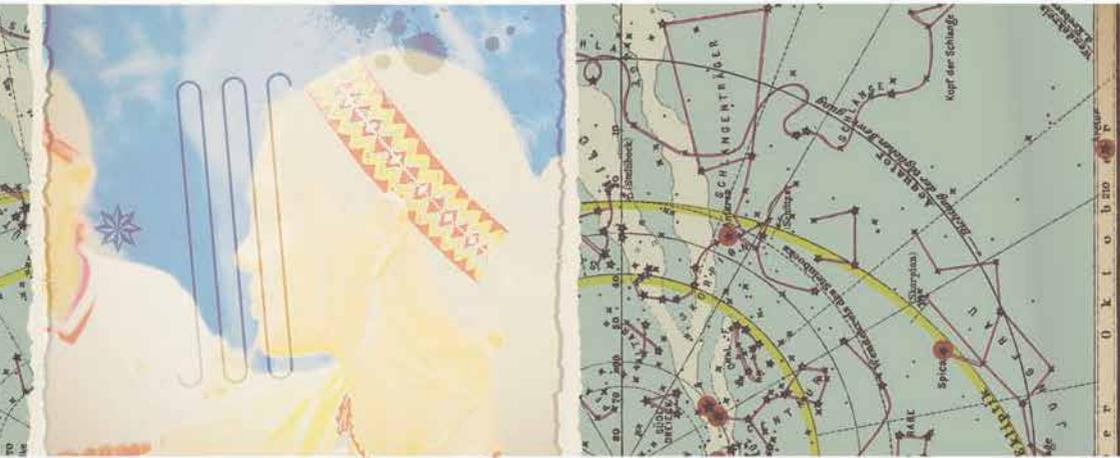


MIGRANTS REVIEW

RESEARCHES AND ESSAYS ON MIGRANT DOMESTIC WORKERS IN HONG KONG



*Mission for Migrant Workers
December 2012*



MIGRANTS REVIEW

Researches and Essays on Migrant Domestic Workers in Hong Kong

**a project by the Mission for Migrant Workers
December 2012**



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December 2012

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UNIFIL
MIGRANTE-HK
UNITED FILIPINOS IN HONG KONG
(MAY 11, 1987)

Filipinos
26th Year
years of struggle! On
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FOREWORD

This compilation of four short studies conducted by undergraduate interns from leading universities in Hong Kong and the United States of America investigate some contemporary issues related to the employment of migrant domestic workers in Hong Kong. It represents one aspect of the work undertaken by the Mission for Migrant Workers (Mission) over the last three decades in Hong Kong and epitomizes Mission's vision for a more just world, its unstinting focus on the empowerment of society's weakest links and the role of education to achieve justice, equality and respect for all.

In this regard, I am very honored to write this Foreword which bears testimony to Mission's steadfast role as a beacon of education, for migrant workers in Hong Kong, on their rights as workers, migrants, women, human beings and as political subjects of nationhood. It is an exemplar for civil society organizations everywhere of how effective NGOs can empower and build constituencies for social transformation. Mission's adherence to the highest ideals of education is exemplified in this collection by its ability to reach youthful audiences where young researchers are, for four to six short weeks, given the opportunity to acquaint themselves with the realities of migrant workers' lives, to study, reflect and understand socio-political environments, often far removed from their own.

According to Paulo Freire’s words:

“Education either functions as an instrument which is used to facilitate integration of the younger generation into the logic of the present system and bring about conformity or it becomes the practice of freedom, the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world.”¹

Internships with organizations such as Mission have provided, over the years, for scores of young people, the opportunity for embarking on their personal journeys of growth and intellectual maturity, by integrating theoretical perspectives with empirical realities and experience. Furthermore, in this challenge, interns not only contribute to the production of knowledge through their research but they learn to undertake disciplined approaches to inquiry and analysis, and learn to make connections between the individual and institutional, and with legal and political discourses at multiple levels. Testimonies such as those found in this compilation underscore the importance of education that takes place within real socio-political contexts, wherein, participants engage and develop a profound sense of self-awareness and relatedness, critical thinking, social responsibility and in the process, discover their own roles as informed agents of social transformation.

The four reports in this collection will provide insights for educators, especially those in the Social Sciences, on how internships can be designed to direct students’ attention towards integrating book learning with field experiences in the areas of interest. It will also be useful to those interested in issues related to labor migration in East Asia, the situation of migrant workers/women, employers of migrant workers, advocates, policy makers and the general public. Each report examines different aspects of localized structures of governance of labor migration in Hong Kong—from the employment ordinance, the Basic Law and the Bill of Rights Ordinance to the

1 Paulo Freire, *Pedagogy of the Oppressed*. Accessed on 20 November 2012 at <http://www.goodreads.com/work/quotes/915602-pedagogia-do-oprimido>

Philippine Consulate’s conflict resolution mechanisms in Hong Kong— and evaluates these against the experiences of migrant workers and international standards, revealing gaps between theory and practice, resultant consequences for migrants and provide recommendations for resolving these deficits.

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Amy Sim is a Cultural Anthropologist in the Department of Sociology, University of Hong Kong. Her research has focused on women’s transnational labor migration in East and Southeast Asia, gender and sexuality, and the development of migrant-oriented NGOs in Hong Kong. Prior to academia, Amy worked in a regional NGO in Asia, on issues of sustainable development.



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NO TO MANDATORY
LAW ENFORCEMENT
AND FBI
PINA

PREFACE

Since our establishment, the Mission for Migrant Workers (MFMW) has called for a living and working condition for migrant workers in Hong Kong that is just and respectful of their rights as women and as workers.

Towards this goal, the Mission actively conducts advocacy to resist policies and practices that are contrary to this aim, as well as advocacy for positive policies and practices.

Key to the Mission's advocacy work is the strength of the grassroots migrant workers themselves. From their unity emanates the power that has, in the past up to the present, successfully delivered gains that alleviate the crisis-ridden condition of migrant workers. For those who have known the Mission for the past 31 years, this is the principle that the Mission has never wavered from and we have practiced for years with admirable results.

But also crucial to advocacy work is an ever-expanding ranks of people from different walks of life who support the causes of migrant workers. They are the people both from Hong Kong and from overseas who are committed and are acting to assist migrant workers in crisis as well as support advocacies for migrants in any way they can.

To develop advocates, the Mission conducts various activities and programs that conscientize the public. We also create opportunities

where those willing to give their time and skills to advocate for the rights and wellbeing of migrants can do so.

One of our ways is through our internship and volunteer program. Vigorous promotion of the condition of migrant workers and the services that the Mission delivers have earned the Mission credibility among universities and other groups in Hong Kong and abroad – belief in our integrity and our capacity – enough for them to place students and youth in our organization for periods ranging from months to over a year. Aside from this, walk-in volunteers who have learned of our work as well as visited our website are also regularly received by the Mission.

On one hand, the Mission develops work programs for interns and volunteers that meet their needs and objectives. On the other hand, we also ensure that the work or placement program we offer also helps in advancing the goals of the Mission.

The researches and essays that appear in this first ever Migrants Review that we are publishing are products of the progressive and responsive internship/volunteer program of the Mission.

Authors of these researches are students and youth from Hong Kong and overseas. They are those who expressed interest in our work and participated in our various programs for empowerment of migrants.

These are guided researches that explored the different aspects of migration of foreign domestic workers in Hong Kong. The topics that were taken up by the interns/volunteers were decided upon based on their academic requirements as well as on what the Mission perceived were topics that could enrich our advocacy work.

We thank our interns/volunteers for these outputs.

The passion and enthusiasm they showed while conducting these studies affirmed the Mission's belief that there are people from

various communities in Hong Kong and abroad who do care for migrant workers. There are people who are sincerely concerned with the plight of migrants and are willing to contribute their time and skills for the betterment of the migrant workers.

Most importantly, many of these people are bright, young and vigorous members of the community who constitute the future of Hong Kong and of other countries where they are in – a future that we hope is without discrimination, where rights are upheld, and where no one will anymore be victims of the vicious and exploitative phenomena of forced migration.

Towards this future, the Mission shall continue to work for.

Cynthia Abdon-Tellez
Manager



United Filipino Independent Church
(Protestant Independent Church)
Isang Litrhiya
para sa mga Pilipino sa
United Filipino In Ch.
(1985-1986)

**WE ARE NOT
A COMMODITY
FOR SALE**
SINCE
1985
UNITED FILIPINO
INDEPENDENT
CHURCH

INTRODUCTIONS & Quotes from the Researchers

1. Desmond Chu (2011)



Desmond is studying law and politics at the University of Hong Kong. During the summer holidays after his first year, he got in touch with Cynthia Abdon-Tellez, manager of the Mission for Migrant Workers, and interned in the Mission for a month.

Desmond compiled the first part of the report, introducing the laws governing employment agencies and the work of the Employment Agencies Administration, and how they affect the current issue of domestic workers being charged illegal agency fees. In the report, he analyzed problems and suggested solutions.

2. Michael Tayag (2011)



Michael Tayag is a Filipino-American youth who interned at the Mission for Migrant Workers for seven weeks in the summer of 2011. He conducted community-based research on the conditions of Filipina migrant domestic workers in the hopes that his findings can help pro-migrant organizations advance their advocacy work.

He is now a fourth-year student at Stanford University and will be graduating in 2013.

“I conducted this evaluative study on the hands-on conciliation of the Philippine Consulate General (PCG) in Hong Kong for two reasons: 1) in particular, to recommend changes that can improve the process for workers to claim payments they were forced to pay illegally; and 2) to connect the injustices in this particular process to the systemic injustices perpetuated by the Philippine Labor Export Policy (LEP) and negligence towards migrants by the governments of Hong Kong and the Philippines. I hope that the PCG can use this to revise their practices, that migrant domestic workers can learn how to better protect themselves and prepare for the conciliation, and that non-governmental organizations and pro-migrant organizations in Hong Kong can use my research to advocate for more humane policies that advance the rights and welfare of migrant domestic workers.”

3. Randa Leung (2012)



Randa is a law student from the University of Hong Kong. She joined a social justice internship programme organised by the HKU law faculty and thus got to know the Mission. She says that the two-months she stayed in the Mission exposed her to the other side of Hong Kong and the world of the migrant workers.

“The research concentrates on the comparison between the Hong Kong existing law and policies on domestic helpers and the ILO Convention 189 which lays out the international standard for protection for domestic workers. It shows how sufficient and insufficient the local laws and policies in helping the domestic workers and expected improvement to some long-existing problems of the domestic workers.”

4. Lee Chi Kam Joel (2012)



Joel is studying law in the University of Hong Kong. Last summer, he participated in a voluntary social justice internship program which is co-organized by the law faculty and many non-governmental organizations in Hong Kong. He applied for the internship position at Mission For Migrant Workers.

“Migrant workers have always been a part of the daily lives of Hong Kong people. Besides, the recent right of abode case filed by the foreign domestic helper also aroused my interest in finding out more about the domestic worker population in Hong Kong. My essay focuses on the new international labour convention C189 (Editor’s note: the ILO Convention No. 189 on Decent Work for Domestic Workers) which directly deals with the rights and protection offered to foreign domestic workers. The aim of the essay is to evaluate the current situation of the foreign domestic workers in the legal context, and this essay seeks to generate some recommendations for the change of the current laws and policies concerning the foreign domestic workers. Through comparing the local labour standards with the international labour standards as stated in the C189, it is intended that one would then understand the inadequate protection that our government has provided to foreign domestic workers.”



ILLEGAL AGENCY FEES: An Analysis of Related Laws and Administration

Desmond Chu
25th August, 2011

1. Introduction

The problem of employment agencies charging domestic workers illegal agency fees has existed in Hong Kong for quite a long time and despite efforts to curb this practice, it does not seem to cease. This research would begin with an introduction of laws proscribing overcharging, followed by a discussion of whether the mechanisms of, first, the Employment Agency Administration in investigating cases and, second, encoding for statistics of the Mission for Migrant Workers, could tackle the problem successfully, and related recommendations.

2. Related Laws

Part XII of the Employment Ordinance and the Employment Agencies Administration

The Employment Agencies Administration (EAA) is the government department responsible for administering Part XII of the Employment

Ordinance and the Employment Agencies Regulations.¹ The offices of the Employment Agencies Administration are located at 12/F, Harbour Building, 38 Pier Road, Central, Hong Kong; telephone number 2852 3535.

