Migrants Review
Researches and Essays on Migrant Domestic Workers in Hong Kong

Mission For Migrant Workers
November 2014
MIGRANTS REVIEW
Researches and Essays on Migrant Domestic Workers in Hong Kong

a project by the Mission For Migrant Workers
November 2014
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THIS SECOND COMPILATION of essays by interns who were attached to Mission for Migrant Workers (MFMW) for several weeks each, researching the realities behind conditions of vulnerabilities encountered by Hong Kong’s foreign domestic workers (FDWs) is impressive for its scope, depth and analysis. Their insights are illuminating of how even very short-term education rooted in working with communities can serve to raise awareness, deepen reflections and cultivate critical thinking on multiple fronts.

The nine essays in this publication testify to the importance of relating book learning to practical applications as these young researchers develop arguments that question the platitudes offered by officialdom and policy failures in protecting the rights of FDWs. The role that MFMW plays in bringing young minds to contemplating and engaging with contemporary social problems is pivotal to the conscientization of successive generations in caring about and speaking up for the human rights of people, wherever they maybe on the social map. These nine essays are but a token of the dividends that MFMW’s commitment, to education and advocacy, will yield for years to come.

The essays range from analyses of policy failures, judicial shortcomings, systemic discriminations that produce conditions for forced labor and the structural hurdles to restitution and justice for victims of abuse and exploitation. Collectively, they constitute an urgent call for transformation to oppressive and exploitative practices among some of the most disenfranchised workers in the modern labor force in Hong Kong, where the FDW population exceeds 320,000. Together they reflect a desire for greater social justice and an end to arbitrary class discrimination of the sector and those who are FDWs.

In their analyses, they have drawn on local laws and practices, and contrasted these to existing international conventions and standards, and best practices in various different countries to argue that change is possible. What is clear is the challenge they raise, that the status quo is morally and legally indefensible, unsupportable and cannot persist without oppositional advocacy in all areas under discussion, from the perspective of a 21st century framework of human/worker rights and social justice.
Readers will be taken through a series of critical exposures of how and where such failures to uphold the basic rights of people who are FDWs occur in the everyday construction of forms of modern day slavery—from the employer’s home, to employment agency shenanigans at manipulating FDWs, legal and policy frameworks, the courts of law, government departments, and to the demystification of discursive doublespeak that obscures empirical realities. It is a credit to these young minds that they have challenged themselves to go beyond the prosaic and mundane to apprehend the structural issues of the lives of those so diametrically different from their own.

This compilation will be of interest to those who seek to understand the complexities of the local phenomenon of labor export and labor import of short-term contract workers who are FDWs in Hong Kong. Furthermore, with Hong Kong as a case study, readers will be able to comprehend the global phenomena of demand for migrant labor in the context of their social and political exclusion, where their vulnerabilities are premised on their temporariness and disposability. Readers will understand how much needed FDWs, who are contributors to high-growth economies like Hong Kong, are constituted as a particular under-class of disenfranchised labor, in other words, modern-day slaves.

In Freirean terms, the conscientization of the next generation to the universal values of human dignity, rights and labor—as MFMW has done—means that the world has the opportunity of becoming more just and more humane, and be in safer hands for all its inhabitants in time to come.

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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.
IN DECEMBER 2012, the Mission for Migrant Workers of St. John’s Cathedral launched the first Migrant’s Review to give a venue for researches and essays made by our bright and young interns and volunteers to be read and appreciated by a wider audience. This year, we decided to publish this for the second time with new write-ups from students and young people who spent months learning and serving migrant workers with us in the Mission.

The Mission has always been both a place of service and learning.

Through the services we provide, we also enhance our knowledge of the condition and concerns of migrants; and through this learning we gain, we continue to improve, innovate and expand the services we offer to the hundreds of thousands of foreign domestic workers in Hong Kong.

As a place of service and learning, the Mission has always opened its doors to those who wish to contribute their time and skills to better the lot of FDWs in Hong Kong, and in turn, also broaden and deepen their understanding of the life and experiences of this significant sector of the HK society.

This year, we had the pleasure of hosting even more interns and volunteers as compared to previous years, which shows that more people are being made aware of the Mission and our programs. More importantly, they put their trust to the Mission’s capacity to fulfill their desire to learn and take an active part in making better the lives of Hong Kong FDWs.

We were very glad to have had the opportunity to give inputs on migration and FDWs through our discussions with them; to have had added to their well of skills through the trainings we conducted; to have had guided them so they can find their way in the whole labyrinth of migration-related topics and resources, and; to have had journeyed with them in deepening our understanding of the concerns and problems that FDWs face in their working and living in Hong Kong.
The researches featured in this Migrant’s Review are the products of painstaking efforts of our volunteers and interns to further advance the discourse on migration and migrant domestic workers in Hong Kong. Through these researches, it is our fervent hope that FDWs and migration will remain to be a public concern and ways can be found to continue assisting them with the short- and long-term challenges that they face.

We are very grateful for the months we spent with these dynamic, spirited, bright and young people of Hong Kong. Their sincerity to serve and enthusiasm to learn have made our hosting of them a very rewarding and enriching experience that will surely further improve our internship and volunteer program.

We hope that the researches and essays that they wrote and compiled in this publication will impart valuable facts and analysis to the reading public, contribute to awareness-raising, and help further build Hong Kong as a society that is accepting and values the work and life of each and every one, including our foreign domestic workers.

Cynthia Abdon-Tellez
Manager
ABOUT THE AUTHORS

GRACE FUNG is a double degree student in Law and Literature at the University of Hong Kong. During the summer of 2014, she interned with the Mission for Migrant Workers, and her experience sparked an interest in the prevailing mainstream and institutionalised attitudes towards foreign domestic workers in Hong Kong. Her paper analyses the established administrative positions that the Government takes on the state of FDW rights, the perspectives and attitudes behind approaches taken by all branches of government while adjudicating FDW issues, and finally attempts to evaluate how compatible the existing statutory framework governing FDW issues are with adopted international standards.

EMMA FOLEY is a student at the University of Sussex (UK) completing her MA in Migration Studies. Her final dissertation is on the use of public space in Hong Kong by migrants working in the domestic sector. During the course of this research she volunteered with the Mission for Migrant Workers for five weeks in May and June 2014, where she met many inspirational women and men. This research paper was produced to make a comparative analysis of working-hours regulations and policies regarding living arrangements.

JOANNE CHAN is a Year 2 BBA(Law) student from the University of Hong Kong. She worked at the Bethune House and the MFMW as a summer intern through the Social Justice Internship Programme. After dealing with various cases, she explored her interest in investigating the malpractices of the employment agencies, the adequacy of local legislation in regulating these manipulative agencies and avenues for migrant workers to address their grievances. She hopes that her research can provide the public with a vision of the conditions of migrant workers and urge the government to change their policies and amend necessary provisions for robust protection of the vulnerable migrant workers.

TONY TSANG is a law student at the University of Hong Kong. In the 2014 summer, he interned with the Bethune House and also served under the Mission for Migrant Workers. He is a passionate volunteer in contributing his effort in working together with the foreign domestic workers in need, in pursuit of justice and a fair outcome. His paper focuses on discussing the physical abuse suffered by the foreign domestic helpers in Hong Kong as well as providing sensible suggestions to minimize the sufferings from assault and battery by their employer.
KATHERINE NASOL is a senior at Stanford University, majoring in International Relations and minoring in Comparative Studies in Race and Ethnicity. She is a staunch activist and community organizer, and her interests lie in human rights, violence against women, and human trafficking. For the past six years, she has worked in grassroots, non profit, and policy sectors. Working with marginalized communities, she has helped develop programs that allow groups to pursue their own community social change and to access basic resources, such as legal assistance, group support, health care, and shelter. She hopes to continue her community work, and to one day become a lawyer for those who are most oppressed.

