzione e riproduzione: profili costituzionali e citizenship*,’ (*Lavoro e Diritto*, 1, 2001), p. 97-120. A valid contribution to foster the gender approach came from the EU level: F Guarriello, ‘Il nuovo diritto antidiscriminatorio,’ (*Giornale di Diritto del Lavoro e Relazioni Industriali*, 2003), p. 99 ff.

<sup>20</sup> Decision 23 December 1987 n, 585 of the Constitutional Court expanded the regulation of the Law 2 April 1958, n. 339 to the domestic work with less than 4 hours, initially excluded from its application.

<sup>21</sup> “Temporary” means up to one year. The length can be extended to two years.

<sup>22</sup> Art. 1 President of the Republic’s Decree 31 December 1971 n 1403.

<sup>23</sup> Art. 2 European Agreement on ‘Au pair’ Placement, Strasbourg, 24/11/1969.

<sup>24</sup> Art. 1 Law 2 April 1958, n. 339; Art 6 Law 2 April 1958, n. 339.



bargaining thereby establishes precise amounts, normally taken into consideration by judges.

Concerning the execution and development of activities to support families, the au pair person “shall render the receiving family services consisting in participation in day-to-day family duties<sup>25</sup>”. The domestic worker has to work for the family’s interest, but in this case specifically according to *due diligence*. S/he has to follow the employer’s directions.

The au pair contract is a private agreement that indicates the way in which the person placed as an “au pair” will share the life of the receiving family, “enjoying at the same time a certain degree of independence<sup>26</sup>.” Domestic workers’ “independence” is supposed by the conditions stated by law, collective bargaining<sup>27</sup> and individual contract. The au pair will receive board and lodging, and a separate room, “if possible”. Domestic work can (and should) eventually guarantee the au pairs board and lodging as eventual contract conditions.

If the domestic work contract provides for board and lodging, the employer has to supply: (i) healthy and sufficient nutrition and (ii) an adequate place to ensure her/his physical and moral integrity. With regards to educational aspects, the au pair should have adequate time available to attend language courses as well as to achieve cultural and professional improvement, i.e. working hours shall be shaped according to these goals. This aspect is not relevant in the regulation of domestic work.

The au pair should have the opportunity to take part in religious worship; the domestic worker should have available time to perform her/his civil and religion duties. Thus, particular importance is given to au pair’s religious rights. Religious aspects are considered in the domestic work regulation, too, but civil duties are also considered in the case of domestic workers.

The au pair should not work for more than five hours per day. The domestic work legislation states required daily rest of at least 8 hours and collective bargaining recognizes at least 11 hours<sup>28</sup>. The au pair has the right to one full free day per week, and at least one Sunday in every month. With regard to domestic workers, the legislation recognizes the right to a day of rest,

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<sup>25</sup> Annex C, Art. 9, Law 18 May 1973, n. 304.

<sup>26</sup> Art. 7 European Agreement on ‘Au pair’ Placement, Strasbourg, 24/11/1969.

<sup>27</sup> We just outline that in Italy collective bargaining does not have *erga omnes* effects.

<sup>28</sup> Annex C, Art.7 and Art. 8 Law 02/04/1958, n. 339 and Art. 14 and Art. 15 of the National Labour Contract.

usually on a Sunday, or two half days, with at least one on a Sunday. Collective bargaining also recognizes the mandatory nature of the Sunday as a day off<sup>29</sup>.

Article 10 of the European Agreement states “each contracting party shall state, by listing them in Annex I to this Agreement, the benefits to which a person placed “au pair” will be entitled within its territory in the event of sickness, maternity or accident”. These benefits cannot be covered by national social security legislation or other official schemes. The competent member of the receiving family shall, at his/her own expense, take out private insurance. The Italian Protocol concerning article 10 establishes that medical, pharmaceutical and hospital costs have to be covered as much as possible<sup>30</sup>. The Italian statutory reserve also states that “where the person placed "au pair" wishes to be entitled to benefits other than those mentioned in Annex I, only one half of the private insurance premiums shall be covered by the receiving family”<sup>31</sup>.

In Italy, the citizen of a non-EU member State can voluntarily register for the National Health Service (art. 34, c. 4 Legislative Decree 25/07/1998, n. 286 - *Testo Unico Immigrazione*) as an au pair, but she/he has to pay a flat contribution, which is € 219,49. This is valid from the 1<sup>st</sup> of January to the 31<sup>st</sup> of December. The EU citizen is entitled to free medical assistance for three months. After three months s/he can voluntary register for the National Health Service of the host member state<sup>32</sup>.