Part XII of the Employment Ordinance regulates the conduct of employment agencies, which are defined as businesses whose purpose is to obtain employment for another person², carried on and conducted in Hong Kong.³

Part XII of the Employment Ordinance was enacted to enable Hong Kong to meet its international obligations under the Recruitment of Indigenous Workers Convention 1936.⁴

Regulations regarding Licensing

The operator of an employment agency must obtain a licence from the Commissioner for Labour⁵ (unless a certificate of exemption is issued by the Commissioner) and only those directly employed by an agency holding such a licence may carry out employment agency business⁶. Any person who operates an unlicensed employment agency or carries out employment agency business whilst not being employed by a licensed employment agency commits an offence and liable to a fine of \$50,000.⁷

1 http://www.labour.gov.hk/text/eng/service/content4_2.htm

2 Section 50(1)(a), Employment Ordinance; also, whether or not for any pecuniary or material advantage: s 50(1)(b).

3 Section 50(2): regardless of whether the employment is to take place within or outside Hong Kong.

4 Paragraph 50.2, "Hong Kong Employment Ordinance, an annotated guide", M Downey (Butterworths)

5 Section 50(1)(a)

6 Section 50(1)(b); also according to Part IV: Frequently asked questions, Practical Guide for Operating an Employment Agency (<http://www.labour.gov.hk/text/eng/public/guide>), self employed agents/contractors cannot conduct employment agency business on behalf of a licensed employment agency.

7 Section 60(6)

Also, the employment agency business must be conducted on the premises specified in the licence.⁸ Any person who carries out employment agency business outside of the premises specified in the licence commits an offence and is liable to a fine of \$10,000.⁹

The licence must be displayed in a conspicuous position in the offices of the employment agency.¹⁰ If there are multiple branches of the employment agency, a duplicate must be displayed in all branches.¹¹ Failure to do so is an offence and can give rise to a fine of \$10,000.¹²

The Commissioner may refuse to issue or renew a licence, or revoke a licence if:

- the name of the employment agency is identical or similar to another employment agency (and is likely to deceive the public)¹³
- the employment agency is being, or is likely to be used for illegal or immoral purposes¹⁴
- the person operating, or intending to operate, the employment agency has been convicted of an offence against a young person or woman, or has been convicted of fraud, dishonesty or extortion¹⁵
- has knowingly supplied false or misleading information to the Commissioner in connection with an application/renewal of a licence¹⁶
- has contravened any provision under Part XII of the Employment Ordinance¹⁷

8 Section 60(6)

9 Section 60(1)

10 Section 52(2A)

11 Section 52(2B)

12 Section 60(3)

13 Section 53(1)(a)

14 Section 53(1)(b)

15 Section 53(1)(c)(i); note – this provision seems targeted towards organised crime, and in particular prostitution, however, it could also apply to fraud, dishonesty or other crimes committed with respect to migrant workers.

16 Section 53(1)(c)(iii)

17 Section 53(1)(c)(iv)

The names of those people who have been refused a renewal/issue of a licence will be published in the Hong Kong Government *Gazette*.

18

Regulations regarding Fees and Commissions

The fees and commission which an employment agency can collect are restricted by section 57 of the Employment Ordinance. An employment agency is restricted from collecting the 'prescribed commission'¹⁹ which is 10% of the first month's salary²⁰, which is payable only after the job applicant has been successfully placed²¹. Any other fee, commission, reward, advantage or expense may not be collected from a job applicant.²² Any person or employment agency collecting a fee, commission, reward, advantage or expense, other than the prescribed commission, commits an offence and is liable to a fine of \$50,000.²³ It is also an offence to collect the prescribed commission before the applicant is successfully placed.²⁴

The employment agency must display in a conspicuous location, in both Chinese and English, the maximum fee (i.e. the prescribed commission) that may be charged by the agency.²⁵ A person or employment agency failing to do so commits an offence and is liable to a fine of \$10,000.²⁶

The employment agency may not enter into an agreement (expressed or implied) with an employer where the employment agency agrees to give the employer some form of material benefit. This could relate to the issue of migrant workers as reduced wages could arguably be interpreted as a material benefit.

18 Regulation 16, Employment Agency Regulations

19 Section 57(1)(a)(ii)

20 Part II, Schedule 2, Employment Agency

21 Part II, Schedule 2, Employment Agency

22 Section 57(1)(a)

23 Section 60(7)

24 Section 60(7)

25 Regulation 10(3), Employment Agency Regulations

26 Regulation 17, Employment Agency Regulations

Liability under the Part XII of the Employment Ordinance

Liability for violations of the Part XII of the Employment Ordinance is strict, meaning that it is possible for a person or employment agency to commit an offence without knowledge that their actions amount to a violation.

If the offence is committed by the employment agency, liability would normally attach to the agency itself, as opposed to the employees of the agency. An exception to this is where officers of the company consented to the violation.

3. Mode of Operation of the Employment Agencies Administration (EAA)

The mode of operation of the EAA would be investigated with a view to understanding the issues in prosecuting agencies suspected of overcharging. Information was extracted from a telephone interview with the EAA and its follow-up email response; the questions, backgrounds and responses are laid down below.

Question 1: Why did the EAA not charge the official agencies shown in the contract but instead pursued others?

This regards why certain agencies could seem to evade prosecution by assigning agency fees to others, which were later pursued by the EAA. This problem has been observed in four cases of agency fees handled and referred to the EAA by the Mission for Migrant Workers. The first case involves Ms. Amelita Grajo, a domestic worker alleging that she had been charged agency fees illegally. The EAA pursued the case and Tiffany Company was convicted, though only of unlicensed operation of an employment agency and not of charging illegal agency fees. However, the company stamp in the employment contract of Ms. Grajo belonged to Phil-Star Employment and General Services,

which means that the latter was the official placement agency, not Tiffany Company. Whilst there is suspicion about the involvement of Phil-Star, it emerges from the case unscathed due to an apparent lack of evidence. The three other cases, regarding Ms. Jocelyn Roxas, Ms. Lorna Sevilla and Ms. Anita Espinosa, comprise similar elements except that no conviction was made on illegal agency fees. Hence, it is indispensable for us to acquire information on why the official agencies in these cases were not prosecuted. In fact, the Mission has requested that the EAA look at the cases again but except the laying of a charge against Tiffany Company in Ms. Grajo's case, no further progress appears to have been made.

In the telephone interview, the EAA admitted that the financial records of the employment agencies were immensely complicated and thus difficult to follow. Moreover, there was a severe lack of evidence for prosecution. For instance, if there was only a loan agreement from another loan company, it would be hard to prove that a certain agency is guilty of overcharging. On the other hand, if there were cash payments, and there were respective receipts or witnesses of the transaction, prosecution could be made. Also, by rules of criminal procedures in Hong Kong, any evidence dated more than six months from the time the act was committed cannot be presented to the court (although none of the four cases above is confronted by this barrier).

Question 2: Do you have any knowledge of inter-agency collaboration such as the ones discussed just now?

The second question is in fact a follow-up of the first. Again, the response was that it was not easy to gauge their relationships due to lack of data.

Question 3: What are the difficulties in pursuing overcharging agencies?

It is mostly evidential difficulties, according to the EAA, which block the way. They added that the evidence is mainly provided by domestic workers, such as receipts that they keep, and available in their and agencies' testimonies. The EAA may, subject to domestic workers' testimonies, request documents from the agencies. It was suggested that Ms. Grajo's case underlines the importance of evidence: prosecution was successful partly because deposit slips could be traced.

Evidential difficulties seem to be the main theme in the EAA's responses to the first three questions. This raises concern over the sufficiency of its resources. The complexity of agencies' financial data, for example, would not constitute too big a problem if the EAA had enough time or experts to decipher the records. Of course there remains the possibility that agencies, in an attempt to conceal traces of their financial transactions, intentionally mess up with their data.

This brings us to another deficiency in the EAA's functioning, namely its lack of power. In case of messed up records or extreme lack of evidence, it is imperative for the EAA to have the active power to compel agencies to provide true data as well as relevant information. This makes a stark contrast with the present situation, where it assumes a passive role and can request evidence only when domestic workers' testimonies suggest such a probability. In a follow-up email response to our queries, the EAA assured us that their officers 'pay inspection visits to EAs (employment agencies) regularly and conduct in-depth investigation into every complaint promptly'. The question of how much can be done during regular inspections is to be doubted: given the sheer number of new licences granted in a single year (2010)²⁷, it is indeed challenging, if not impossible, for the EAA to follow agencies' transactions closely.

27 21 April, 2011. Gazette No. 16 Vol. 5, Supplement 4.

The final point lies in the transparency on the EAA. It does not reveal to the public or other non-governmental groups its organisation and division of labour, hence it is hard to assess its work and gauge its efficiency. Also, the EAA expressed concern over confidentiality in face of our request for more information about individual cases. This could hamper investigation as opportunities of cooperation between the EAA and the Mission would be denied; the effect is marked towards evidential difficulties when the two collect data themselves. Since the EAA focuses more on financial records of employment agencies and the Mission more on long-term circumstances surrounding domestic workers, the lack of cooperation possibly limits the pool of information.

Question 4: Is it possible that agency owners, after their companies' licences have been revoked, open another agency in another name and continue to overcharge domestic workers?

The EAA keeps a record of the agencies and persons in charge having been convicted of illegal agency fees so they cannot open a company in another name. However, it is doubtful whether the names of members of staff other than the persons in charge would be recorded if they committed an offence.

Success Rate

In the end we asked for the EAA's statistics of cases regarding overcharging of domestic workers, such as the success rate of claims, in order to help us compare the cases dealt with by the EAA and those by the Mission, and hence assess the effectiveness of the EAA's investigation and prosecution mechanisms. It replied in the follow-up email that up to the time of its response (24 August, 2011), there was one successful case in 2011 of prosecuting an agency, which is that of Ms. Grajo but which is related only to operation without a licence. As for overcharging, no employment agency has been prosecuted in 2011 due to dearth of evidence and statutory time barred (the six-

month barrier). This echoes observations made above on problems with the EAA's resources and power.

Recommendations

In light of the problems discussed, we would appreciate efforts on the part of the EAA to implement these suggestions:

Resources

(i) It would be hugely beneficial for the EAA to assess the amount of resources it owns in inspecting, investigating and prosecuting employment agencies, and, if they are shown to be inadequate, to consider adjustments in their organisation so as to allow better resource allocation; and

(ii) the EAA could also work with the Labour Department as well as the Police Force to discuss the coordination of resources.

Power

(i) It is suggested that the EAA discuss with the Police Force their respective scopes in enforcing laws concerned with employment agency problems; and

(ii) the EAA's mandate could also be laid down more clearly to require it to handle all cases related to employment agencies.

Transparency

(i) It is hoped that the EAA could disclose to the public its organisation and division of labour by, for instance, setting up a clear website; and

(ii) the pool of information for investigation could be expanded through cooperation between the EAA and the Mission, for example by sharing of details and progress on individual cases (confidentiality

concerns would have to be resolved through further discussions between the two). A notable method is for the Mission to submit its information and statistics on cases of agency fees to the EAA on a regular basis, and the mode of calculation is set forth in part 4 below.

Others

Further research could be conducted on the EAA's methods of investigation as well as amount of its resources, such as the number of staff and its budget.

4. Conclusion

The persistent problem of employment agencies overcharging domestic workers cannot be solved with the flick of a magic wand; it needs detailed measures arising from careful discussion. It is hoped that the EAA and the Mission can consider the recommendations made and cooperate to curb the practice.

The thrust of this report is that closer collaboration between the EAA and the Mission should be fostered. On the EAA's part evidence seems to be the key problem, evidence (if not validated by through courts) is what the Mission can supply – this is the reason behind the extensive modification to the encoding system. The aim should be to produce and supply the EAA with accurate and clear data so that they become aware of the problems and so that they know how best to focus their resources.