ON YEE LI (AUDREY) is a law student from HKU. She was an intern at MFMW for 4 weeks in July 2014, as part of the Social Justice Summer Internship Programme. She was initially drawn to MFMW because of their involvement in the highly publicized Erwiana case. However, she soon learnt that the work of MFMW extends far beyond helping FDWs seek legal redress for wrongful acts of their employers, but also involves raising greater awareness of migrants’ rights and campaigning for legal reform. For her research paper, she chose to focus on the Standard Employment Contract, as it forms an essential part of a FDW’s life in Hong Kong. She analysed the compatibility of the Standard Employment Contract with international human rights instruments, namely ILO Conventions, the ICCPR and ICESCR. In her view, Hong Kong has made progress in securing greater protection for migrant workers, however there is room for improvement, most significantly in more reasonable working hours and privacy.

LORRAINE LAU is an English literature student at Queen’s University and a graduate of Canadian International School of Hong Kong (CDNIS). Her first interaction with the Mission of Migrant Workers was in 2012, when she attended a forum held in St. John’s Cathedral about working conditions for migrant workers in Hong Kong. This event inspired her to establish connections between the Mission and CDNIS’ Amnesty International Club. As an intern at the Mission, Lorraine is grateful to have had the chance to learn about a critical issue much overlooked in Hong Kong politics and media. Her internship has also motivated her interest in understanding gender, racial, and social inequalities, which she hopes to continue exploring through her studies.
HENRY LEE HEINONEN is currently an undergraduate anthropology student at the University of Toronto. During the summer of 2014 he conducted fieldwork with Indonesian migrant workers in Victoria Park, Hong Kong, and worked as an intern for the Mission for Migrant Workers. His research interests include grassroots activism, virtual communities, labour movements, and gender studies.

TIAN ZHEN JENNIFER studies Master of Social Work in University of Hong Kong. She spent more than 400 hours of internship with the Mission for Migrant Workers as well as the Bethune House. She got to know about the conditions of the migrant workers in Hong Kong. This kind of experience taught and inspired her that there is always a human aspect in relationships among workers and clients. She believes that such connections between people are where all those strength and being brave comes from. She contributed in the analysis of data of Henry Lee’s research on social media and migrants.

HEE YEON CHO is a second year LLB student at the University of Hong Kong. This summer, she had the privilege of working at the Mission for Migrant Workers through the Faculty of Law’s co-ordinated internship programme called Social Justice Summer Internship. During her internship period, she was involved in counseling, and paralegal consultation as a case officer. Her research paper introduces issues regarding provisions and future application of Statutory Minimum Wage on FDWs. The experience of writing this research paper has entrenched her interest in employment law and truly appreciate the MFMW for providing the opportunities to get a real grasp of field work and supporting the structuring of her research. She looks forward to be back at the Mission as a Sunday volunteer.
AN ANALYSIS OF HKSAR POSITIONS AND ATTITUDES ON FDW ISSUES AND A CASE FOR DOMESTIC WORKER LEGISLATION

Grace Fung

This paper will analyse the HKSAR’s public positions on Foreign Domestic Worker (‘FDW’) issues based on a variety of official policy papers and UN periodical human rights reports. It will then seek to evaluate the extent to which the Administration’s claims, actual policies and existing legislation governing the states and livelihoods of FDWs in Hong Kong adhere to international standards and covenants to which Hong Kong has obligations, such as the International Covenant on Cultural and Political Rights (‘ICCPR’), International Covenant on Economic, Social, Cultural Rights (‘ICESCR’) and Migration for Employment Convention (ILO097). It argues that the HKSAR’s policy-based approach in regulating FDW matters is the main source of any discrepancy and shortfall between FDWs’ reality in Hong Kong and obligatory international human rights standards, and finally attempts a case for proper legislation.

Summary of HKSAR positions regarding FDW issues

Established by Court that together characterise the collective attitude all branches of government take towards FDW issues, and will form the basis of this paper. They are based on various panel papers issued by the Administration in LegCo from meetings on the Panel on Manpower, submissions to the UN, and landmark FDW cases.

1. FDW’s enjoy “equal statutory rights” as local employees, including the Employment Ordinance and Employees’ Compensations Ordinance.

2. The Standard Employment Contract (‘SEC’) does not only “further protect” FDWs, but also confers benefits that are not “usually available to local employees”, such as free accommodation, food and travelling expenses.

A. (1) and (2) are often reinforced as responses to outside requests.


3 Ibid, see footnotes 1-2.
that HKSAR should take more extensive action in safeguarding the wellbeing and equality of FDWs in Hong Kong, or requests that HKSAR should take better measures to adhere to ratified international covenants such as the ICCPR⁴ and ICESCR⁵.

(3) The two-week rule and live-in policy are necessary conditions of stay implemented by the Immigration Department are used to regulate the existence of the large number of FDWs in Hong Kong.

(1) These ‘highly restrictive conditions’⁶ are justified by the ImmD’s duty to ensure that FDWs in Hong Kong meet only a ‘particular purpose’ in Hong Kong, i.e. to meet the shortfall of local live-in domestic helpers,⁷ and are not admitted into Hong Kong for the purpose of settlement.⁸ This position was applied and further reinforced in the CFA ruling that FDWs, irrespective of how many years they have resided in Hong Kong, cannot be considered ‘ordinary resident’ in Hong Kong due to the aforementioned reasons, and thus cannot apply for permanent residency.⁹ The exclusion of FDW from the right of abode from FDWs was therefore not in contravention of the Basic Law.

(4) The two-week rule, implemented in 1987, is to allow sufficient time for preparation and departure while preventing job-hopping, and is not designed to facilitate finding new employment.¹⁰

‘EQUAL STATUTORY RIGHTS’

Clause 16 of the SEC states that terms set out in the SEC “do not preclude the Helper from other entitlements under the Employment Ordinance (Cap. 57), the Employees’ Compensation Ordinance (Cap. 282) and any other relevant ordinances.”¹¹ Key entitlements under the aforementioned statutes include

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⁸ §88. Vallejos & Domingo v Commissioner of Registration (FACV 19, 20/2012).

⁹ ibid.


holidays, weekly rest days and paid leave, maternity protection, severance and long service payment, compulsory insurance, and compensation in event of occupational accidents, loss of earning capacity, or death.

However, while FDWs are indeed entitled to the same rights under key labour legislation in Hong Kong, considering exclusionary provisions in other ordinances, such as the Minimum Wage Ordinance (Cap. 608), Immigration Ordinance (Cap. 115), and the insufficient protective coverage of the Race Discrimination Ordinance (Cap. 602) and Sex Discrimination Ordinance (Cap. 480), the repeated assertion from Administration that FDWs enjoy ‘equal statutory rights’ as their local counterparts does not fully take into account all other rights conferred to locals and non-FDW foreign nationals, but not conferred to FDWs. These exclusionary provisions are carved out to make way for and affirm the considerable authority and margin of discretion afforded to the Immigration Department (‘ImmD’) and to some extent the Labour Department (‘LD’) in governing and regulating the FDW population through policy. In doing so, Administration limits FDWs’ rights and strictly defines and emphasises FDWs’ existence as migrant domestic workers who are, above all, subject to the permission and conditions of stay of the ImmD, and substantively create in them a distinctly separate and disadvantaged class. While these policies are technically lawful, they are discriminatory in effect and substantively deprive FDWs from enjoying ‘equal statutory rights’ as local employees. Thus, the repeated assertion from Administration that FDWs enjoy ‘equal statutory rights’ as their local counterparts is substantially inaccurate and misleading.