Domestic workers have the right to sick leave, as well as work accident insurance and maternity leave. They are insured in these cases as dependent workers, but this insurance is constituted by a specific regulation. In case of dismissal or resignation, a notice time has to be given by the domestic worker to the employer. This is reduced in the case of resignation<sup>33</sup>. The

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<sup>29</sup> Annex C, Art. 7 and Art. 8 Law 02/04/1958, n. 339 and Art.14 and Art.15 of the National Labour Contract.

<sup>30</sup> Law 18 May 1973, n. 304.

<sup>31</sup> Law 18 May 1973, n. 304.

<sup>32</sup> [http://www.salute.gov.it/imgs/C\\_17\\_pagineAree\\_2522\\_listaFile\\_itemName\\_0\\_file.pdf](http://www.salute.gov.it/imgs/C_17_pagineAree_2522_listaFile_itemName_0_file.pdf), (last accessed 10/04/2016).

<sup>33</sup> Law 02/04/1958, n. 339: > 24 weekly hours: 15 or 30 days, depending on the length of service (<5 or >5 years); > 24 weekly hours: 8 or 15 days, depending of the length of service (<2 or >2 years). For white collar workers (for example butler, graduate nursemaid, tutors, etc.): from 30 days to 47 months, depending on the length of service. For non-white collars, 15 days, and after 5 years of work: 30 days.

Art. 38, 15 of the National Labour Contract: 15 days until 5 years of work and 30 days for more than 5 years of work.

notice time has to be paid for, even if it is effectively not worked. The only case in which the dismissal/resignation can be without notice, and without its payment, is the justified dismissal or resignation, with “just cause”.

In the case that the private agreement for an au pair placement has been concluded for an unspecified period, each party shall be entitled to terminate it by giving two weeks’ notice. If the agreement has been concluded for a specified period, the au pair relationship will expire at the deadline. Each party can terminate the au pair relationship with immediate effect in the event of serious misconduct on the part of the other party or if other serious circumstances make such instant termination necessary.

In the case of both dependent work and au pair placement, dismissal of the contract can be *ad nutum*: this means that the only limitation for the employer/family is in respect to the period of notice before withdrawing from the contract. All other eventual rights could be written in the au pair agreement. Further rights are recognised to domestic workers, such as:

- In case of holiday, half day of paid leave, but collective bargaining recognizes one day of paid leave and extra money in case of work.
- Paid vacation after one year of work: (i) for white collars (for example butler, graduate nursemaid, tutor, etc.): 15 days, and after 5 years of work: 25 days; (ii) for no-white collar workers: 15 days, and after 5 years of work: 20 days. Collective bargaining recognizes 26 days for both the categories of workers<sup>34</sup>.
- Maternity leave; marriage leave of 15 days; family allowance.
- Trial period of 8 days, paid.
- Contributions.
- “Severance indemnity”, or “deferred salary” or *trattamento di fine rapporto*.
- In case of death, seniority compensation is given to the family or inheritor.
- Christmas bonus.
- The individual domestic employment contract could also establish further rights and duties.

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<sup>34</sup> Art. 18 of the National Labour Contract for Domestic Work.

4. How to distinguish au pair placement from domestic work: can an au pair agreement be abused?

The borders between dependent work and an au pair placement are established by looking at specific *indicators of subordination*. Such indicators also discriminate between dependent work and self-employment. These indicators are circumstantial elements observed by judges in concrete work relationships. They may be several, such as the lack of entrepreneurial risk, the respect of working time, and the payment of a fixed term wage.

A lack of a subordination indicators list causes judges to consider the entire situation under their analysis in order to decide if it can be defined as dependent work. There are a number of cases and studies that have attempted to clarify these indicators.

Determining whether a relationship is a dependent work relationship is relevant to the clarification of its legal effects. The traditional protective regulation in labour law concerns dependent workers. For Italian Law, the subordinate employment worker, or dependent worker, is the person who collaborates in the company, in exchange for remuneration. They do so by supplying his/her intellectual or manual work at the disposal of the employer (*alle dipendenze*) and under the employer's direction<sup>35</sup> (*sotto la direzione*).