AN EVALUATION of the Hands-on Conciliation Policy and Practice of the Philippine Consulate General in Hong Kong

Michael Tayag
Stanford University

Introduction

On Filipina Migrant Domestic Workers in Hong Kong

In 2009, around one million Filipino/as migrated out of the country, largely on an economic basis. The Philippines has prioritized debt-servicing to keep in “good standing” with the International Monetary Fund (a prerequisite for obtaining more loans from foreign lending agencies). Government expenditures in economic and social services are cut to help pay back foreign debt. For middle and lower class Filipino/as, this means lower salaries due to higher taxes; increased cost of living; lower-quality public services; and monopoly control of prices (Ibon, 1997 cited in Parrenas, 2006). One strategy the Philippine government has used to provide stable wages for the impoverished Filipino/a people and to service its foreign debt is the Labor Export Policy (LEP), which established the Philippine Overseas Employment Agency (POEA) to facilitate Filipino/a labor migration (targeting one million Filipino/a workers to be deployed annually). Over 10% of the

Philippine economy is made up of the remittances of these foreign workers. Further, reports indicate that 34 to 54 percent of the total population is directly dependent on the remittances of overseas family members (Mission, 1998 cited in Parrenas, 2006).

One major destination for the annual 1,000,000 deployed Filipino/a workers is Hong Kong, one of the most economically competitive cities in Asia and in the world. According to the Hong Kong Immigration Department's 2009-2010 Annual Report, the population of foreign domestic helpers as of March 31, 2010 was 273,609, about 48% of whom were from the Philippines (and about 49% of whom were from Indonesia). As many as 99% are women. My study will focus on this significant population of Filipina (female) migrant domestic workers (MDWs) in Hong Kong.

MDWs in Hong Kong are able to work in the country by entering into two-year contract with employers. They have faced such issues as underpayment, arbitrary termination, 24-hour shifts, sexual and verbal abuse, lack of regular days off, decreasing wages, the removal of maternity rights for MDWs, etc. Furthermore, migrant workers are forbidden to bring family members to Hong Kong, to change their type of work, or to become permanent residents (even after 7+ years of working in the country). One Hong Kong immigration policy against which migrant groups have been protesting for over 15 years is the New Conditions of Stay (NCS). A provision of the NCS is the "two-week rule," which holds that after the termination of a migrant worker's contract, s/he only has two weeks to pack up and leave, lest s/he be forced to leave Hong Kong for her/his home country. Under the two-week rule, even if you find an employer, you are still required to leave if your reason for contract termination doesn't fall within the so-called "exceptional cases." Because of the two-week rule, migrant domestic workers are inclined to remain with their current employers even if they are suffering physical, verbal, or employment-related abuses (Asian Migrants Coordinating Body, 2006).

On Overcharging and Illegal Collection

Amongst foreign domestic workers in Hong Kong, the problems of overcharging and illegal collection are rampant, as individuals pay fees up to HK\$21,000 in recruitment fees in order to migrate for work. These issues are related to the illegal practices of recruitment agencies in both the Philippines and their principals in Hong Kong in forcing workers to pay high fees. Because of these practices, agencies continue to make enormous profits and increase in number, despite the steep fees they themselves must pay to the government in order to operate the business (Abdon-Tellez, 2009).

The Department of Labor and Employment (DOLE) Secretary Marianito Roque issued a memorandum effective in 2009 that banned the direct hiring of foreign domestic workers, in which employers and workers can enter into a contractual working relationship independent of an agency. This memorandum forces workers to pass through recruitment agencies, where they are illegally charged as much as PHP100,000 or more (Abdon-Tellez, 2009).

According to the Philippine Overseas Employment Agency (POEA) Guidelines for Household Service Workers (HSWs), effective 16 December 2006, workers should not be charged any placement fees. However, undermining this policy, agencies continue to charge blatantly excessive fees, yet do not refer to them as “placement fees.” Workers are charged insurance fees, an often unnecessary number of overpriced medical examinations, and “training fees” whose amounts are arbitrarily set by the agency. The activities undertaken during training vary by agency, but all of the workers I interviewed stated that they only reviewed basic and common sense skills like washing dishes and cleaning, instead of skills like operating a dishwasher or vacuum cleaner, with which they may not have been familiar. Some workers have even stated that, as “training,” they worked as maids (without payment) for some time in the home of their agency’s owner, or those of his/her relatives. With agencies sidestepping

the no-placement fee policy, a survey conducted by the Mission for Migrant Workers (MFMW) in 2008 indicates that, of workers who passed through recruitment agencies (some before the effective date of the POEA Guidelines, and some after), 46% had to pay between PHP60,000 to P100,000. About 8% paid more than P100,000. Only 14% paid PHP25,000, the approximate legal amount of placement fee before the implementation of the POEA Guidelines (Abdon-Tellez, 2009).

Some workers are able to find some means to pay off their agency fees, in which case they usually borrow money from friends and/or family. The majority of migrant workers, though, who leave the Philippines in the first place to make more money than they can in their own country, do not have access to tens of thousands of pesos in order to complete the application process. Agencies force them to take out loans in their own names, usually with family members and/or friends as co-signer(s), with loan companies referred by the agency. Once the migrant begins working in Hong Kong, she pays these loans either to a financial institution in Hong Kong, or has relatives in the Philippines pay to one there. Money is split between the recruitment agency and loan company. These complicated loan schemes are used by agencies to cover their tracks for the illegal placement fees they charge. All of the workers I interviewed were not given receipts for the fees they paid to the agency, even those who asked. With personal loans in workers' names and no documents proving that their loan payments go to the agency, agencies can deny that the worker is paying illegal placement fees, despite the obvious connections between the agencies in the Philippines and Hong Kong and the loan company. The fact that the Philippine agency can waive the worker's loan after conciliation (discussed in the next section) is one indication of such relations.

On the Hands-On Conciliation of the Philippine Consulate General

For Filipino/a migrant workers, one method offered by the Philippine Consulate General (PCG) of "finding justice" for these illegally high

fees is hands-on conciliation. The hands-on conciliation method is the way in which workers make monetary claims against agencies via the consulate, whether or not they have balance remaining on their loans. In these conciliations, a consulate official mediates a meeting between a worker, often alone, and an agent from her recruitment agency. The PCG has boasted that, through conciliation, it has been able to facilitate the return of millions of Hong Kong Dollars to victims of illegal collection. While the PCG has boasted of the method's quick process of "delivering justice" by reimbursing workers for some of what they have paid to the agencies, the MFMW expresses concern about the validity of the process.

The Mission asserts that the handling of the hands-on conciliation reinforces the current system of illegal fee-paying, diminishes the culpability of erring recruitment agencies, and places workers at a disadvantage during the negotiating process. The Mission argues that the conciliation pacifies victims of illegal recruitment fees with the illusion that they are being given reparations for the fees, when in reality the workers often get less than half of what they are owed – fees from which the Philippine government should have protected them in the first place. The Philippine government does not protect workers pre-departure, and once workers are in Hong Kong, belittles their systematic struggle with recruitment agencies by tagging such cases simply as a labor issue. This "quick fix" scheme, which evades any question of prosecution, dissuades workers from filing cases with the Philippine government, which could win them a larger portion of what they are owed and has the potential to punish erring recruitment agencies.

The system under which the conciliation operates places workers at a disadvantage. Should a worker choose to settle, she must sign a document waiving any right to pursue further claims from the agency; on the same document, the settlement amount is referred to as "financial assistance" from the agency. In this way, the settlement is considered final and recruitment agencies can avoid any further litigation and continue their illegal practices with other workers. On

the other hand, if workers want to find work again in Hong Kong, they must pay (illegally high) recruitment fees to other agencies, virtually all of which charge similar fees. In upholding the legitimacy and effectiveness of the conciliation process, the Philippine Consulate covers the illegality of agencies' actions, perhaps suggesting connivance between agencies and the Philippine government.

This Study

This research evaluates the hands-on conciliation of the Philippine Consulate General in Hong Kong. By looking through case files and other data on victims of illegal fees, interviewing case officers of the Mission and its clients, interviewing the Philippine Overseas Labor Office (POLO) of the PCG, sitting in on a conciliation, and conducting supporting interviews (with employers, a lawyer, and an academic), I examine the effectiveness of the hands-on conciliation process and suggest how it can be improved to offer greater protection from illegal collection to Filipino/a foreign domestic workers in Hong Kong. This study will focus on Filipina migrant domestic workers who applied to an agency in the Philippines with a counterpart in Hong Kong (as opposed to workers who had already been working in Hong Kong and found new employers by applying directly to Hong Kong agencies).

Methodology

This study includes both qualitative data in the form of interviews and observation, and quantitative data derived from the MFMW's case files. I interviewed:

- five case managers and community organizers from MFMW for a fuller picture of the conditions of migrant workers in Hong Kong, the Philippines Consulate, and the practices of the latter;
- seven workers for anecdotal evidence;
- two employers;

- two professors working at universities in Hong Kong (one of which was also an employer);
- a Hong Kong lawyer currently handling a case regarding workers made to take out loans by their recruitment agency; and
- two officials from the Philippines Consulate General, one with some purview over the hands-on conciliation.

All of the above interviews were recorded on tape for later review. Through one of the consulate officials I interviewed, I was allowed to sit in on a real-life conciliation and take notes.

I also conducted informal interviews talking with workers congregated on the streets of Hong Kong on Sunday (the rest day for most HK domestic workers).

Lastly, I went through MFMW's database and case files, both for the quantitative portion of my research and also for extra notes on the modes of operation of the PCG and the agency officials during conciliation.

I conducted this field research in Hong Kong from mid-July to the end of August 2011.

How Conciliation Works

When a worker whose contract is terminated or pre-terminated (under a one-month notice), or in rare cases has been allowed by her employer to pursue conciliation with an agency, the worker must first file a complaint with the Philippine Overseas Labor Office of the Philippines Consulate General in Hong Kong. The consulate staff will then set an appointment for the worker, first calling her agency as to what day and time it can send a representative to the conciliation.¹

1 Sometimes the worker's agency insists that she settle at the agency rather than attempt a conciliation, but this is usually a trap that leaves the worker at gravest disadvantage. Both migrant worker-serving organizations like the Mission and the agency official whom I interviewed discourage workers from doing this.

On the day of the conciliation, the worker will go to the consulate and meet with the conciliator and an agent or representative from the Hong Kong counterpart agency who will call an agency official from the worker's Philippine agency. The worker and agent/representative sit side by side in front of the conciliator, with the conciliator's desk in between. The entire conciliation takes place verbally, usually involving a discussion of the worker's circumstances and her pleas for a larger settlement, in opposition to the agency representative's negotiation for a smaller one. Workers, caseworkers, and even an official from the PCG have all likened the conciliation process to haggling at a market.

Conciliations can range from a very short time (10-20 minutes) to hours. Regardless, by the end of the conciliation, the worker chooses either to settle there or be endorsed to the Philippine Overseas Employment Agency (POEA) in the Philippines to pursue a greater settlement there. Depending on the worker's place of stay in the Philippines, she will file a case with the nearest POEA office, where she will face another series of (3) conciliations. If her case is still not settled by the end of these conciliations, she will then be endorsed to the National Labor Relations Council (NLRC), where a court hearing will take place and the agency's license can be suspended if found to be charging illegal placement fees.

Quantitative Data

The purpose of the quantitative data is to answer the following questions:

- How many workers chose to settle at the conciliation? How many chose instead to file in the Philippines? How do these two numbers compare?
- For those who did settle, how much of their claims did they actually receive? How do these numbers compare?

In order to isolate the data to be used to answer these questions, I reviewed the electronic and paper copies of the Mission's case files.

Since the Mission did not have follow-up information for every client (due to several reasons, e.g. the worker could not be contacted in the short time between the conciliation and her flight home), I went through the electronic spreadsheet to identify records indicating 1) that the worker chose to be endorsed to the POEA, or 2) the worker's final amount settled at the conciliation. I then found these workers' case files in the Mission's paper records to confirm the accuracy of the numbers on the electronic spreadsheet and to get more detailed information about their cases.

The Mission has workers include fees for POEA processing, Philippine Overseas Workers Welfare Administration (OWWA) membership, and PhilHealth health insurance in the calculation of their placement fee, to be written on the client intake form. When amounts were indicated in Hong Kong Dollars (HKD), I converted the HKD amount to Philippine Pesos (PHP) by multiplying the HKD amount by 5.9.