STATUTORY MINIMUM WAGE VS. MINIMUM ALLOWABLE WAGE

For example, Section 7(3) of the Minimum Wage Ordinance (Cap. 608) states that statutory minimum wage “does not apply to a person who is employed as a domestic worker in, or in connection with, a household and who dwells in the household free of charge.” While this does not directly isolate FDWs from the ordinance, the descriptor “and who dwells in the household free of charge” makes indirect reference to the “live-in requirement” provided for in the SEC, which is not imposed on local domestic workers, and indirectly singles out FDWs from the protection of statutory minimum wage. While this would likely amount to indirect racial discrimination under international standards, the protective scope of the current Race Discrimination Ordinance (Cap. 602) does not include acts of discrimination done by the Immigration Department. During the passage of the bill, Labour Party legislator Lee Cheuk-yan proposed the inclusion of FDWs under the protection of the bill. This motion was however struck down 9 – 26.12

Alternatively, FDWs are afforded a Minimum Allowable Wage (‘MAW’), distinct from statutory minimum wage, which is not provided for in legislation, but established as policy by the Labour Department on a yearly basis based on considerations such as “Hong Kong’s general economic and employment situation, as reflected through a basket of economic indicators

including the relevant income movement, price change and labour market situation, as well as the affordability of employers.”

While Administration has repeatedly quoted ‘a basket of economic indicators’ as being the factors in the determination of the MAW, actual computations or elaborations have never been released, and the process of determination remains opaque to the public. In response to repeated requests through the Code of Access to Information of the Labour Department for further elaboration on what is specifically meant by ‘basket of economic indicators’ or how the balance between ‘livelihoods of FDWs’ and ‘affordability of employers’ is struck, representatives did not give any further clarification or elaboration, but merely repeated similar or identical sentences found in press releases on the same issue. As of 1 Oct 2013, the MAW for FDWs is set at $4,010, while statutory minimum wage is $30 per hour.

Although a FDW is to be paid the wage originally contracted for regardless of any policy change during the course of their employment, the arbitrary and unstable nature of the MAW leaves FDWs who do not have any economic alternative but to remain working in Hong Kong for multiple contracts vulnerable to unpredictable and unexplained wage changes that occurs at the sole discretion of the Labour Department. On the other hand, local employees and those protected by statutory minimum wage, under s.11-14 of the Minimum Wage Ordinance, will see a comprehensive review in statutory minimum wage every two years or so based on the findings of the Minimum Wage Commission, a statutory body sanctioned by the MWO, who must then prepare an extensive report explaining recommended changes to the Chief Executive, which is then published to the public in the Gazette.

The vulnerability of FDWs under the unpredictable MAW policy as opposed to the protections of the Minimum Wage Ordinance is further exemplified in the employee retraining levy controversy of 2003. In the 2003 ‘Report of the Task Force on Population Policy’, it was recommended that the Administration ‘introduce a levy for the employment of FDWs, set at the same level (i.e. $400 per month) as that imposed under the Supplementary Labour Scheme [and to] reduce the minimum allowable wage of FDWs by $400 on 1 April 2003,” which was then implemented over the course of the year. While counsel to the Administration in a failed judicial review challenging the constitutionality of the levy said that the simultaneous occurrence of the levy and wage cut was only an “unfortunate coincidence,” the opaque and seemingly arbitrary nature of the MAW and the proximity of the two events led many NGOs (AMCB, APMM, Mission for Migrant Workers) to believe that the new levy amounted to indirect taxation of Hong Kong’s lowest earning class, while circumventing the need to legislate a tax during a dire time of economic

depression. The lack of transparency of the MAW policy and the one-sided power of the administration in determining it yearly, when contrasted with the transparency and comprehensive legal mechanisms of the Minimum Wage Ordinance and Minimum Wage Commission further exemplify the substantive inequalities that FDWs face not only in remuneration, but before the law.

THE IMMIGRATION ORDINANCE AND IMMIGRATION STATUS

The substantive differences between the entitlements of FDWs and other workers is, as aforementioned, largely caused by the considerable authority that the Immigration Ordinance and ImmD has grown to assume in governing the FDW population. As exemplified in the exclusionary provisions of key statutes, the attitude of the ImmD in regulating and adjudicating FDW matters is to create in completely different and exclusive terms of engagement not applied to local citizens and other foreign nationals residing in Hong Kong. Less noticeable measures of the ImmD engaging in exclusive administrative treatment for FDWs is the often unspoken policy that, as of 1989, all FDWs that arrive in Hong Kong hold ID cards with prefixes of either ‘W’ or ‘WX’. In a response to a request through the Code of Access to Information inquiring about the purpose of this policy, a representative of the Director of Immigration responded that the purpose of this is for government agencies to be able to "more readily identify" FDWs in their functions.

This exclusionary attitude is enshrined in the SEC (ID 407), which explicitly sets out the exact limits and conditions of stay exclusively imposed on FDWs, and which preclude them from being deemed 'ordinarily resident' by any branch of government. They ensure that FDWs are, above anything else, characterised by their unalterable migrant status and occupation in Hong Kong. Whereas other migrant workers working in other sectors, or foreign citizens who 'ordinarily reside' in Hong Kong for a period of not less than 7 years are entitled to become naturalised permanent residents in Hong Kong by way of the Immigration Ordinance, FDWs are excluded from this as per Section 2(4)(a)(vi.), which provides that “a person shall not be treated as ordinarily resident in Hong Kong while employed as a domestic worker who is from outside of Hong Kong.” Instead, “each time a FDH is given permission to enter, such permission is tied to employment solely as a domestic helper with a specific employer (in whose home the FDH is obliged to reside), under a specified contract and for the duration of that contract.” This precludes the FDW’s ability to build up years of ‘ordinary residence’.

More specifically, this preclusion is caused by immigration policies or ‘conditions of stay’ imposed by the ImmD which effectively cordon FDWs from becoming fully participating equals among society, and systematically define their existence as second class citizens in Hong Kong. These conditions include the ‘2-week rule’, whereby FDWs are required to return to their countries of origin within two weeks of the termination of their employment contracts.

While these policies and the statutory deprivation of the right of abode
are indirectly discriminatory under international standards,\(^\text{17}\) under existing statutory protections, FDWs are unable to seek relief for discriminatory practices done by the government. The Race Discrimination Ordinance in Hong Kong was implemented as a means of ratifying the UN’s International Covenant to Eliminate Racial Discrimination (ICERD). While the purpose of the Race Discrimination Ordinance (Cap. 602) (‘RDO’) is to “render discrimination, harassment and vilification, on the ground of race unlawful”, contrary to establish the very international standards it seeks to adhere to, it fails to include acts done on bases of resident status, nationality, citizenship,\(^\text{18}\) whether or not a person is subject to conditions of stay by the Immigration Ordinance,\(^\text{19}\) or any act done by the Immigration Department.\(^\text{20}\)

**THE COURT’S ATTITUDE TOWARDS FDWS: AFFIRMATION OF IMMIGRATION CONTROL**

The key policies governing FDW policies have been repeatedly taken to Court in judicial review, but Courts have repeatedly been proven to be more likely to favour the authority of the Immigration Department, creating a further difficulty in the assertion of FDW rights. Vergara and Arcilla v. Attorney General of Hong Kong is a case in which judicial review was sought against the new conditions of stay (or the “two-week rule”) for FDWs, implemented in 1987 to prevent ‘job-hopping’ among FDWs. It set forth the court’s attitude and emphasis on immigration policy as a means of adjudicating FDW matters. When asked to rule on whether or not the new conditions were ultra vires the powers of the Director of Immigration, the Court of Appeal established that as FDHs enter Hong Kong for the purposes of work, the implementation of the “two-week rule” was within the powers of the Director of Immigration as it falls under the jurisdiction of immigration matters, under the Immigrations Regulation 2(4).\(^\text{21}\)

In 2012, in the landmark case Vallejos v Commissioner of Registration, more commonly known as the “right of abode case”, the constitutionality of the same section of the Immigration Ordinance was challenged, per Article 24(2)(4) of the Basic Law, which states that “Persons not of Chinese nationality who have entered Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the [HKSAR].” The CFA finally ruled against the defendants, and reasoned to affirm the considerable authority and margin of appreciation of the ImmD in dealing with FDW matters. The courts asserted that in the drafting of the Basic Law, “it is plainly within the intent of Article

\(^{17}\) Under the 2010 Equality Act of the UK, a “provision, criterion or practice” is indirectly discriminatory if it is neutral in construction, but in effect disadvantages a group with a protected characteristic, and cannot be shown to be justifiable or a proportionate measure to achieving a legitimate aim.