From the aforementioned definition we can outline the main elements of dependent work:

- Remuneration: can be in money or in nature;
- Work: can be intellectual or manual;
- Collaboration: this term has an attitude merely descriptive in the legal definition<sup>36</sup>;
- *Eterodirezione*: this is the of the employer to give directions concerning the execution of the work and thus indicates the obligation of the employee to follow such directions. This element can be weak in the case of work characterized by high autonomy;
- Dependence of the employee: this means that the employee has to be at the disposal of the employer. This element is considered less relevant by law cases, but it can be crucial to include inside the dependent work

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<sup>35</sup> Art. 2094 Civil Code.

<sup>36</sup> M Roccella, *Manuale di diritto del lavoro*, (Giappicchelli Editore 2009), p. 38.  
D Gottardi, F Guariello., *Manuale di diritto del lavoro*, (Giappicchelli Editore, Torino, 2015)

classification and also relatively new atypical job contracts. As a matter of fact, the decision of the Constitutional Court 5 February 1996, n. 30, gives a particular definition of “dependence”, referring to the situation in which<sup>37</sup>: (i) the work is executed within the employee’s organization; (ii) the employee has the right to enjoy the results of the work.

Thus, the *nomen juris* of the contract -how the contract is legally defined - is not decisive and crucial to determining its dependent work nature. The judge has to ascertain the concrete relationship. Hence, in order to investigate if an au pair placement is effective or if it hides dependent work, the judge has to consider the whole concrete situation in its complexity

The fact that a person may stay with the family does not help to clearly outline the boundaries of these two “different<sup>38</sup>” relationships and makes it more difficult to classify the typology of the contract involved. Within this picture, it is worth considering whether the au pair contract can be abused and thus whether it can hide a domestic work relationship. In light of the considerations that we have already mentioned, it is possible to support the hypothesis that a risk of an abuse of the au pair placement can occur for two reasons:

- 1) It can be difficult to distinguish the typology of relationships involved.

It could be hard to understand: (i) the differences between assignments to be performed, since in both cases activities are family-oriented; (ii) the grade of independence of the workers: in case of the au pair contract, independence seems to be a crucial element of distinction; (iii) the improvement of knowledge that has to be achieved by the au pair person.

As aforementioned, in any case one should distinguish the two relationships by considering the presence of indicators of subordination in the concrete situation.

- 2) The domestic work regulation is considerably more protective, and thus expensive, in comparison to the regulation of the au pair placement. Considering the current care-services needs, it can be possible to presume that families try to take advantages by

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<sup>37</sup> M Roccella, *Manuale di diritto del lavoro*, (Giappicchelli Editore 2009), p.43. The Author based the theory of “doppia alienità” on this sentence.

<sup>38</sup> Are these two contracts really different in nature? We will try to answer this question.

signing an au pair contract and paying less to a person who is basically dependent upon them.

##### 5. The au pair as dependent worker?

The investigation of the relationship between an au pair placement and dependent work has provided the chance to highlight another issue. After having analysed some aspects of the au pair placement concept, there is reason to doubt the truth in the statement that the person undertaking an au pair placement “is not a student neither a *worker*”. This argument could be supported in two ways.

The first regards the hypothesis that the au pair regulation contains the aforementioned elements of subordination. Indeed, au pair placement is characterised by: (i) “remuneration”, part in money (pocket money) and part in nature (board and lodging); (ii) “work”, that is the participation in day-to-day duties and child care; (iii) “collaboration”, between the family and the au pair person; (iii) “hetero-direction”, the au pair person has to follow the family's indications to participate in day-to-day duties and child care; (iv) “dependence”, because the work of the family is executed in the family organization and the family enjoys the work's result. Both the au pair activities and the results of them are addressed to the family.

The second reason regards the analysis of some similarities between au pair placement and a specific dependent work contract. As we have already mentioned, the aim of the au pair placement and the aim domestic work differs considerably: with regards to the au pair placement, the work in favour of the family should be exchanged with knowledge, board, lodging and pocket money; concerning the domestic work, the work in favour of the family should be exchanged with a salary.