The limitations of these methods should be addressed:

- The sample of clients' case files with complete follow-up data was relatively small (27).
- Since there is no record of the agency's final offer at the conciliation before the worker chose to be endorsed to the Philippines, the effect of this amount on the worker's decision whether or not to settle, cannot be determined.
- Mission's case files did not indicate how much the worker had already paid to the agency before the conciliation and the remaining balance on her loan. We do not know, for example, if she is just getting the rest of their loan waived, or if she is being reimbursed for illegal fees she had already paid. Such data is highly variable, depending on the circumstances of the worker.
- For the "placement fee" amount as indicated on the workers' case files, it cannot be confirmed whether or not interest on the workers' loan (if the worker paid via a loan) was included in the calculation.

The quantitative research I conducted produced the following results:

- For all of the 27 workers included in the sample, the average amount paid was PHP 91,840.41.
- Of 27 workers, 4 chose to be endorsed by the PCG in HK to the POEA. This shows that around 15% of workers who attend conciliation at the consulate choose endorsement over settlement.
- For the 23 workers that chose to settle after the conciliation, the average amount paid in placement fees was PHP 92506.74, and the average amount settled from conciliation was PHP 41991.04. The latter is 45.39% of the former, meaning that workers who choose to settle at the consulate settle for less than 50% of the total amount they paid to agency.
- For the 4 workers who chose to be endorsed by the PCG in HK to the POEA, the average amount paid in placement fees was PHP 88,009.

According to these results, workers receive as settlement a relatively small percentage (45.39%) of the amount that they paid to the agencies in order to work as domestic workers in Hong Kong. It should also be noted that the workers reflected in this data are clients of Mission, who, prior to the conciliation, are briefed as to the running of the facilitation, what they can say to help their case, and how to defend against common tactics by agency officials/representatives to lower the settlement amount. It is likely that other workers who participate in conciliation without being prepared beforehand in such a manner receive even less from the settlement.

Despite this, few workers (15%) choose to pursue their cases further in the Philippines, where they can potentially receive greater amounts and have the licenses of erring recruitment agencies suspended. The low number of the workers who continue the fight for justice in the Philippines can partly be explained by the agency's tactics in convincing workers to settle for whatever they can during conciliation, and the facilitation of the conciliation by the Philippine Consulate.

Tactics by the agency staff

Since attending conciliations has become a usual aspect of an agency's operation, agency representatives/officials have come to employ a variety of tactics during such meetings to minimize the amount of money the agency must expend into the settlement, and any chance that the worker will continue her case against the agency in the Philippines and possibly have the agency's license suspended. Below is a sample of these tactics, as gleaned from interviews with Filipina migrant domestic workers and with Mission caseworkers:

- *Telling the worker to meet at the agency instead of the Consulate to settle the case*

In some cases, the agency tells the worker that she should settle her complaint with the agency not through conciliation, but at the agency itself. In such a case, the worker would go to the agency during open hours and speak with them in person and sign documents. Unsurprisingly, this leaves the worker at a grave disadvantage, since the worker may be pressured into signing documents stating that she forfeits her case, or accepting only a flight ticket home. The worker should insist that her case be settled through the consulate.

- *Insisting that the worker's lack of receipts invalidates her case against the agency*

The agency might suggest that if the worker does not have any receipts (which in many cases the agency refuses to issue), she cannot prove that she has paid or is paying any placement fee to the agency and thus cannot make a monetary claim against it. This is false. The worker is entitled to conciliation even without receipts on hand. It is rather ridiculous in the first place for the agency to make such a statement since many agencies and lending companies systematically do not give receipts to paying workers.

- *Rescheduling the meeting over and over again to force the postponement of the conciliation*

One worker said that, despite having a scheduled date set by the consulate (having consulted with the agency beforehand) for conciliation between her and the agency, the agency representative/officially simply did not show up to the meeting. This occurred several times for two weeks and two days until her visa expired and she had to return to the Philippines without having had a conciliation.²

- *Insisting that there is no connection between the agency in the Philippines, the agency in Hong Kong, and the lending company*

The agency might say that, because it has no connection to the lending company, it cannot reimburse the worker for any money she has already paid on her loan. This is a lie. There is a connection between the agency and the lending company in cases that involve loans. Even if there were not, it should not stop the agency from reimbursing what the worker was made to pay in illegal placement fees.

- *Telling the worker that the agency will just find her a new employer*

The agency may tell the worker that instead of repaying her a significant portion of what she is owed, or anything at all, it will just find her another employer in Hong Kong. This, however, would greatly disadvantage the worker, for she would still be required to pay placement fees to the agency to be hired by a new employer. Still, the agency would gain profits from the fees paid by prospective employers. Doing this would help perpetuate the agencies' current corrupt system.

² I was able to interview this worker because she had returned to Hong Kong for a case with Hong Kong's Small Claims Tribunal, for which a case worker of MFMW Ltd. had filed during her absence.

- *Insisting that the agency cannot refund any fees already paid, or loan payments already completed*

Agencies have apparently said, “What? You’ve already been working that long? You’ve already earned all the money you’re claiming for!” Again, even if the worker has been working long enough to pay all or most of her loan / placement fee, the agency can and should still reimburse her for the illegal placement fee she was charged to work abroad as a domestic worker.

- *“If you knew this was illegal, then why did you still pay?”*

The agency should not have demanded that the worker pay an illegal placement fee in the first place, which under the “Omnibus Rules and Regulations Implementing the Migrant Workers And Overseas Filipino/as Act Of 1995, As Amended By Republic Act No. 10022” amounts to illegal recruitment. Furthermore, migrant workers leave their own countries namely because they do not have money and cannot find work in the Philippines, and it is very difficult for them to stop in the middle of the application process because of the money they have already paid (often borrowed from friends and relatives) and the need to pay it back. Usually, first-time migrant workers are unaware of the many fees they must pay in order to work abroad, and only learn about each fee at the time she is expected to pay it. For these reasons, such a comment on the part of the agency pays no attention to the corruption within the international labor migration system, largely perpetuated by agencies themselves.

- *Mixing up the money that employers should pay with the money that the agency owes the worker*

One worker I interviewed explained that the agency scheduled for her a second conciliation session, telling her to wait for the completion of her case with the Hong Kong Labor Department, because the money she won from the labor case would be reduced from her settlement. Other workers are told that the money used to pay for their flight

ticket home (the responsibility of the employer) would be taken away from the settlement amount. In this way, agencies sometimes attempt to claim the employer's payments and money as its own (which is untrue) and thereby extort the worker by giving her less.

- *"This is a business!"*

Indeed, the agency is a business, and as a business it should respect and protect both the employers and workers who allow it to keep running. Being a business does not excuse an agency's illegal practices and systematic exploitation of workers.

Such tactics are used by agency officials/representatives before and/or during conciliation in order to minimize the money the agency loses to the worker. Workers should be aware of these strategies and respond to them appropriately in order to effectively fight to win back the money they paid to their agencies in illegal placement fees.

Although these tactics are often employed during conciliations, my research has shown that consulate officials do not expose agencies' lies, to the detriment of the worker. This issue will be further discussed in the following section.

Evaluation of conciliation

As aforementioned, the PCG in Hong Kong claims to be proud of the conciliation as a quick and fair means to win justice for migrant workers. However, my research has shown that there exist fundamental problems with the facilitation of the conciliation that leave workers at a disadvantage when facing the agency. This section will explore the positive and negative aspects of the conciliation from the perspective of a worker who has been charged high illegal placement fees.

Benefits

- If the worker makes herself aware of agency tactics and how she can respond to them, and remains determined to fight for justice and her money despite the high-pressure circumstances of a conciliation, they can at times get a considerable portion of the money they are owed. For example, one case worker recalls a worker who was able to win PHP67,400 out of her PHP78,633 claim. This, however, also depends on how much the agency is willing to negotiate with the worker. Although a few outstanding cases where a worker received almost all of her claim come to mind for each caseworker, such cases are obviously not common.
- For workers who are determined to find another employer in Hong Kong, the conciliation provides the quickest way to settle their cases and move on to other employers. This, however, comes at some expense, since the worker is virtually guaranteed to lose money and would inevitably be contributing to the perpetuation of this rotten system, as they re-apply to work as a domestic worker with the same or another agency and must once again pay an enormous placement fee.

Points for Improvement

- *A worker's complaint is only entertained when her contract is terminated or pre-terminated.*

The consulate official stated that this is a security measure, for the worker, if her employer is not supportive of her participation in the conciliation, may risk the termination of her contract. That is, if the agency is close to the employer, who does not support the worker, it can encourage the employer to terminate the worker's contract and hire a new worker through the agency. On the other hand, the consulate states that the worker can participate in conciliation even

if she is employed, but she must approach her employer about the issue and make sure that he/she is supportive. However, one worker in this position whom I interviewed has faced some difficulty in entering the conciliation process, explaining that the consulate is requiring her to solicit a letter from her employer of his/her approval. In sum, usually only workers whose contracts are pre-terminated or already terminated can participate in conciliation; the process is rather difficult and bureaucratic otherwise.

- *The consulate schedules the conciliation very close to the worker's departure date, in some cases even on the day of her departure.*

The consulate official stated that this was because the workers come in too late (as in only a couple days before she is scheduled to leave for the Philippines), but one case worker said that the consulate maintains this practice even when the worker comes in well ahead of time (as in one or two weeks). If the worker is set to leave in two days, one day, or even on the day of her conciliation date, this places her in a precarious and insecure position during the negotiation process. She will not have the chance to ask for another conciliation date if the negotiations are against her favor or wishes, and she will have much less time to thoroughly contemplate her decision and understand its consequences, with tens of thousands of pesos at stake. I surmise that this practice, while decidedly disadvantageous to the worker, is beneficial to the consulate; by setting a conciliation date near the worker's date of departure, it can prevent further conciliation meetings with the same worker and more quickly clear its own schedule.

- *The consulate does not allow workers' friends and caseworkers from sitting in the conciliation to provide moral support and/or counsel to the worker.*

The consulate reasons that they have this policy because the conciliation is solely between the worker and the agency, and that other people cannot speak to the circumstances of the case. However,

by the nature of casework, a case worker becomes very familiar with the worker and her case. Because a caseworker is likely more familiar with the rights guaranteed to a migrant domestic worker in Hong Kong, he/she can provide sound counsel to the worker and help her defend herself against agency tactics. In fact, each of the case workers I interviewed who, before this policy was implemented, had the chance to join a worker during her conciliation, believed that he/she was able to help workers increase the amount they received from their agencies, or help them make the decision to continue the fight for justice in the Philippines if unsatisfied with the settlement amount in Hong Kong. For example, one caseworker said that when the conciliator discouraged the worker from filing in the Philippines, the caseworker silenced the conciliator and the agent by reminding them that, should the worker pursue the case in the Philippines, it could potentially lead to the suspension of the agency's license. Such assertions remind all parties involved that the worker also has power during the negotiations and does not just have to take whatever she can get from the agency. This helps create the ideal situation in which the conciliation is a negotiation between two equal parties.

Although the worker cannot have another person in the room, the consulate allows agencies to send agency representatives in the place of agency officials who deal with workers. If the PCG is maintaining this policy on the basis that the conciliation should be between only the worker and the agency, why does the PCG not require the agent who processed the worker to attend in person, like the worker?

- *The agency is in a position of power during the conciliation because of its money and its officials'/representatives' familiarity with the process.*

Because the agency has the money, it is in a better position to negotiate how much it gives to the worker. Furthermore, since agencies are used to attending these conciliations, the officials and representatives who often participate in conciliation do not have any uncertainties about the process, can anticipate what the conciliator

and the worker might say, and can over time develop strategies to minimize the agency's payment to the worker.

- *The consulate may proceed through the conciliation too quickly, such that the worker may not fully understand everything to which she is agreeing.*

Upon signing the settlement agreement at the end of the conciliation, the worker waives any right to pursue the agency further. One worker states that, although the conciliator may have explained this to her, the conciliation proceeded so quickly that she was not able to take in all the information. From what I have observed from the waiting area for the conciliation room, many workers become very emotional, even crying, during the conciliation due to their lack of power to win a just settlement; in such a case, it is understandable that the worker (not as familiar with the protocol as the conciliator or the agent) does not register every piece of information given to her by the consulate official, especially if it is facilitated very quickly. Again, perhaps the consulate officials continue this practice in the spirit of wanting to clear their schedules, despite the disadvantages to the worker.