\(^{18}\) s.8(3)(d).

\(^{19}\) s.8(3)(b)(iii).

\(^{20}\) s.55.

\(^{21}\) Regulation 2(4) states that “Permission given to a person to land in Hong Kong for employment shall be subject to the condition of stay that he shall only take such employment or establish or join in such business as may be approved by the Director.”
24(2)(4) that the immigration status of persons claiming to come within that category must be taken into account” (emphasis added).22 This is based in the Basic Law’s description of non-Chinese citizens eligible for permanent residence, which stipulates that they must have “entered Hong Kong with valid travel documents”23 (emphasis added), which, in their reasoning, implicitly “makes immigration control a constant feature in the process of building up eligibility.”24 In applying the law, The CFA affirmed the ImmD’s considerable margin of appreciation in adjudicating FDW matters, and upheld the “highly restrictive conditions […] that mark out FDWs as a class and characterise the nature and quality of their existence in Hong Kong.”25

**ADHERENCE TO INTERNATIONAL OBLIGATIONS**

The Court’s attitude is in line with that of the executive branch of government - that FDW matters fall strictly under the jurisdiction of immigration matters, and they should therefore be constantly subject to immigration control. The discrepancies between the statutory protections of FDWs and other employees reflect a similar attitude in legislation. The perspective that FDW matters should be governed as a matter of policy is a pervasive and deep-rooted belief in all branches of our legal system. However, this attitude gives rise to constant criticism from local NGOs and international bodies due to the HKSAR’s resulting inability to adhere to international human rights obligations, precluded by highly restrictive immigration policies such as the ‘two-week rule’ and ‘live-in policy’.

Article 25 of the Basic Law (‘BL’) states that “All Hong Kong residents are equal before the law.” The first article of Article 39 sets out that all provisions of the International Covenant for Civil and Political Rights (‘ICCPR’), the International Covenant for Cultural and Social Rights (‘ICESCR’), and relevant international labour conventions (most relevantly the ILO 097, the ‘Migration for Employment Convention’) ratified during British rule shall remain in force in Hong Kong. It also sets out that any rights and freedoms restricted by law “shall not contravene the provisions of the [first] paragraph of this article”. The aforementioned international covenants provide for universal rights that are therefore not qualifiable by any statute, and are conferred to both non-permanent and permanent residents of Hong Kong. The reality of FDWs, their working conditions and the current policies and statutory provisions in place to protect them do not meet international human rights standards, and as a result constantly face criticism from international bodies.

**ICERD AND CEDAW**

The UN Committee on the Elimination of Racial Discrimination has repeatedly expressed concerns on immigration policies imposed on FDWs,

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22 §83. Vallejos & Domingo v Commissioner of Registration (FACV 19, 20/2012).
23 Art. 24(2)(4) of The Basic Law.
24 ibid at §85.
25 ibid at §82.
specifically the ‘two-week rule’, which they find ‘may be discriminatory in effect.’ After the implementation of the RDO, the Committee has continued to express its concerns on the limited scope of the RDO in regulating acts done by the government and the ImmD, and has strongly recommended that ‘indirect discrimination with regard to language, immigration status and nationality be included among the prohibited grounds of discrimination’ (§27). Moreover, it reiterates its concerns “that the ‘two-weeks rule’ […] continues to be in force, as well as the live-in requirement, and that migrant workers may be subject to longer working hours, and shorter rest and holiday periods.’ In response, it strongly recommends that ‘effective measures be taken to ensure that domestic migrant workers are not discriminated against. It calls upon repealing of ‘two-weeks rule’ as well as the live-in requirement and that [the HKSAR] adopt a more flexible approach to domestic migrant workers in relation to their working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.” (emphasis added) Similarly, the UN Convention to Eliminate Discrimination Against Women expressed a similar concern, recommending that the HKSAR “ensure that female foreign domestic workers are not discriminated against by their employers or subject to abuse and violence. It urges the Hong Kong Special Administrative Region to repeal the “Two- Week Rule” and to implement a more flexible policy regarding foreign domestic workers.”

ICPPR

The ICCPR is ratified into local legislation in the Bill of Rights Ordinance (‘BORO’, Cap. 383). Article 8(1) of the BORO states that “Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freed to choose his residence.” While it can be argued that FDWs voluntarily sign the SEC upon arrival in Hong Kong which stipulates that they must live in their employer’s home during the course of their employment, the lack of any other option allowable by law precludes the substantive exercise of this fundamental right. It also renders FDWs disproportionately vulnerable to exploitation and abuse.

Moreover, Article 4(2) and (3) of the BORO states that “No one shall be held in servitude” and that “No one shall be required to perform forced or compulsory labour.” In an April 2013 study by MFMW, 37% of respondents reported to having to work 16+ hours a day, while 9% reported working 19 hour straight days. The lack of prescribed maximum allowable working hours, overtime pay, the fact that FDWs are ‘on-call’ all hours of the day

28 ibid at §30.
due to the live-in requirement, and the increasing incidence of illegitimate pressure placed upon them by employment agencies and employers through illegal actions such as exorbitant commission fees and withholding of travel documents, render them vulnerable to servitude and forced labour under a severe lack of regulation and enforcement. Moreover, the “live-in policy” precludes effective enforcement of the labour protections that FDWs are entitled to, such as statutory 24-hour rest days.

The UN ICCPR committee has expressed strong concerns about the “the lack of adequate protection and redress provided for [FDWs]” which precludes the fulfilment of their basic social rights. They recommended that HKSAR “adopt measures to ensure that all workers enjoy their basic rights, independently of their migrant status, [and that HKSAR should] consider repealing the “two-weeks rule” […] as well as the live-in requirement.”

**ICESCR**

Article 7(a)(i) of the ICESCR provides for “the right of everyone to the enjoyment of just and favourable conditions of work” including “fair wages and equal remuneration for work of equal value without distinction of any kind […]”. In the discussion of the differences between statutory minimum wage and the MAW, it is clear that this does not apply to the case of FDWs. Section (b) of the same article provides for “safe and healthy” working conditions. In the same 2013 study by MFMW, 25% of respondents stated that they manifestly did not feel safe in their place of work as many have to sleep in common areas such as the living room or corridor, while 30% reported not having a room of their own, and some even reported having to sleep in verandas and bathrooms.

Moreover, in the ICESCR Concluding Observations of Hong Kong, the Committee expressed concerns “about the exclusion of migrant domestic workers from the Minimum Wage Ordinance, social security and maternity leave protections”, and recommended that Hong Kong “(a) adopt a comprehensive law to regulate domestic work and ensure that migrant domestic workers have the same conditions as other workers, [and] (b) Take immediate actions to repeal the two-week rule and the live-in requirement.” (emphasis added), as well as mechanisms for reporting abuse and monitoring the conditions of domestic workers.

