

外籍家庭看護工重要勞動權利保障 和救濟之多重困境分析 ——一個法與社會研究視角之初步反思*

傅柏翔**

摘 要

本文試圖討論的核心議題，為外籍家庭看護工之重要勞動權益保障和救濟在臺灣現有的法制和文化下，遭遇到了什麼樣的挑戰，並且嘗試透過法與社會分析之角度，解釋在法律和救濟管道都具備的情況下，何以外籍家庭看護工在遭遇違反勞動契約之待遇時，並未積極地援引法律提出申訴和救濟來抵抗，而是選擇持續的工作。一個法律制度和政策如果要確實地發揮其立法時所欲達成之目的，除了客觀法律制度之完善之外，尚需要受到法律管制和保護之當事人主觀上願意認識並且運用法律，並積極的援引救濟管道來貫徹

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** 國立臺北大學法律學系助理教授；美國 University of Wisconsin-Madison 法學博士。
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法之效力，透過相輔相成之效果，才能讓法律不只是書本上的法條（law in books），而是真正在社會產生效力之行動中的法（law in action）。本文透過對於外籍家庭看護工勞動法制之客觀制度和主觀運用法律之誘因分析，希望可以歸納出現行制度面和制度誘因的運用狀況，以及可能造成法政策貫徹障礙之處，作為未來調整或討論時之參酌因素。

文中首先就臺灣外籍家庭看護工之勞動現況以及適用之相關法制進行文獻分析和整理，並且發現客觀法制面之保障雖然多數具備，但仍有不適用勞動基準法導致的勞動條件低於基準行情之疑慮，另外勞工長居雇主家工作之特殊情況和看護工作與一般工作本質上的差異，也會衍生出許多影響深遠的文化因素，進而嚴重干擾到未來勞工遭遇勞動待遇上之不利益時，主觀上依法提出救濟之意願和可能性。綜言之，外籍家庭看護工之勞動權益保障以及救濟狀況，在現行之制度和社會文化之綜合影響下，其實可能出現多重困境。

為深度分析此議題，本文以當前法與社會研究理論之發現和成果為基礎，以客觀法制和勞工主觀文化影響因素作為分析背景，再運用法與社會之分析方式，從法律糾紛之形成、歸責、正式申訴三個階段，逐一檢視法制和職場文化對於外籍家庭看護工之勞動權益救濟，分別在不同階段會產生何種影響。最後再以該分析之成果，回應初始的研究議題，並試圖提出有意義之對話或建議，作為未來相關研究持續精進討論之重要參考依據。

關鍵詞：外籍家庭看護工、勞動權益、法與社會分析、法律糾紛之損害辨識和歸責以及正式申訴

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The Challenges and Dilemmas on Protecting and Implementing Domestic Immigrant Worker Rights in Taiwan — A Law and Society Analysis

Bo-Shone Fu^{*}

Abstract

This article aims to focus on the challenges for domestic immigrant workers to implement their crucial employment law rights and the dilemmas they may encounter under the current workplace context. To reveal this particular issue, the author adopts the law and society method to analyze the laws that regulate immigrant worker rights and the social institutions where the laws operate. The author believes that an effective legal policy requires not only substantial texts and mechanisms as the firm foundation of implementation, but also demands sufficient incentives for regulatees to apply the law proactively. The research on immigrant domestic workers serves as a vivid example of this argument.

The domestic immigrant worker has been a significant supplementary human resource in Taiwan for decades, especially in the domestic homecare industry. In most cases, domestic immigrant workers live with and work for the employer in the

^{*} Assistant Professor, Department of Law, National Taipei University; Doctor of Juridical Science (S.J.D.), University of Wisconsin-Madison.

same residence. Due to this particular characteristic, the Ministry of Labor has exempted domestic workers from the basic wage and hour standards and left their working conditions to be decided by the freedom of contract. Under the common assumption, it does not seem to be a problem since these workers may still enforce their agreement through legal channels to secure their rightful wages and payment accrue from extra working hours.

Labor statistic on legal complaint rate regards to wage and hour matters, however, indicates that the complaint rate of illegal wage deduction is substantially low if it compares to the actual violations that had occurred in reality. The puzzle of workers not willing to file legal complaints and tolerate the damage caused by the employer is still unsolved, and this lack of incentive to apply the law will cause an enforcement gap on the protective labor law policy.

To shed light on the unsolved myth, the author examines the legal ground for domestic immigrant workers' rights to gather possible impact factors that may influence their possibility to apply the law. Furthermore, this article moves to check on the social setting where these laws operate and use the law and society scholarships to analyze the interaction between the law and the worker. The analysis points out that when deciding whether to file an official complaint to remedy their rights under the contract, workers will consider more than the legal ground of the case. The social setting and pressure of their workplace may hinder their willingness to respond by law actively but lead to a somewhat mitigating non-complaint solution.

Keywords: Domestic Immigrant Worker, Labor and Employment Rights, Law and Society Analysis, Naming Blaming Claiming