- *The conciliator allows the agent/agency representative to mislead the worker during the conciliation.*

In reference to the agency tactics earlier explained, the conciliator does not correct the agent or representative when he/she gives the worker false information, if not encouraging the worker him/herself to listen to the agent/representative. For example, one caseworker explained that in one case, when the agency told the worker that it could not refund her for past payments because she has already worked so long, the conciliator said something like, "Yes, come on. Don't ask for too much, you've already had the chance to earn that money by working." This does not account for the fact that the worker should not have been made to pay such illegal fees in the first place, and that she is entitled to this money whether or not she has already earned it back through her labor. Such actions on the part of

the conciliator help perpetuate the agencies' systemic exploitation of Filipina migrant domestic workers in Hong Kong.

- *The consulate allows (or, according to one case worker, sometimes even advises) the worker to go to the agency to settle her claim.*

As aforementioned, if the worker goes to the agency to “negotiate” her settlement rather than participating in conciliation, this would place her in an even more unstable position to assert her rights. At the agency, she might be forced to sign documents stating that she has received all of her money even though she has not in reality, or that she will no longer pursue the agency, etc. Although the consulate official I interviewed stated that she strongly insists that workers participate in the conciliation rather than going to the agency in person, both case workers and domestic workers have attested that this occurs nonetheless. One worker, for example, spoke with her agent on the phone while at the consulate. When the agent said that they should talk further at the agency, the consulate staff agreed. No matter the circumstances, this obviously goes against the consulate interviewee's (stated) strong position that all discussion between the agency and the worker about her case should be conducted at the consulate.

- *The conciliator discourages workers from filing cases in the Philippines.*

In the case of almost every domestic worker I interviewed, the conciliator encouraged the worker to take whatever she can get from the agency at the conciliation. If she tries to file in the Philippines, they say, the process would take too long, it would cost a lot of money to pay for her travel to and from the POEA, she might not be able to find a job when she goes back home to the Philippines, etc. Indeed, these statements are in many cases true, but they also ignore the worker's opportunity to potentially receive a higher, more just settlement in the Philippines and/or to take judicial action to suspend the agency's license.

To discourage the worker, conciliators also say that the worker cannot continue the case in the Philippines if she is not there in person, which would effectively prevent her from supporting her family by working abroad. This is untrue. Domestic workers with a claim against an agency can file for a special power of attorney for someone else to represent them in their case, preferably a relative, but possibly also a representative from a community organization like Gabriela Philippines or Migrante Philippines.

Why does the consulate uphold this practice even when it may be in opposition to the worker's fight for justice? One reason is made clear by the consulate official's explanation that the conciliation in Hong Kong is the first step in a worker's fight for her claim, a way for the Philippine government to "de-clog" its system. That is, the more workers the Philippine Consulate can encourage to settle in Hong Kong, the fewer they will have to entertain at the POEA and NLRC. And the more quickly the consulate can process workers in Hong Kong, the more it can "de-clog" its own schedule. This is decidedly not pro-worker.

- *During the conciliation, workers felt that the conciliator was on the side of the agency.*

The conciliator, for example, might say that the worker is simply asking for too much—"Oh, come on, don't you think that's a bit much?" he/she would say in a tone friendly and appealing, if not condescending. In a similar vein, the conciliator from the consulate might coax the worker into just accepting the agency's offer so that she can move on with her life. In one instance that made the worker feel that there was a certain closeness between the agency and the conciliator, the conciliator, as per the request of the Philippine employment agent on the phone, kicked out of the conciliation room an agency representative that surprisingly was strongly pleading with the worker not to accept such a low settlement and demand a higher one. After the agent on the phone and the worker had reached a

settlement, the conciliator took the phone and said to the agent, "See, didn't I tell you everything would be OK?" Another example is the postponement of a conciliation meeting when the agent or agent representative does not show up, with apparently no penalty; on the other hand, one worker I interviewed who was late to her meeting was scolded by the conciliator. I do not mean to say that the conciliator should have pardoned the worker for being late, but if such is his/her treatment of the worker, why does he/she not scold the agent or agent/agent representative (who in some cases does not show up at all, forcing the consulate to reschedule the conciliation) in the same way? The consulate official I interviewed said that the conciliator is simply moderating a negotiation between two equal parties. But is the worker truly treated as if she is on equal footing with the agency?

When I asked the caseworkers why they think consulate does this, they suggested that the consulate and the agency may be working together, that they both have an interest in the current system of migrants' cycles of debt. Because agencies pay a very large chunk of money to the government to receive agency licenses, the government can profit from the sustained growth of the industry and the establishment of new agencies. Furthermore, agencies, which connect Filipino/a workers to employment abroad, play an integral role in the government's continuation of the Labor Export Program (LEP), on which the Philippine economy has become dependent for remittances. Perhaps for these reasons, agencies are protected from greater government regulation.

- *The settlement agreement, also known as the Affidavit of Desistance, Waiver and Release and Quit Claim, takes blame away from the agency and fully protects it from further action by the worker for her claims.*

As if rubbing salt on the wound, one point of the settlement agreement (as of March 2011) which the worker signs after the conciliation (if she chooses to settle) states: That after carefully evaluating the facts and

the circumstances surrounding the filing of complaint/case, I have come to realize that filing thereof was a result of plain and simple misunderstanding and misapprehension of facts between me and [agency] or its officers, directors.” Previous versions of the settlement agreement refer to the settlement amount as “financial assistance” from the agency. Such statements belittle the worker, while taking blame away from the agency, in the latter case even creating an image of it as helping the worker. These words may serve another indication of the consulate’s stance between the agency and the worker, and which party it favors.

Policy Recommendations

In light of the issues aforementioned, this section delineates suggestions for the Philippine Consulate General in Hong Kong, pro-migrant organizations, and Filipino/a migrant domestic workers, both short-term and long-term, in order that the conciliation method be revised or replaced for justice for migrant domestic workers.

Suggestions for Philippine Consulate General (PCG)

The Consulate must remember its position as the representative of the Filipino/a people abroad. As such, it must re-evaluate its practices and its reasons for upholding the hands-on conciliation as the only method offered to Filipina migrant domestic workers to make claims against their recruitment agencies. The consulate official I interviewed made statements about the practices of the consulate with regard to this method that came in direct conflict with the anecdotal evidence of migrant domestic workers and caseworkers. For example, the consulate official said that workers’ conciliation dates are scheduled very close to their departure dates only if they come into the consulate very late, but workers and case officers have suggested that this occurs even when the worker inquires about a date well ahead of time. Further, while the consulate official claimed that conciliators stay neutral during the conciliation as to what the workers’ actions should be, both domestic workers and caseworkers

state that conciliators discourage workers from pursuing their cases further in the Philippines. Why do such discrepancies exist?

In the short-term, the PCG should take the following measures:

- Conduct a short-term assessment of the hands-on conciliation method. During this assessment, it should monitor and evaluate each of its conciliators as to whether he/she upholds the fair practices he/she is supposed to uphold, in line with the consulate official's explanation of how the conciliation is currently run (or how it should be run).
- Re-orient the conciliators as to the fair facilitation of the conciliation. During this orientation, the consulate should ensure that conciliators thoroughly brief workers prior to the conciliation on their circumstances and rights, including the illegality of the agencies' charging of placement fees and a worker's right to pursue her claims further through the POEA and NLRC (which has the power to suspend the agency's license), should she be unsatisfied with the settlement at the conciliation. The consulate should train the conciliators to ensure that, despite the quickness of the conciliation, the workers understand all of the stipulations of the documents they are signing; perhaps after explaining the consequences of a settlement, for example, the conciliator can ask the worker to repeat the explanation to check for complete understanding. The consulate should also remind its conciliators not to allow agencies to use false information to manipulate the negotiations; this does not create an environment that allows fair negotiation between two equal parties.

Over the long-term, the PCG should take the following measures:

- Assert that agencies that charge illegal fees are committing a criminal offense, and treat them as such. The consulate should start collecting data as to which agencies workers are claiming against, and how often. If specific agencies have a particularly high number of claims against it, this may be a sign that it charges high illegal placement

fees and/or is very abusive towards its workers. Such data should be forwarded to the POEA, NLRC, and/or other Philippine government bodies for reference and consideration, especially when a worker is filing a case. If, as the consulate official says, the consulate does not itself have “judicial” power, at least such data can provide a broader view of particular agencies, assist in workers’ fights for justice against erring agencies, and help to genuinely enforce the POEA Guidelines.

- Conduct a long-term assessment of the hands-on conciliation method, and perhaps look into providing another method for workers that can protect them not only in the short-term through their monetary claims, but also in the long-term from agency abuse and illegal collection. For example, the PCG can take punitive measures against erring agencies, like suspending the processing of contracts submitted by these recruitment agencies until they comply with regulations set.

Suggestions for the Mission for Migrant Workers and Other Pro-Migrant Organizations

Pro-migrant organizations have a key role in protecting and advancing the rights and welfare of migrant workers. For the purpose of further community research regarding the hands-on conciliation and other issues affecting migrant domestic workers, such organizations, particularly those with case work services, should keep clear records with standardized and specific information regarding agency fees and, as much as possible, diligently follow up with workers after their conciliations, whether or not they decide to settle (i.e. How much was the agency’s final offer? Did they choose to settle? Why or why not?). Furthermore, these organizations, if assisting migrant domestic workers in preparing for the conciliation, should ensure that they fully understand the tactics that can be employed against them by agencies, as well as the treatment they can expect from the conciliator. They should warn workers that if they settle, they can no longer seek justice against the agency or lending company, and that if they choose instead to pursue their case further through the POEA

and/or NLRC in the Philippines, they can be referred to pro-migrant worker organizations in the Philippines to assist them. Lastly, these organizations should continue to spread knowledge and outreach to migrant workers.

Points for Study / Advocacy

Case workers I interviewed proposed both immediate and long-term changes to the hands-on conciliation of the consulate to make sure that the Consulate takes a more solid stance in supporting Filipino/a compatriots abroad. The following points should be studied more carefully and/or advocated for by pro-migrant organizations:

- The consulate used to allow friends, relatives, and caseworkers to accompany workers during the conciliation for moral support and/or reminders of their rights. This has been banned in recent years. As a short-term measure, community organizations can advocate for the return of the policy, for its benefits in keeping the worker levelheaded and cognizant of her rights during the negotiation process.
- ‘Direct hiring’ refers to the process in which employers, without going through an agency, hire a worker in the Philippines with whom they have some connection (personal acquaintance, a friend’s recommendation, etc.) and process this directly with the consulate. In 2003, the Philippines imposed a ban on direct hiring, forcing workers being hired from the Philippines to pass through an agency. As discussed earlier, these agencies fundamentally depend on short-lived relationships between workers and employers so that new workers can be charged placement fees and employers pay more fees to hire these new workers. On the other hand, according to the two employers I interviewed (both sympathetic to the plight of migrant domestic workers, it should be noted), direct hiring actually takes very little time and effort on the employer’s part and more truly represents an “equal decision between an employer and a worker,” since workers do not feel pressured to stay with the same employer in order to pay off their huge debts.

One official from the PCG said that the reason for the direct hire ban is that, if the worker goes through an agency and faces any abuse or mistreatment, the consulate can hold the worker's agency liable. However, when I asked him how they could actually punish the agency or somehow hold it accountable for the worker's circumstances, he had no concrete steps and instead had me ask the higher official. The higher official said that the consulate does not have any "judicial power" and instead chooses to deal with agencies through the hands-on conciliation method. Indeed, such logic for the direct hire ban is flawed, since it is namely the agencies that force workers into abusive situations where migrants are afraid to speak out against their employers for fear of being unable to escape their agency's debt trap.

- One caseworker suggested advocating for a separate court in the Philippines regarding the monetary claims of Overseas Filipino Workers (OFWs) against agencies. As of right now, court cases regarding such matters are processed through the NLRC, which also sees domestic cases from workers living in the Philippines. Separating these two courts, one caseworker mentioned, might ameliorate the slowness of the process to pursue claims against agencies, which is a major deterrent for workers to pursue their claims further in the Philippines. On a related note, community organizations can also advocate for the building of POEA and NLRC locations and courts nearer migrants' places of residence—particularly more rural areas. At this point, the distance of such government offices makes it very difficult and expensive for workers to continue their claims against agencies in the Philippines, since they must travel to and from those locations, or stay in Manila for the duration of their case.

- Community organizations should hold the POEA accountable for keeping track of the agencies with illegal practices, especially the ones that have a particularly large number of claims against them. These statistics should be considered by the POEA and NLRC when workers are pursuing claims/cases against their agencies.