**OTHER LABOUR CONVENTIONS**

Hong Kong is also party to the ILO097, or the Migration for Employment Convention. Article 6 states that all parties to the convention must give migrant workers “treatment no less favourable than that which applies to its own nationals in respect of the following matters: (a)(i) remuneration,
including family allowances were these form of remuneration, hours of work [...] (iii) accommodation”. The discrepancies between SMW and the MAW and 
the live-in requirement show that Hong Kong falls short of this standard. 
Although China is currently not party to the ILO C189, or the 'Domestic 
Workers Convention', it prescribes international human rights standards for 
the humane and responsible governing of DWs that Hong Kong should strive 
towards. The convention requires that parties take active steps take measures 
to protect FDWs from abuse, harassment32 and exploitation, to promote 
their rights33 and ensure a safe and healthy work environment,34 allow DWs 
to choose their own residence,35 and include them under minimum wage 
coverage.36

THE CASE FOR PROPER LEGISLATION

FDW ISSUES AS POLICY: A LABOUR IMPORTATION SCHEME?

In a report by the Office of the Commissioner for Administrative 
Complaints (now the Ombudsman) issued in December 1995, it was stated that 
as FDW importation is a “scheme that encroaches on both immigration and 
labour affairs, it has always been administered by the Imm D and the LD.”37 
(emphasis added). The importation of FDWs is often referred to as such, which 
implies that it is similar in character and function to other overseas labour 
importation schemes existing as policy in Hong Kong. This centralised deferral 
of FDW matters solely on the jurisdiction of the ImmD and LD is evident in 
the subsequent drafting of exclusionary sections in key ordinances and Court 
rulings, namely the Immigration Ordinance and Minimum Wage Ordinance. 
This deferral is also a common approach in the governing of other previous 
and existing importation of labour schemes (such as the General Importation 
of Labour Scheme, or the ‘GILS’, and the Supplementary Labour Scheme, or 
‘SLS’). In relation to FDW matters, the Labour Department has stated that, as 
in other importation schemes, “priority in employment should be given to 
local workforce, and importation of workers should only be allowed where 
there is a confirmed manpower shortage in a particular trade that cannot be 
filled by local workers.” However, the marked differences between the social 
presence and function of FDWs and other ‘unskilled’ imported workers within 
the workforce should preclude the analogous treatment between FDWs and 
other overseas imported workers.

The present labour importation scheme in place, which allows employers 
who are unable to find employees in the local market to import overseas 
technician-level-or-below workers under a similar standard employment

32 Article 5.
33 Article 3.
34 Article 13.
35 Article 9.
36 Article 11.
the Commissioner for Administrative Complaints. HKSAR. Dec 1995.
contract, is the Supplementary Labour Scheme (‘SLS’). It imposes similar immigration and visa requirements as those imposed on FDWs, which are also bound to the duration of a standard employment contract of 24 months. Imported workers under the SLS are also subject to the same “two-week rule”, and must also return to their place of origin after the completion of a contract. Moreover, since the inception of schematic importation of foreign labour in 1989 (the General Importation of Labour Scheme, ‘GILS’, and now the SLS), the ‘W’ or ‘WX’ ID prefix policy was also extended to other imported unskilled labour, suggesting an analogousness in the ImmD’s treatment and administration towards FDWs and other imported unskilled labour. The Administration’s reasoning and justification behind imposing the employer’s retraining levy on FDW employers in 2003 as mentioned previously (i.e. as FDWs are imported workers, they should be brought under the SLS, and thus their employers should pay the levy) reflects a similar attitude.

However, the ‘live-in’ policy is, of course, not imposed on SLS-imported contract workers. Employers are instead contractually obliged to provide accommodation at the expense of a maximum of 10% of the worker’s wages. They are paid statutory minimum wage, and compensated for overtime work at a rate that is determined at the time of contracting. FDWs, on the other hand, do not have prescribed working hours, and because of the live-in policy, are often subject to 16+ hour days, with little and/or interrupted rest. They do not enjoy statutory minimum wage, and are more likely to be subject to inhumane treatment or abuse because of the more restrictive conditions of stay exclusively placed on them.

Furthermore, more substantive differences between two classes of imported works reflect the profound societal role and dependence the FDW presence in the workforce has grown to constitute, which calls for an alternate governmental approach in dealing with FDW issues. Like other low-skilled imported workers, FDWs in Hong Kong may be a “transient population,” but they are not, by far, a transient presence. In recent years they have made up the largest and still growing ethnic minority in Hong Kong (Indonesians at 29.6%, Filipinos at 29.5% as of 2011, totalling presence of more than 326,000 in 2013. They are a class of workers upon which Hong Kong families, lifestyle and economic growth has formed a dependency. There has never been any cap on the number of FDWs allowed in Hong Kong at any given time, whereas as of 2012, there were only 2,415 imported under the SLS, and a cap of 25,000 workers was set under the previous scheme, the GILS, indicating the administrative’s implicit recognition of this dependence.

The Administration has often recently stated that, like other labour

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importation schemes, the FDW scheme arose out of a shortage of local domestic workers, and where possible, priority should be given to the local job market. This is a line of reasoning that allows the conclusion that the ImmD centralised approach in dealing with FDW matters as a labour importation scheme is justified.

However, FDW importation was never formally launched by Administration as a schematic case of labour importation, and unlike these other schemes, clear purposive parameters were never set at the beginning of FDW exportation. The inception of importation schemes such as the SLS arose as calculated and planned solutions to recognised manual labour shortages in the local market, which were proposed and introduced in the Legislative Council before implementation. On the other hand, “the importation of FDWs first started sometime in 1969 when some expatriates […] were allowed to bring along their domestic helpers. Since 1972, local residents also began to employ FDWs in increasing numbers”. Therefore, the main policies governing FDWs were largely reactionary, implemented as un-schemed responses to a fast growing dependence and presence. This should be taken into account when adjudicating and regulating FDW matters. The growing class of imported FDWs and increasing dependence over the years is an unplanned, un-‘schemed’ social phenomenon that has arisen organically from Hong Kong’s social circumstances during that time, emphasis on fast-moving capitalist growth, and growing gender equality within the workforce, and should thus be treated as such.

CALL FOR AFFIRMATIVE ACTION: DOMESTIC WORKERS LEGISLATION

In the above discussion, it is evident that the substantive differences in statutory and policy protections between FDWs, local employees and other imported workers call for an alternate governing approach for FDW issues. Part III, Article 2(1) of the ICESCR states that “each State Party to the present Covenant undertakes to take steps, […] to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised […] including particularly the adoption of legislative measures.” (emphasis added) The ImmD centralised approach to dealing with FDW matters does not provide sufficient coverage for FDW rights or regulations. In the Administration’s repeated attempts to regulate FDW issues solely using policy, it is becoming increasingly evident and problematic that their approach to regulate and control the increasing FDW presence is to impose further, more restrictive policies, such as the “two-week rule” and the “live-

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in policy”, which often directly result in the derogation of their basic rights, dignity and personal safety.

Moreover, as policy is implemented on a relatively unpredictable basis issued on the discretion of governmental departments involved, a largely unilateral relationship and power imbalance is created, wherein it is not practical for FDWs to collectively bargain or voice their concerns in an effective and meaningful manner, without having to take time-consuming and extreme measures such as seeking judicial review. This issue is further exacerbated as, when an FDW-related issue is taken to court, the Courts have to apply the law as it is, and is therefore much more likely to favour the considerable authority and discretion of the ImmD and the strong statutory basis of the Immigration Ordinance. On the other hand, FDWs cannot seek statutory relief on the most pressing and relevant issues that they face, simply because these statutes do not exist, or those that exist, such as the Discrimination Ordinances, do not provide sufficient coverage of their rights or protections. Instead, they must instead resort to roundabout ways, such as relying on remote common law positions\(^{47}\) or the heavily loaded terminology of the Basic Law in order to make their case.