The aim of the au pair contract could be intended as a *mix cause*<sup>39</sup>, in order to provide both knowledge and remuneration. If we assume this, we can

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<sup>39</sup> P Trimarchi , *Istituzioni di diritto privato, Giuffrè* (Milano 2009) 190 ff. Mix cause is the literal translation of “*causa mista*”. The “*causa*” of an agreement is the economic individual scope of the contract; it can also be defined as the sum of the aims of the parties involved in the contract. For example, the “*causa*” of the contract of sale is “to give a price to get a thing”. The “*causa*” of a labour contract is “to work to get a salary”. The apprenticeship has a “*causa mista*” because its “*causa*” is “to work to get a salary and an education / training”.

outline some similarities with the apprenticeship contract<sup>40</sup>. The apprenticeship provides a job in return for vocational training and a salary. On the contrary, domestic workers execute domestic services in a continuous and predominant way. Training and knowledge aspects are not involved.

Furthermore, the au pair placement regulation specifies an age limit between the ages of 17 and 30. It is, however, possible to apply for a permit from the receiving country to extend the mentioned age. Domestic work doesn't have any age limit, but an apprenticeship does. Both au pair and apprenticeship contracts are characterised by a fixed term, even with different lengths. The length of the au pair placement cannot exceed one year, but it could be extended to a maximum of 2 years with specific permission.

Apprenticeship regulation states the possibility of a recognized salary which is lower than the minimum wage contracted by social partners. It is relevant to stress the peculiarity of the domestic work regulation. For example, it is not applicable to the retirement regulation (art. 4 Lay 11 May 1990, n. 108), it doesn't recognize the entire assistance rights, for example, it does not bind the employer to do a payroll.

Even the apprenticeship is characterized by a different regulation. Nevertheless, these typologies of work are dependent work, entitlement of rights and obligation stated by law and collective bargaining. For this reason, in order to prove its existence, domestic work follows the same *ratio* to prove the existence of the dependent work.

The analysis should persuade that an au pairing relationship is a kind of dependent work. It is plausible to consider it as domestic work or as a mix cause contract. In the latter case a limit of age can be accepted such as in the case of apprenticeship, because the contract is oriented to provide a means of education for young people. In the first case, a limit of age could be intended as an age discrimination.

Thus, we can suggest the au pair to be a mix cause contract that should have a special regulation (for example the possibility of a lower wage, such as in the case of an apprenticeship), but with some *basic rights* to be recognized. Such rights should include: social contribution; maternity rights, in both sense of protective dimension and paid leave; work health and safety rights;

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<sup>40</sup> Law Decree 15 June 2015, n. 81.

determination of the wage, meant as a sum of a salary and board and lodging. This sum should be respected by the general constitutional principle of remuneration, article 36 of the Italian Constitution: “The worker has the right of a remuneration in proportion to the quantity and quality of his work...” and the other principles in this field; collective rights and the possibility of becoming a member of a Trade Union<sup>41</sup>.

The hypothesis to consider the au pair contract as a mix-cause dependent contract is also in accordance with the declaration of the Council of Europe. The au pair person could be considered to belong to a “special category” that requests an “appropriate arrangements”.

## 6. Conclusion

The 2015 Censis Report points out that social services are downsizing because of the lack of public resources. Within this picture, families have to face more care needs by themselves and they have less economic resources available. The relevant lack of public services increases the request of private family caregivers assisting children, elders and individuals living with a disability.

The au pair placement could be viewed as an alternative way to cope with care needs since it is cheaper and could be worth hiding undeclared domestic work. Common aspects characterize the relationships between the person and the family in an au pair placement and in domestic work. In particular, when the domestic work contract provides for board and lodging, similarities become more evident. Moreover, a crucial common issue seems to be the kind of work that is performed: activities in favour of the family, which could include both cleaning and care giving.

These similarities could be used to sign an au pair placement contract and to hide domestic work. The Italian framework is characterised by features that can create conditions of abuse. In order to avoid this abuse, a different legal classification of au pair placement is proposed. By looking at the theoretical definition of the au pair placement, it is possible to recover the elements of subordination in its structure. Thus, it is plausible to look at it as a dependent work.

The eventual new classification of this contract raises at least another issue,

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<sup>41</sup> The IAPA – International au pair association - is an international non-profit organization, which represents au pairs' interests at the national level and provides counselling to au pairs.



one that could be considered to be a starting point for further research. What are the criteria for an agency to become a provider of au pairs to families? Does this agency need to meet the requirements requested by law to temp agencies providing temporary work?

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