- Oftentimes when agencies' licenses are suspended due to court order by the NLRC, the agencies just open up again under a different name and/or with the same directors in different positions (i.e. the previous CEO becomes the new CFO, etc.). Perhaps community organizations can advocate for the Philippine government to regulate this occurrence through legislation.
- Community organizations should themselves re-evaluate the hands-on conciliation of the Philippine Consulate General, in comparison with other conciliation methods (e.g. that of the Hong Kong Labor Tribunal) and non-conciliation methods by other consulates. One PCG official stated that the Indonesian Consulate has expressed interest in adopting a conciliation method. Community organizations must continue to work across ethnic and cultural lines to investigate this further and, if this is true, learn how such actions might affect migrant domestic workers of all backgrounds.

Suggestions for Workers

The migrant domestic workers themselves are the most important group to empower. Through outreach to community organizations, educating oneself on the hands-on conciliation method, and a solid understanding of their circumstances, workers can assert their own agency in their fight for justice. More concretely, workers can take the following steps:

- Workers should consider beforehand whether or not they would like to settle, and if so, what the target amount would be. For example, if a worker would like to continue working in Hong Kong, or has another employer already secured, then she may decide to just settle at the conciliation, get the case over with, and continue working to pay off her loan. A worker should also ask herself if she lives far from the nearest POEA or NLRC office. If you live too far, is there a family member, relative or trusted friend who can assist you, or who can coordinate with organizations like Migrante International or support

groups like church programs, etc.? Depending on her circumstances, a worker can decide whether it would be beneficial and/or reasonable for her to pursue her case further in the Philippines, fighting for the full amount to which she is entitled, or to simply settle in Hong Kong.

- In making their decision whether or not to continue their cases in the Philippines, workers should also consider their individual role in the collective fight to assert the rights of migrant domestic workers at large. The Mission for Migrant Workers (MFMW) Ltd. states in one article: We must not stop bringing agencies who overcharge to court. While this is a slow and painstaking process, every legal battle we fight against overcharging only brings to fore the dire situation of OFWs. For this to also work, it is imperative to keep tab of every transaction conducted with the recruiters. Also, finding fellow OFWs who have been victimized by the same agency strengthens the overcharging complaint (Abdon-Tellez, 2009).

- Workers should educate themselves on how the conciliation works, the agencies' tactics during the conciliation, their advantages and disadvantages during the process, and how they might approach these. How, for example, might a worker leverage the fact that she can potentially get an agency's license cancelled or suspended by pursuing the case further in the Philippines, to maximize the agency's final offer at the conciliation? In addition to reading this guide, workers can also talk to officers of organizations of which they are a part, or the staff of migrant-based organizations like MFMW to get concrete examples of how workers have dealt with the process in the past, and how their approach could have been improved.

- Workers should, as much as possible, save all of their receipts from the agency and/or the loan company with which it is associated. During this process, these receipts can be used as concrete evidence of the charges imposed upon a worker. The lack of receipts, however, does not prevent a worker from fully participating in the conciliation and making her case, and the consulate is required to allow the worker to tell her side of the story regardless.

- Workers can also keep a diary or journal as record of transactions, for the reasons mentioned in the previous point.
- Workers should continue to spread their knowledge by reaching out to friends and acquaintances, and joining migrant-based organizations.
- Workers should themselves remember that the hands-on conciliation should be a negotiation between two equal parties, and their self-empowerment should be reflected in their behavior during the meeting. For example, workers often refer to the agency official/representative as “Ma’am” or “Sir,” whereas the other party refers to her simply by her first name. The worker’s choosing to refer to the agency official/representative and the conciliators as she herself is referred to may seem a trivial matter, but it reminds all parties involved, including the worker, of her own power during the conciliation.
- One caseworker discussed how being part of a union legally entitles a worker to a companion (friend, caseworker, etc.) during the conciliation. Workers might investigate the benefits of joining a union like the Filipino Migrant Workers Union (FMWU).
- The migrant worker should assess what she has learned from the case, whether or not she has decided to settle in Hong Kong. This is especially true if she is going back to work as a domestic worker in Hong Kong or somewhere else as an OFW. The worker should ask herself how she can better protect herself in the future from similar circumstances.

Conclusion

Naturally, this is not an exhaustive explanation of all of the different tactics adopted by agencies during the conciliation, or all of the good and bad points of the process. Depending on the case, depending

on the day, despite general patterns, all parties involved ultimately improvise during the hands-on conciliation and may veer from the patterns aforementioned. Regardless, the consulate, pro-migrant organizations, society at large, and especially workers themselves all have a role in asserting the rights and welfare of migrant workers in light of (or in spite of) the concrete conditions they face, and the current state of the hands-on conciliation as the consulate's sole method for entertaining workers' monetary claims.

The current conditions of Filipino/a migrant workers not only in Hong Kong, but in other parts of the world, are incontrovertibly tied to the Philippines' lack of national industry (and therefore jobs) and emphasis on the export of human labor. The consulate official I interviewed stated that one of the purposes of the hands-on conciliation is to "de-clog" the system of workers making claims against agencies and corporation. But this system can never truly be "de-clogged" if the Philippine government continues its current policies of debt servicing, dependence on foreign economies, and labor export. Thus, Filipino/a workers both in and out of the Philippines should fight for fundamental change in their country, one that places the interests of workers above corporations and foreign economies, and fosters consulates that are truly "for the Filipino/as abroad."

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YES! TO FDWs'
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Minimum Wage for All

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FMWU - HKCTU



SOCIAL JUSTICE

Summer Internship Report

Randa Leung
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Introduction

This June marks the 1-year anniversary of the adoption of the Domestic Workers Convention No. 189 of the International Labour Organization (The Convention). Recognizing the importance and contribution by the foreign domestic workers (the FDWs) to one's society, the Convention sets out the international standard with the aim to improve the working condition and enhance the protection to the FDWs. Passed with majority vote, the Convention, regrettably, has been ratified by one country¹ only so far.

Hong Kong, which has started importing FDWs to meet the shortage of local full-time live-in domestic helpers since the 1970s, now has a population of 299,961² as at end of 2011. It is like a dream place to many FDWs. Being one of the largest FDWs importing countries, are Hong Kong's laws and policies on FDWs comprehensive or even up to the international standard despite non-ratification?

1 Uruguay ratified the Convention in June 2012 in International Labour Conference in Geneva

2 Immigration Department Statistics 2011

Prior to the adoption of the Convention, Hong Kong has passed laws and policies to protect both the interests of the employers and FDWs. However, these laws and policies at the same time are detrimental to FDWs. I will discuss in this paper whether Hong Kong laws and policies are up to international standard and their limitation and other problems.

Hong Kong laws and policies are up to international standard

1. Standard form of contract

The 2-year standard employment contract³ drafted by the Immigration Department incorporates the Convention standard and provides additional and exclusive rights and benefits to FDWs. The employment contract is the only contract recognized by the Hong Kong government and enforceable in Hong Kong.

More importantly, employers cannot use private agreements to exploit or abuse the FDWs. Any private agreement in relation to the clauses in the employment contract must be approved by Commission of Labor. If not, these agreements will be invalid and void⁴. This gives greater protection to FDWs as this helps to ensure every FDW enjoys the most basic and the same rights and benefits.

a. Commencement date and duration – Article 7(c)

Clauses 2(A), 2(B) and 2(C) in the employment contract clearly states that the duration of the employment is 2 years and the starting and ending date of the contract. And clause 2(C) further provides that the contract begins upon the grant of visa to the FDWs.

b & c. Scope of duties – Articles 7(a), (b) and (d)

3 Employment contract Clause 2(A): The Helper shall be employed by the Employer as a domestic help for a period of two years commencing on the date on which the Helper arrives in Hong Kong.

4 Clause 15 of the employment contract

Clause 4(a) states that FDWs only perform domestic duties. They are not allowed to work for other employers or work part time or work in other places according to clause 4(b).

d. Minimum wage allowance – Article 11

Under clause 5(a)⁵, the employers must pay the FDWs the minimum wage allowance decided by the government. They can pay more than that if they like. However, it is an offence to pay less than the amount.

e. Food allowance

Employers have to provide free food and suitable accommodation to FDWs. If they do not want to, they can pay them the food allowance of \$780 under clause 5(b). The provision of accommodation is further specified in the Schedule of Accommodation and Domestic Duties which lists whether the FDWs have their own room, the size of the residence and the provision of facilities to FDWs.

f. Rest days⁶, statutory holidays and paid annual leave – Article 7(g)

Clause 6 gives rest days, statutory holidays and paid annual leave to FDWs. FDWs are entitled to claim compensation for paid annual leave only after have they have worked for more than 3 months. They are entitled to 7 days each year in the first contract and 1 day more each year if they renew their contracts with their employers⁷.

g. Transport and daily food and travelling allowance

It is compulsory for the employers to provide free passageway (any mode of transportation) to come to and leave Hong Kong upon termination of contract regardless of who terminates the contract. In addition, clause 7(b) gives FDWs \$100 daily food and travelling allowance⁸ starting from the date of departure to the date of arrival.

5 The minimum wage allowance is \$3,740 as set by the Immigration Department from 2011. The allowance is subject to review.

6 EO section 2 and Article 10(2) of the Convention both define rest days as continuous 24 hours of rest

7 Chapter 4 of A Concise Guide to the Employment Ordinance by the Labour Department

8 The food and travelling allowance is paid on daily basis for the FDWs to arrive at Hong Kong and their place of origin

This is an additional benefit to FDWs which is not required in the Convention.

h. Other expenses

Employers have to pay for medical examination fees, authentication fees, visa fee, insurance fee, administration fee and others if necessary under clause 8. This is not a must under the Convention.

i. Medical treatment

If the FDWs are sick, the employers must take them to receive medical treatment and pay all the expenses, which are not suggested in the Convention.

j. Termination of contract – Article 7(k)

Clause 10 allows both parties have right to terminate contract⁹ and clause 11 allows both parties can terminate without following Clause 10 in exceptional circumstances¹⁰

k. Death of FDWs

Employers must pay all relevant costs¹¹ under clause 14. This provides additional protection to FDWs. The details are further supplemented by the Employment Ordinance. The Convention does not specify the employers' obligation on this matter.

9 by one month's notice in writing or one month wages in lieu of notice (OMWIL)

10 The exception circumstances are provided in EO sections 9 (by employers) and 10 (by FDWs)

11 Employers have to pay the cost of transporting the FDWs remains and personal property back to their place of origin

Comparison of the Employment Contract and the Convention

| | The Employment Contract | The Convention |
|---|---|-----------------------|
| a. Commencement date and duration | Clause 2(A), 2(B) and 2(C) | Article 7(c) |
| b. Perform only domestic duties | Clause 4(a) and item 5 on the Schedule of accommodation and domestic duties | Article 7(d) |
| c. Work only for the named employers and at the named address in the contract | Clause 4(b) | Article 7(a) and 7(b) |
| d. Minimum wage allowance | Clause 5(a) | Article 11 |
| e. Free accommodation and food or food allowance | Clause 5(b) and Schedule of accommodation and domestic duties | Article 7(h) |
| f. Rest days, statutory holidays and paid annual leave | Clause 6 | Article 7(g) |
| g. Transport and daily food and travelling allowance | Clauses 7(a) and 7(b) | |
| h. Other fees and expenses | Clause 8 | |
| i. Medical treatment | Clauses 9(a) and 9(b) | |
| j. Termination of contract | Clauses 10 and 11 | Article 7(k) |
| k. Death of FDWs | Clause 14 | |

2. FDWs enjoy the same protection as the local employees—additional rights and benefits outside the standard employment contract

2.1. Labor and other legislation

FDWs fall within the definition of “employee”¹² in many ordinances. Clause 16 of the employment contract clearly states that FDWs are protected under the Employment Ordinance and the Employees’ Compensation Ordinance (Cap. 282) and other relevant ordinances, for instance the Race Discrimination Ordinance (Cap. 602)¹³.

12 Employees are commonly defined as any person engaged under a contract of employment, which is continuous, with an employer

13 A Guide for Foreign Domestic Helpers and their Employers by the Equal Opportu-

a. Employment Ordinance

The Employment Ordinance conforms to the Convention in a large extent, which gives the FDWs greater protection. Under the Employment Ordinance, the FDWs will be entitled to maternity protection¹⁴, sickness allowance¹⁵, long service payment and severance payment.¹⁶ It also lays out the payment of wages and its method¹⁷.