Furthermore, in analysing the various official responses to international human rights bodies and local/international NGOs set out in the beginning of this paper, it is also evident that it is now becoming increasingly difficult for the HKSAR to defend their policy-based approach in FDW matters in a way that is legitimate and meaningful. Criticism of crucial legal cases, such as those aforementioned, rest upon the same sentiment of illegitimacy and the perception that courts have repeatedly favoured the more bureaucratic, procedural approach in dealing with FDW matters, rather than ways that are perhaps more compatible with notions of substantive justice or the upholding of fundamental rights.

Given the extraordinary circumstances in the late 20th century that have led FDWs to become the crucial labour presence they are today, it is also important to recognise the extent to which FDWs have integrated into Hong Kong society and become not only crucial working class, but part of the bedrock upon which the economy is able to flourish, and Hong Kong women able to become both mothers and full participants of the workforce. As the number of FDWs employed in Hong Kong increased since the 80s, the percentage of labour force participation of married women has correlatively increased from 39.1% in 1986 to 48.3% in 2013.\(^{48}\) Thus, the administrative treatment of their presence as an ordinary case of overseas labour importation or population control in a way that is not contingent to FDWs’ actual effects on Hong Kong’s society or dependencies is no longer an acceptable approach. It calls for a less arbitrary, less unilateral way of adjudicating their matters.

\(^{47}\) Consider, for example, the attempt of the common law position of “Wednesbury unreasonableness” in *Vergara v. Attorney General of Hong Kong*. In order for this precedent to have been able to succeed, the plaintiff must have proven that a policy or measure, i.e. the new conditions of stay, is “so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.” (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223*)

Administration has recognised that they would have to “incur enormous manpower and administrative resources if [they] were to visit and follow up with each individual FDH” to regulate FDW matters or ensure that FDWs were being treated properly, exemplifying that they too, to some extent, recognise the disproportionality and inefficiency of current policy which preclude the possibility of any effective or substantial investigation into whether or not a FDW’s basic human rights are being undermined.

Therefore, instead of relying on restrictive policy, the HKSAR should take affirmative action and stipulate in new statute the working conditions, maximum working hours, remuneration that FDWs should be entitled to in order to achieve obligatory international human rights standards, and reaffirm and restate in legislation the basic human rights that all residents of Hong Kong, permanent and non-permanent, are entitled to by way of the Basic Law. Crucially, it should make clear how key aspects of FDW matters, like the MAW, are determined and by whom. The drafting of such statute should involve the process of public consultation, and include the views and input from representatives of the FDW community, local employers, and expert independent bodies like the Equal Opportunities Commission (‘EOC’).

A comprehensive reform in discrimination law, such as one that the EOC is currently seeking, would also greatly benefit the security of FDW rights. Currently, protections available against all forms of discrimination, are dispersed into four discrimination ordinances (sex, family status, race, and disability). Between them are many inconsistencies in regards to exceptions (e.g. the activities of some governmental bodies, such as the ImmD, do not constitute discrimination under the RDO, but do in the others), need for proof of intent in establishing discrimination, and availability of damages in event of discrimination. Moreover, as mentioned previously, the protections currently in place do not sufficiently protect the most vulnerable to discrimination, i.e. ethnic minorities. The EOC is currently considering proposing the inclusion of protection against ‘intersectional discrimination’ in HK discrimination law – acts of discrimination which do not pertain unambiguously to one protected characteristic (such as sex or race), but rather to a combination of two or more. Ethnic minorities such as FDWs are most vulnerable to intersectional discrimination, as acts done on the basis of their status as an FDW is likely to done on the basis of sex and race, as the FDW population is comprised almost completely of Southeast Asian Females. However, these acts cannot be protected against as it is difficult to prove that they pertain only to one protected characteristic (i.e. race or sex). The protection against such forms of discrimination would more effectively tackle the issues that many ethnic minorities, including FDWs, face in Hong Kong, providing a strong statutory basis upon which they can more comprehensively redress their grievances.

Hong Kong can also look to the example of some states in the United

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States (New York, California, and Hawaii) who have taken active steps to legislate domestic workers’ rights in respective “Domestic Worker’s Bills of Rights”, which prescribe working hours, overtime pay, maternity protection and protection from all forms of discrimination.

CONCLUSION

The completely administrative approach to regulating FDW matters and protecting their rights is a misguided approach by the HKSAR. The implementation of highly restrictive policies, namely the “two-week rule”, and the “live-in” policy render FDWs vulnerable to abuse and inhumane treatment, and is becoming increasingly difficult for the HKSAR to defend in the face of local and international scrutiny, especially as recent instances of extreme abuse, and the unscrupulous and exploitative behaviour of employment agencies caused by these policies have to come to light in the media. In light of this, in seeking to govern and regulate the presence of FDWs in a responsible and humane way, the HKSAR should seek to legislate, instead of administratively restrict, the basic labour and fundamental rights of FDWs. By prescribing statutory parameters and entitlements, as well as regulatory frameworks under which entitlements and protections for FDWs can be enforced, HKSAR will be able to meet international human rights standards and live up to its ideals of democracy, fairness and international esteem.

52 Chapter 374. AB-241.
53 Act 348. SB535.
WORKING HOURS REGULATION AND THE LIVE-IN RULE: A COMPARATIVE POLICY ANALYSIS FOR DOMESTIC WORK

Emma Foley

INTRODUCTION

Domestic workers are those employed to assist in the running of private households; while duties may be hugely varied by country, region or demand, domestic workers are commonly employed for childcare, household work, private social care, for care of the elderly, and very often a combination of such duties. The essential component in defining domestic work is that it takes place within a household. However, unlike other labour sectors, either in terms of local or foreign workers is often not met by protections or regulation in national legislation. Furthermore, in the global economy demand for such labour is in the main part met by migrants who - due to the economic issues of their home countries - are willing or forced to work longer hours, for less wages and different conditions than local workers may expect.

Its particular nature, of work within a private household and the intimacy of a family, places specific demands upon the employment relationship and in many situations employees may also live within the household of their employer making for a unique labour relationship. Indeed such living arrangements are often not only a tendency or characteristic of domestic work but are also a mandatory employment or immigration requirement for migrant workers in some countries. This can result in a vacuum of differentiation between work time and rest time in domestic labour situations, as the worker lives with their employer at their place of work. This is also further compounded by a general global trend in lack of working-hours legislation or regulation for domestic work. The very domesticity of the sector, in the privacy of the household, is often cited as a key reason against regulation of working hours, however this paper will argue that rather than acting as a reason not to give protections in this sector, this presents precisely the reasons why it is so important to re-examine and strengthen protection requirements for domestic workers.

The report will comparatively analyse policy approaches regarding the regulation of working hours and habitation requirements for migrant domestic workers. It does not aim to be a comprehensive analysis of global
policies, but rather aims to situate the local context of Hong Kong SAR within an international context, with a selection of other countries notable for their respective policies on these issues. Whilst the focus on Hong Kong is situated within a wider environment of policies relating to domestic work, the topic is particularly relevant to Hong Kong in light of local issues of labour sourcing, regulation, working hours and housing concerns. Most pertinently it is relevant due to the 312,395 Foreign Domestic Workers (as of 31st December 2012 HK ID Statistics – 2012 Annual Report, Chapter 1) who are employed in Hong Kong. After outlining some global issues concerning domestic work and the human rights framework on work and rest time, Hong Kong will be the first case study examined regarding the Live-In Requirement and Working Hours regulation. The consequences of policy and lack of regulation will then be discussed through the experiences of migrants working in the domestic sector in Hong Kong, and how they feel improvements could be made. Following this the report will take a wider international perspective, comparatively examining the policy landscape on living and working hours. While some countries have implemented positive regulation in this area, examples from other regions already show the negative impacts of recent restrictive turns. Finally, points for improvement and policy recommendations will be made drawing from the comparative analysis.

The report has been produced for the Mission for Migrant Workers Ltd as part of their campaign work on the Live-in Policy and Working Hours regulation.

**ISSUES IN DOMESTIC WORK**

The range of issues affecting those employed in the domestic sector is wide, however the scope of this paper is limited to a focus on such issues which are particularly critical when the spaces of employment and habitation are merged. These effects are outlined here as: lack of labour recognition, being situated in the household, and the impacts of inadequate rest time.

**LACK OF RECOGNITION**

Whilst it is a sector of important global significance, with approximately 52.6 million women and men employed as domestic workers in 2010 (ILO 2013:32), domestic labour continues to be widely undervalued in social, economic and legislative terms. Firstly, the sector carries a huge gendered bias towards the employment of females rather than males, thus both producing and perpetuating gendered notions of appropriate work. As labour that takes place within a household - such as cleaning and cooking - and labour that centres around care of people - such as children, those with disabilities or the elderly - it is largely designated as female work due to gendered notions of domesticity and the emotional concept of caring labour. These means that in terms of both demand and competition it may be difficult for men to enter the sector, whilst simultaneously domestic work is one of the only avenues of employment and income open for many women, especially those driven
by poverty to seek other opportunities, creating intersections with issues of poverty and racialised conceptions. Representative of a traditional social persistence in under-valuing work that takes place in a household or familial sphere, domestic labour is considered ‘free’ in personal households globally, so the value of domestic labour in an employment relationship - where labour must be remunerated - has not sufficiently translated. The physical aspects of domestic work are denied as ‘real’ labour and care roles are also denied value in the nurture and educational influence they provide, for example, the wide under-valuation of the early-years educational work in childcare that many domestic workers are informally tasked with. According to the ILO (2013) 90% of domestic workers globally are not covered by labour laws where workers in other sectors are; such treatment with informality and lack of legislation or regulation can be seen as the legal affirmation that domestic work is not viewed as ‘real’ work. As well as a denial of labour, this situation does nothing to recognise the production of mobility, access, and involvement in the labour market that domestic workers allow others to take. Domestic assistance can enable both parents to work through the provision of childcare, enables greater participation in the labour market particularly in terms of female employers, and allows for increased working hours of local populations in markets of economic development. Whilst figures given by the ILO and other bodies are useful to estimate how many people are employed in domestic labour globally, the value of the labour extends far beyond this and enables the participation of many other workers in the labour market. The effects of under-valuation of course should also not be under-estimated, as it can be productive of further marginalisation and humanly detrimental.

**BEING SITUATED IN THE HOUSEHOLD**

In addition to being a globally under-valued workforce, working within the private sphere of a household creates a specific employment dynamic and does not have the same definition that other employment sectors have. Moreover, although not all domestic workers live-in, this is a very common arrangement and indeed is mandatory in many countries; further blurring the lines between habitation and work, a requirement for domestic workers to live-in easily gives a green light to employers for exploitative working hours and conditions as the employee is always ‘present’ and seemingly available, making true rest time and privacy a falsity. Even where an employment relationship may not be seemingly exploitative, a sense of familial obligation can be developed through co-habitation and intimacy, meaning that long working hours and additional tasks and unspecified duties are difficult to say no to. In addition, with scarce or no legislative mandate on working hours, employers may not understand or recognise that workers have the right to rest time, creating a 24 hour working situation. Informal employment relationships are easily habitualised, with both parties settling into informality (even when exploitative) due to the household environment. The production of closeness or intimacy in the domestic labour situation is therefore not necessarily a positive development and is certainly always unequal, as close
proximity to employers serves to remove or reduce bargaining power for the employee. More specifically this can be seen as a migrant worker issue as local employees are less likely to accept live-in conditions and furthermore their employment is less likely to depend on this crux, let alone their right to remain in the country. Crucially, residing in the workplace, without regulations on rest and leisure time easily creates isolation and invisibility, giving a context ripe for exploitation that is simply not visible compared to other sectors.

**INADEQUATE REST TIME**

Habitation in the workplace can be productive of inadequate rest in a number of ways. As described above, living-in can create a characteristic expectation from employers of constant availability, including during the worker’s day off and during sleeping hours. The merging of the place of employment with place of habitation means the employee is always on standby and rest may be commonly interrupted with requests and always shadowed by the anticipation of work. Indeed, employers may exercise their entitlements by maximising the labour of a person living and working within their home, creating extra work if the worker is taking a break, or using surveillance to monitor the worker. Such lack of privacy, within the household whether under direct surveillance or not, can have mental and physical health impacts; just as the unpredictability of working-hours and expectations, long working days, night work and the irregular distribution of sleep, food and labour can produce detrimental effects, especially over prolonged periods.

**HUMAN RIGHTS FRAMEWORK**

The Human Rights Framework concerning work and employment is well developed and outlines a number of important considerations. Firstly, Article 24 of the Universal Declaration of Human Rights states that:

‘Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.’

The end of the work day, including designated time for rest and non-work activities have then been formally expressed in human rights discourse since 1948. Inclusive and open in its language the declaration fundamentally acknowledges that not only should actual hours of working time be limited but also that rest and leisure are a vital right. Considered the cornerstone of international human rights law, the declaration serves to inform other human rights documents, treaties, declarations and conventions by setting a standard for governments to achieve and for citizens to work towards.

The Convention on the Elimination of All Forms of Discrimination Against Women (Adopted 1979) is also particularly important for both current and historical patterns in domestic labour. Calling for States to take immediate action to eliminate all forms of discrimination against women, on any aspects where women are not treated with equality to men, Article 11 of the convention, the right to Employment includes: the right to have choices in profession; the right to have equality in valuation of work; and the right
to protection of health and safety in working conditions. These points are particularly relevant to domestic labour patterns where gender, poverty and marginalisation lead to under-valuation of an entire sector, and a lack of employment choice for many workers. Article 21 of the convention provides room for annual suggestions and recommendations, and subsequently General Recommendation No. 26 on Women Migrant Workers was made in 2008, outlining the specific vulnerabilities of migrant women which are furthered in the domestic employment situation. Acknowledging that migration is not a gender-neutral phenomenon, it states that employment opportunities are often limited to the informal sector or domestic work. Crucially it affirms that regardless of an individual’s status, dependency or citizenship, there is a requirement for origin, transit and destination states to provide protection.

Most significant in its specialised focus is ILO Convention 189 on Domestic Workers (2011 - Entry into force 5th September 2013), unique in its recognition of the specific needs of domestic workers. Its purpose is to provide protections through both the acknowledgement and application of general work conditions allowed for other sectors, whilst also considering issues that are specific to the domestic sector. It ‘seeks to bring domestic workers under the umbrella of labour law’ (ILO 2013:39). The Convention offers specific terms on the labour standards and protections that are needed for the sector, and in the case of merged habitation and employment, selections from Articles 7, 9, and 10 can be particularly called upon.

Article 7 requires states 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 contracts in accordance with national laws, regulations or collective agreements’. This includes: the type of work to be performed; the remuneration, method of calculation and periodicity of payments; the normal hours of work; paid annual leave, and daily and weekly rest periods; and the provision of food and accommodation, if applicable. Article 9 states that Members ‘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’. Article 10 stipulates that there should be ‘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 in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work . . . Weekly rest shall be at least 24 consecutive hours . . . [and] 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.

Ratified by 14 countries and in force in 8, the convention also has power as a tool for organisation in its individual provisions, as countries which are not willing to ratify the convention can at least work towards asserting individual provisions with or without ratification.
Recommendation No. 201 on Domestic Workers followed the Convention also in 2011, providing detailed guidance on how the convention can be applied. Whilst the convention is a binding agreement to signatory countries, the recommendations offer further guidelines for implementation. Amongst the body of the recommendation is the use of a standard model employment contract, that is widely available for free; suitable guidelines decided by the Member state on how to record working-hours and pay, based on consultation with involved parties; to determine, regulate and remunerate standby hours; defined weekly rest periods, public holidays and annual leave; clear conditions on the quality of accommodation and food provisions, including safety, privacy and sanitation.