3. Enjoyment of human rights – Article 3 of the Convention

3.1. *The Basic Law (The BL)*

Basic Law is the constitution and highest law in Hong Kong. Article 11 states clearly that no law shall contravene the BL¹⁸. Article 4 exerts the same protection of rights and freedoms as Hong Kong residents to the FDWs¹⁹ as FDWs are categorized as any “other persons in the Region”. And

3.2. *Bills of Rights Ordinance (the BORO)*

Hong Kong has ratified the ICCPR and incorporated it into the BORO. This provides dual protection to the human rights to the FDWs, just like an ordinary Hong Kong people.

3.3. *Establishment and participation of trade unions*

FDWs in Hong Kong are permitted to form and join trade unions. This marks the recognition of rights of association in the Convention²⁰. These unions help fight for rights and interest of the FDWs and serve as a communication channel between the government and FDWs.

nities Commission

14 Part III of the Employment Ordinance and Article 14 of the Convention

15 Part VII of the Employment Ordinance

16 Part VB of the Employment Ordinance

17 Part V of the Employment Ordinance corresponds to Article 12 of the Convention

18 Article 11(2): “No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.”

19 Section 4: “The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law.”

20 Article 3(2) of the Convention

Table 1. List of registered trade unions concerning issues of FDWs

| Name of trade union | Year of registration | Declared membership by the end of 2003 |
|---|----------------------|--|
| Asian Domestic Workers union | 1989 | 30 |
| Bontoc (Filipino) Domestic Workers Union, Hong Kong | 1990 | 25 |
| Philippine Domestic Workers Union | 1994 | 26 |
| Filipino Migrant Workers' Union | 1998 | 65 |
| Indonesian Migrant Workers Union | 1999 | 359 |
| Filipino Domestic Helpers General Union, Hong Kong | 2003 | 26 |
| Overseas Nepali Workers Union Hong Kong | 2003 | 7 |

Source: Labour Department

4. Regulation of recruitment agency, access to courts and complaint mechanism– Articles 15, 16 and 17

a. Regulation of recruitment agency – Article 15

The Employment Agencies Administration (the EAA) under the Labour Department is responsible to enforce the Part XII of the Employment Ordinance²¹ and the Employment Agency Regulations. Frequent inspections are conducted to employment agencies to ensure that they are operating within the limits of the law to safeguard the interest of job-seekers.

Some recruitment agencies may overcharge FDWs for commission or placement fee while the maximum amount of commission the recruitment agencies can charge is 10% of the first month salary²². Some may even force the FDWs to borrow money from the financing companies to pay for the commission. When complaints are made to the EAA, the EAA may withdraw the licenses of the recruitment agencies and prosecute them.

21 Part XII covers employment agencies regulations

22 Employment Ordinance Part XII and the Employment Agency Regulations

b. Access to courts – Article 16

FDWs have full access to courts in Hong Kong. They can claim compensation in the Labour Tribunal and even appeal their cases in the High Court. The recent right of abode case by the FDWs in the High Court and Court of Appeal best illustrates their rights and access to courts.

c. Complaint mechanism – Article 17

The Labour Department and its Labour Relations Divisions listen to FDWs' complaints and give advice and consultation service to employers and employees regarding conditions of employment and their rights and obligations under the Employment Ordinance. The EAA also receives reports or complaints about the operation of recruitment agencies. After receiving complaints, they will investigate in them and take proper actions.

Limitation of Hong Kong's law and policies and other problems

1. New Condition of Stay – Two-week Rule

Prior to the New Condition of Stay implemented on 21 April 1987 by the Immigration Department, FDWs were allowed to change employers within their first year of employment. The New Condition of Stay imposes a few restrictions to the FDWs.

a. No change of employment in the first contract

Change of employment will not be allowed in the first two years of the employment contract. If the FDWs are terminated in the first contract, they have to go back to their place of origin before they can start a new one as they should process a new working visa from their place of origin. Although FDWs may apply to the Immigration Department to process their visa in Hong Kong, it is discretionary and only given in limited circumstances.

b. Two week rule

The two-week rule is to the effect that FDWs must return to her place of origin on or before the expiry of two weeks after the date of termination if they are terminated. Secretary for Security David Jaaffreson justified the rule that it was to prevent “job-hopping” by FDWs²³. “Job-hopping” implies that the helper terminates her employment prematurely with a view to obtaining employment with a new employer.

Forcing FDWs to return to their place of origin upon termination of contract will make them have a harder life. It is a common practice that they have to pay the local recruitment agency placement fee, usually around HKD\$21, 000 in order to come to Hong Kong. If they cannot find a new employer in Hong Kong during the two weeks, they have to go back to their place of origin and borrow money again to come to Hong Kong. It usually takes them 7 months to pay off the debt by monthly installment. If they are terminated before the 7 months, they still have to repay their debt even they lose their jobs. The two-week rule jeopardizes their situation.

2. Long working hours

a. Work on weekdays

The Convention suggests the written contracts specify the normal hours of work while the number of working hours is absent in the employment contract. Long working hours have been the main problem the FDWs face. 69% of 2023 clients helped by the Mission for Migrant Workers in 2011 work 16-17 hours²⁴ in average daily. Some even work for more than 20 hours. The compulsory live-in arrangement exposes the FDWs to exploitation as they can be wanted and they have to stand by at any time at the Employers’ residence. This exploitation can be avoided if the number of hours can be put in the employment contract.

23 The same purpose was confirmed on 30 May 1994 by Legco Paper No. 3150/93-94

24 Statistics of the Mission for Migrant Workers 2011

b. Work on holidays

Both the Employment Ordinance and the Convention provide that FDWs should enjoy at least 24 hours of rest consecutively a week, that means a full day per week. And forcing FDWs to work on holidays is an offence²⁵. However, in reality, many FDWs have to work on holidays like rest days and statutory holidays before they go out and after they go home.

3.Exclusion from the protection of the Minimum Wage Ordinance (

The MWO makes employers pay at least \$28 hourly rate to employees. As illustrated above, FDWs would have earned more even there is a maximum working hours if they had been included in the MWO.

The government excludes FDWs from the MWO based on the grounds of special nature of work of FDWs and the difficulty of calculating working hours²⁶. If FDWs are included, more than 220,000 households which hire FDWs will be affected and they have to pay more. There has been history that FDWs are dismissed because of rising cost. Also, FDWs already enjoy free accommodation and food and rests days like any other Hong Kong workers. In order to protect the interests of FDWs, they should not be included in the MWO.

As there is a maximum hour to be charged, the difficulty of calculating working hours should not be a problem preventing FDWs from including in the MWO. Moreover, it is also the special nature of work of the FDWs that leads to exploitation by employers. The exclusion is discriminatory and cannot be justified.

25 Section 19 of Employment Ordinance: An employer who without reasonable excuse fails to grant rest days to his employees is liable to prosecution and, upon conviction, to a fine of \$50,000.

26 “Secretary for Labour and Welfare ‘s Reponse to Legislative Council Member Lee Cheuk Yan’s motion of amending proposal regarding live-in foreign domestic helpers of the Minimum Wage Ordinance” (Chinese only), July 15 2010, at <http://www.info.gov.hk/gia/general/201007/15/P201007150327.htm>

4. Compulsory live-in arrangement

Prior to 2003, FWHs could apply for live-out arrangement after getting consent of the Director of the Immigration Department. However, after 2003, as specified in employment contract, the FDWs shall work in the Employer's residence at his address. Although the provision of the employment address appears in the contract and conforms to the Convention, it is contrary to Article 8(a) which provides that FDWs can freely negotiate with their employers to decide their residence arrangement.

a. Vulnerable to physical abuse

Other than the long working hours as discussed in the above, the arrangement may make FDWs more vulnerable to abuse, harassment and maltreatment by the employers. As the FDWs must stay in their employers' residence, they may face violence, abuse and harassment if for example the employers are drunk and angry easily. More importantly, fearing loss of shelter, FDWs may continue to stay at the employers' residence despite violence and harassment. This arrangement may make Hong Kong have ineffective measures to protect FDWs from all forms of abuse, harassment and maltreatment²⁷.

b. No privacy

Despite the specification of the size of the employers' residence²⁸ and the facilities provided to the FDWs, the living condition of FDWs cannot be guaranteed and cannot be reflected. The limited living space in Hong Kong makes only 33% of 2023 FDWs have their own room²⁹. Some may have to sleep on the floor of the living room, kitchen, laundry or storage areas³⁰. The lack of their own room deprives them

27 Article 5 of the Convention

28 Item 3 of the Schedule of Accommodation and Domestic Duties of the employment contract: "the employer should provide the helper with suitable accommodation and with reasonable privacy"

29 Mission for Migrant Workers 2011 Statistics

30 "Helpers demand right to live away from employers" by South China Morning Post, July 12, 2012, at <http://topics.scmp.com/news/hk-news-watch/article/Helpers-demand-right-to-live-away-from-employers>

of privacy. Their life will be interrupted at anytime and be watched by any member in the house.

Even they have their own rooms, the accommodation may not be suitable, as reflected in the recent “toilet bed” scandal of a famous singer³¹. Also, some reflect that they have to share bedrooms with a male child or adult. They will feel insecure as most FDWs are female. This may further expose them to physical and even sexual abuse.

5. Confiscation of passport and contracts

According to article 9(c) and article 8(1) of the Convention, FDWs are entitled to keep in possession their travel and identity documents and shall receive a copy of their contract respectively. And under item 4 of the Quick Guide for the Employment of Domestic Helpers from Abroad by the Immigration Department, FDWs are entitled to retain one copy of their contracts.

73.8% of 930 FDWs³² claimed that their contracts and passports were confiscated by their employers and recruitment agencies. Some even failed to retrieve them upon termination of contract. The reason for keeping their contracts and passports is to control the FDWs and make them do what they say. Without their contracts and travel passports, they cannot return to their place of origin and start legal proceeding against their employers.

Conclusion

Hong Kong has reached the international standard in a large extent with the standard employment contract and other legislations like Employment Ordinance. Its protection to FDWs is better and more extensive than other countries. However, problems can be found in the existing laws, for example the notorious Two-week rule. Only with

31 “FDH ‘toilet bed’ sparks HK netizens’ anger” by Open Door, July 9, 2012, at <http://opendoor.hk/?p=515>

32 a survey conducted by Hong Kong Confederation of Trade Unions in 2012

amendment and consultation with FDWs, Hong Kong can be truly a dream place to FDWs.



RESEARCH

on Migrant Workers' Rights in Hong Kong

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On 16th June 2011, the International Labour Organization (ILO) passed its 189th international labour convention, namely the Convention concerning Decent Work for Domestic Workers (C189). It is a convention that sets the international labour standards for domestic workers.

Despite the fact that the convention has not yet been ratified by China, the passing of this convention does put pressure on the Chinese Government and its subordinate Hong Kong Government, as a member of ILO, to ratify this convention and take protective measures to safeguard the rights of foreign domestic workers (FDWs).

This essay attempts to compare the current labour standards that are in use in Hong Kong with the proposed international standards as stated in the C189. The local laws that regulate the employment of FDWs mainly come from the Employment Ordinance (Cap. 57), the Immigration Ordinance (Cap. 115) and some policies of the Immigration Department.

The Coverage of the Convention

According to Article 1 of C189, the term ‘domestic work’ means work performed in or for a household or households, whereas the term ‘domestic worker’ means any person engaged in domestic work within an employment relationship.

FDWs in Hong Kong are required by the Immigration Department to have their employment contracts made in standard form¹. The contract clearly states that the particular FDW can only perform domestic work in the stated contractual address for that particular household. Therefore, they certainly fall into the definition of ‘domestic worker’ as stated in C189.

It is expressly stated in Article 2 that the convention applies to all domestic workers but the member state can, after consultation with the most representative organizations of employers and workers, exclude partly or wholly from its scope (a) categories of workers who are otherwise provided with equivalent protection or (b) limited categories of workers in respect of which special problems of a substantial nature arise.

As will be seen in the follows, FDWs in Hong Kong are not well protected under the current laws and policies. FDWs are deprived of many rights as stated in the convention, such as the right to live out and protection against discrimination. Thus, it is not likely that the government can exclude FDW under Subsection 2(a) of Article 2. Whether the government can exclude FDWs under Subsection 2(b) would be a matter of debate. The answer would depend on what are the special problems as interpreted by ILO. This convention only aims at offering basic protection to FDWs. It is unlikely that any special problems of a substantial nature would arise.

1 Standard Employment Contract (ID407) can be obtained from the Immigration Department.

Right to Association and Collective Bargaining

Article 3 states that each member shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, and to respect, promote and realize the fundamental principles and rights at work.

In particular, C189 stresses the protection of the right to association, the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

In Hong Kong, FDWs are allowed to form organizations. Examples are the United Filipinos in Hong Kong (UNIFIL-HK) and Indonesian Migrant Workers Union (IMWU). FDWs are free to choose which organizations to join or they can refuse to join any organizations. As for the right to collective bargaining, since FDWs are not employed in a corporate context, it is difficult for workers' organizations to bargain collectively with individual employers. Therefore, the targets of confrontation would be the relevant government departments of both the sending and the receiving countries. Generally, worker organizations are allowed to protest against the government, but given the unconcerned attitude of the government, such protest hardly made any progress.

Child Labour and Human Trafficking

Article 4 deals with the problem of child labour. It states that each Member shall set a minimum age for domestic workers.² Domestic workers who are under the age of 18 and above the minimum age

² The standard should be consistent with the provisions of the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182), and not lower than that established by national laws and regulations for workers generally.

of employment should not be deprived of compulsory education or the opportunities to participate in further education or vocational training.

Hong Kong laws has done relatively well in this regard. According to the Employment of Children Regulations (Cap 57B), children under 13 are prohibited from taking up employment and children aged between 13 and 14 may be employed in non-industrial establishments, subject to the condition that they attend full-time schooling if they have not yet completed Form 3 of secondary education and to other conditions which aim at protecting their safety, health and welfare.

However, the real problem lies in the enforcement of the laws. There are certainly laws in the sending countries that prohibit children from being FDWs, but agencies in the sending countries often alter the personal particulars of the workers, such as changing the year of birth, in order to send workers abroad. The Hong Kong government should have carried regular checks to curb these illegal practices of the agencies.

Article 7 of C189 requires members to take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts³. Article 8 requires that workers receive a written job offer or an employment contract prior to crossing national borders. All these are aiming at curbing human trafficking.

Under current policy, FDWs would need to sign the standard

3 In particular, the written contract should include: (a) the name and address of the employer and of the worker;(b) the address of the usual workplace or workplaces;(c) the starting date and, where the contract is for a specified period of time, its duration;(d) the type of work to be performed;(e) the remuneration, method of calculation and periodicity of payments;(f) the normal hours of work;(g) paid annual leave, and daily and weekly rest periods;(h) the provision of food and accommodation, if applicable;(i) the period of probation or trial period, if applicable;(j) the terms of repatriation, if applicable; and(k) terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer.

employment contract before they are granted the visa to work in Hong Kong. Most of the information that is required in the convention is included in the standard contract. However, in practice, none of the clauses are explained to the worker when they sign the contract. Some of them do not read English and some are just asked by the agency to sign hastily. More can be done by the government to help FDWs understand their contracts and their rights, such as collaboration with the government in the sending countries to provide seminars before signing contracts or commencing work.

Abuse, Harassment, Violence and the Live-in Arrangement

Article 5 of C189 clearly states that each member should take measures to ensure that domestic helpers are effectively protected against all forms of abuse, harassment and violence.

In Hong Kong, it is common that FDWs would experience verbal abuses. Worse still, physical abuses are occasionally reported. The laws in Hong Kong, of course, would not tolerate any violence committed against anyone. FDWs can constructively terminate his or her contracts when they face physical dangers.⁴

However, the problem is how could the local government ensure an on-going safe working conditions for these workers. It needs to be an on-going protection rather than simply giving FDWs the right to constructive termination. These workers want to work in the first place. Most of the time they just keep silence and suffer the abuses in order to keep the job. Besides, the chance of succeeding in a court case against their employer is slim. The essential evidence is not easy to obtain, as the offences are usually committed inside the employer's house.

⁴ It is stated in the s10 of the Employment Ordinance that an employee may terminate his contract of employment without notice if he reasonably fears physical danger by violence or disease such as was not contemplated by his contract of employment expressly or by necessary implication and if he is subjected to ill-treatment by the employer. Any employer who commits assaults would be prosecuted under the relevant laws.

The live-in arrangement, which was introduced by the Immigration Department as a policy in 2003, has further aggravated the situation. According to the statistics of Mission for Migrant Workers, 16% of the client it served in 2011 report instances of physical or sexual assault. The figure has been increasing in recent years after the implementation of the live-in arrangement. Before the compulsory live-in arrangement was in place, employer and employee can agree on the live-out arrangement. With the live-in arrangement in force, there would be a greater chance that FDWs would suffer from physical abuse and especially sexual harassment.

It is also stated in Article 9 that each Member shall take measures to ensure that domestic workers:(a) are free to reach agreement with their employer or potential employer on whether to reside in the household;(b) who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave; and(c) are entitled to keep in their possession their travel and identity documents.

Hong Kong has been notorious for its expensive rents. Most middle-class family cannot afford a flat with an extra room for the domestic helper. Yet, it is this type of family who needs to hire FDWs so as to let the wife work. As a result, many FDWs have to bear the poor living conditions with no privacy at all, not to mention that most of their travel and identity documents are confiscated by either the employer or the agencies, which is also in contravention with Article 6⁵. Although the Immigration Department has reaffirmed that visa would not be granted if the employer fails to provide accommodation as per the standard specified in the 'Schedule of Accommodation and Domestic Duties', the situation has not improved. When FDWs arrive Hong Kong and discover that the accommodation is not up to the standard, most of them would just put up with it, given the considerable expenses

5 Article 6 states that each member shall take measures to ensure that domestic workers, like workers generally, enjoy fair terms of employment as well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy.

that she has paid in order to work in Hong Kong. Besides, the live-in arrangement also causes the FDWs to be forced to work during their daily rest time, simply because they live in the house.⁶ Therefore, it is obvious that the live-in arrangement contravenes the Article 9 of the convention. With so many problems that are caused by this live-in arrangement, it is difficult to understand why the government would not abolish this rule.

Rest days, Annual Leave, Statutory Holidays and Minimum wage

Article 10 states that each member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave, taking into account the special characteristics of domestic work.

The laws in this respect are rather clear. The method of computation of the claims for rest days, annual leave and statutory holidays is comprehensively set out in the employment ordinance and relevant regulations. The crux of the problem here is the enforcement of the laws. It is not uncommon that FDWs are bereaved of their rest days, annual leave and statutory holidays. Most of them kept silence in order to keep the job. The issue of deprivation of rest days and holidays are therefore only brought into light when their contracts are terminated.

Stated in Article 10 is also that the weekly rest shall be at least 24 consecutive hours. The policy in Hong Kong is in accordance with the convention. The problem lies again in the enforcement. Many FDWs are required by their employer to work on their rest days. A typical example would be that a worker who leaves the house at 8:00 AM in the morning would need to get back to work at 8:00 PM. The

6 Bearing in mind that Article 10 states that periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work.

government should have mechanisms to ensure the compliance with the laws.

As for the normal hours of work, given the unique nature of domestic workers, it is difficult to compute a normal hours of work. However, there should at least be laws stipulating the maximum hours of work. According to the statistics⁷, workers reported that the average hours worked was between 16 to 17 hours. The absence of work hours limit, together with the live-in arrangement, have caused many FDWs to be overworked.

It is stated in Article 11 that each member shall take measures to ensure that domestic workers enjoy minimum wage coverage.⁸ There is a minimum allowable wage (MAW) for FDWs in Hong Kong. The current MAW is \$3,740 per month. This figure is subject to periodic reviews by the Labour and Welfare Bureau.

The existence of MAW does not mean that the laws in Hong Kong are up to the international standards. The current laws in Hong Kong have two deficiencies.

First, the enforcement of such MAW cannot be guaranteed and the Immigration Department has no measures to ensure full compliance by the employer. Despite the government's policy that domestic helpers cannot agree with their employers to settle for wages lower than the MAW, and that the employer may be prosecuted for underpayment of wages⁹, making false representation¹⁰ and conspiracy to defraud¹¹, there are still numerous cases of underpayment of wages. According

7 Statistics from the Mission For Migrant Workers.

8 Where such coverage exists, remuneration should be established without discrimination based on sex.

9 An employer who underpays wages is liable, upon conviction under the Employment Ordinance (Cap. 57), to a maximum fine of HK\$350,000 and three years' imprisonment.

10 Any person convicted of making false representation under the Immigration Ordinance (Cap. 115) is liable to a maximum fine of \$150,000 and imprisonment for 14 years.

11 Any person convicted of the offence of conspiracy to defraud (under the Common Law and punishable under the Crimes Ordinance) is liable to imprisonment for 14 years.

to the statistics, 15% of the clients of Mission For Migrant Workers were underpaid by their employers in 2011.¹²

Another deficiency is that the MAW is significantly less than the Statutory Minimum Wage (SMW), which is HKD\$28 per hour. Article 11 should be read together with Article 14, which states that each member shall take appropriate measures to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity. Therefore, it is arguable that the FDWs should be covered in the SMW laws. The exclusion of foreign domestic helpers from receiving the benefits of the newly enacted statutory minimum wage law is a class discrimination against domestic helpers from the government.

Access to Courts and the 2-Week Rule

It is stated in Article 16 that each Member shall take measures to ensure that all domestic workers have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.

One immediate cause that deprives foreign domestic helpers access to justice is the '2-week rule' policy implemented by the Immigration Department since 1987. Upon termination of contract, the foreign domestic helper's visa would be cut to only 14 days. Bear in mind that this rule only applies to FDWs, not other foreign workers of other occupations. This is another example of discrimination from the government.

The worker would need to find another employer within 2 weeks. Otherwise, they would have to be sent back to his or her place of

¹² In some cases of underpayment, employer were found to manipulate payment records, such as opening a bank account on the worker's behalf and make payments through the bank account. This is in contravention with Article 12, which specifies that workers shall be paid directly in cash, unless the workers agree on other forms of payments.

origin. Another option that is available to FDWs whose contracts are wrongfully terminated is that they can file a claim against their former employers. They would need to extend their visa, subject to the discretion of the Immigration Department. Besides, they are generally not allowed to take up a new employment while having a labour claims. With no income and the high cost of living in Hong Kong, most of them would just accept a quick settlement from their employers and leave Hong Kong.

Complaint Mechanisms and Labour Inspection

Article 17 requires that each member shall establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers. Measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, shall be developed and implemented.

Under the current policy, there is no regular labour inspection on the employers' side to ensure that the laws are fully complied with. The Police and the Immigration Department would only take actions when they receive complaints from the FDWs. If there were regular checks and inspections, there would not be so many reported cases of poor accommodation and abuse from FDWs. However, by the time FDWs report their cases, their contracts are usually already terminated. The government should not depend too much on the complaint system. Rather, it should take measures to ensure the on-going compliance.

Conclusion

It can be seen from above that Hong Kong laws are not up to the international standards as set out in C189. Human rights of the FDWs are not well protected in many ways. From the exclusion from the coverage of statutory minimum wage to the discriminatory 2-week

rule, it seems that even the government is not respecting the human rights of FDWs. Bearing in mind that although FDWs are earning foreign earnings from Hong Kong, they at the same time is contributing to Hong Kong in the sense that they make it possible for the 2 parents in the family to work. It is sad to see that they are considered as the second-class workers. With the C189 being passed in the ILO, it is hoped that the Chinese government would be pressured to ratify it and improve the situations for FDWs.

ABOUT THE BOOK

The researches and essays that appear in this first ever Migrants Review that we are publishing are products of the progressive and responsive internship/volunteer program of the Mission.

Authors of these researches are students and youth from Hong Kong and overseas. They are those who expressed interest in our work and participated in our various programs for empowerment of migrants.

These are guided researches that explored the different aspects of migration of foreign domestic workers in Hong Kong. The topics that were taken up by the interns/volunteers were decided upon based on their academic requirements as well as on what the Mission perceived were topics that could enrich our advocacy work.



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