**CASE STUDY: HONG KONG**

Migrant domestic workers make up a very large sector in Hong Kong SAR as part of a labour import policy that has increased steadily over the past 30 years. Many aspects of the labour relationship are outlined in strict detail in the Labour Ordinance, Standard Contract, and guidelines for employers from The Hong Kong Immigration Department. One such requirement is the mandate that foreign domestic workers must reside in the home of their employer, which is also specified as their place of work. Concurrently there are no restrictions on working hours in the domestic sector in Hong Kong, nor in any other sector (apart from for workers under 18). The joint impacts of a mandatory live-in requirement and lack of working-hours regulation are outlined here.

From the 1st April 2003 a legal requirement was implemented for migrant domestic workers to live-in with their employer at the address specified in their employment contract. The given reasons for this were due to the belief that domestic workers should provide full-time live-in service and in order to prevent 'moon-lighting' and thus help reduce competition and maintain employment opportunities for the local workforce. Simultaneously this requirement ties the employee to the place of work and place of residence by demanding that they match for visa terms of entry. Additionally with the Conditions of Stay or ‘two-week rule’ - where workers have 14 days to remain in the country after termination in order to find a new employer - these policies can have the effect of tying the employee to the employer in exploitative situations. Any deviation, such as working or living at another address, will be an immigration offence on the part of the employee, a condition then creates high dependency from the worker on their employer, not only for employment but also for right to remain in the country, accommodation and food provision. The live-in policy has created a variety of related issues due to the legislative merging of the employment and habitation spheres, but too begs the question what are the limitations to full-time domestic employment?

For many domestic workers in Hong Kong there are no limitations and they do not feel entitled to assert themselves due to the precarious position of both their employment and right to remain. In a report marking the 10 year anniversary of the policy, the Mission for Migrant Workers identified
a number of common issues resulting from the Live-in Requirement. These included inadequate and unsuitable accommodation as provided by the employer; inadequate or unsuitable food provision or lack of food allowance; long-working hours with unpredictable working patterns; duties beyond the signed contract which lead to an Immigration breach on behalf of the worker; work during the entitled weekly rest day and statutory holidays; and a critical lack of privacy resulting in lack of safety also in many cases.

The results of a survey collated by MFMW throughout 2013 also found that 87% of clients reported long working hours, with an average working day of 15.8 hours. While some had as little as 12, others were working up to 20 (MFMW Statistics Report 2013). Living in their employers house the majority are always ‘on-call’ and feel reluctant to report any violations, as policies such as the live-in requirement and the conditions of stay play off against each other. In a focus group conducted with clients of MFMW for this report, migrants described the various conditions of their employment and how their living-situation affected their working hours. Whilst the majority expressed that their expectation as an employee was to meet their employer’s needs, the participants in this focus group described conditions which were particularly difficult for them and in some cases led to end of the employment relationship.

**INADEQUATE AND UNSUITABLE ACCOMMODATION**

According to the mandate of the live-in policy, employers are obliged to provide ‘suitable accommodation’ with ‘reasonable privacy’; however many domestic workers report that they do not have their own room, but commonly have to sleep in the living room, share a bedroom with the children, or in the kitchen. Cases are also reported of the provided accommodation being in the toilet or cupboard. Whilst there are serious safety issues in some cases, the overall lack of privacy is certainly detrimental as is perpetual insufficient sleep. One focus group participant explained that she slept on the sofa in the living-room and her employer instructed her to wait up for her to return each night, no matter how late. If she was asleep she would wake her and demand help with arbitrary tasks such as peeling an apple:

“12 o’clock she came in the house. I was laying down in the sitting room, because I don’t have a room. ‘Come, can you remove the skin from the apple because I want to eat it?’... Yes, because that is your employer, I am only the employee.”

**INADEQUATE AND UNSUITABLE FOOD PROVISION**

With the introduction of the Live-in requirement it has also been the duty of the employer to provide food for the period of employment; stated in the standard employment contract the employer should either provide food free of charge or provide a food allowance of HK$920 per month. Many employers prefer the food provision arrangement as no details are specified on cost and quantity, meaning that the final cost may be lower; however both arrangements have restrictive consequences for the employee. Migrants
report inadequate amounts of food, such as only being provided with the family’s leftovers, or food that the worker is unable to eat, due to religious observations for example. Issues of food provision also have more subtle exploitative characteristics, where workers are given food to cook with but not given access to the kitchen, or not given the time to cook or eat. Access to food may also be used as a tool to express superiority and inferiority in the household dynamic, such as a requirement for the employee to eat at separate times or outside, or through the use of different cutlery and crockery from the family.

**NO DEFINITE WORK TIME SCHEDULE**

While many workers described a certain routine in terms of waking early and essential chores, there was a great sense of uncertainty surrounding working-hours and the end of the day, as this is at the employer’s discretion. This may include being woken from sleep for menial tasks, like described above, but it also impacts on the quality of ‘down time’ and can impact on personal lives, such as keeping in contact with family. One focus group participant reported that her phone was confiscated by her employer, and she was only allowed to use it on Wednesday evenings; even after going to bed on the other evenings she could not use her phone. Others felt that employers created tasks, if the worker was resting, feeling that the purpose of employment is to be constantly occupied. The feeling that a domestic worker should always be busy was embedded in the story of one participant who had been required to mop the floor tiles according to her employer’s particular system: changing the water in the bucket for every four tiles she mopped, a task that was to be repeated daily and stretched a reasonable daily task into an occupation that was stretched into hours per day.

**DUTIES BEYOND THE SIGNED CONTRACT**

As already outlined above, the consequences of being caught working beyond the address given in the contract are dire for migrant workers, however as the onus is on the employee, many find themselves put in this situation by employers. One focus group participant was cleaning three houses, an office and working on a farm. Common additional duties also include looking after multiple pets - walking them, washing, combing and blow drying their fur - and it was expressed that the pet dogs they looked after were treated better than themselves. Other commonly reported scenarios include, signing a contract that details looking after one family but routinely having to cook for the extended family, or doing extra care work that has not been stipulated.

**WORK DURING REST DAYS AND HOLIDAYS**

According to the Labour Ordinance of the Hong Kong Labour Department, workers are entitled to ‘a continuous period of not less than 24 hours during
which an employee is entitled to abstain from working for his employer’ (p.11). This also follows Article 10.2 of ILO Convention 189, however many workers in Hong Kong’s domestic sector are still expected to work before going out and when returning. Even though the rest day is clearly outlined in point 6 of the Standard Employment Contract and point 4 of the Employment Ordinance, it is with frequency not observed by employers, including short-notice changes and lack of substitution. As such when it comes to the rest day, staying in the house is not an option, and some workers described that they resort to leaving their employers house very early in the morning in order to avoid work demands on the rest day. The mere physical presence within the household, induced by the Live-in requirement, leads to such demands of entitlement by employers.

SAFETY AND PRIVACY

The Live-in policy fundamentally removes the right to absolute leisure time, or the freedom to choose how to spend this time, with no room for personal privacy and the safe-guarding that would be enacted by the freedoms of leisure time. Combined with lack of working-hours regulation, it is preventative in terms of access to family, friends, services and rights – especially without the employer’s knowledge. Privacy is also revoked in such settings through the use of monitoring and surveillance, and the safety of domestic workers is easily jeopardised in a sector that has barely any regulation, or where ordinance is enacted as reactive rather than preventative. The reality of verbal, physical and sexual abuse caused by such policies sadly cannot be under-estimated, and should be just cause for the re-evaluation of policy and regulation on its own.

The general issue of working hours regulation in Hong Kong is both a complex and sensitive one, which ‘carries widespread and significant implications for the overall labour market, manpower demand, employment relations, work culture, business environment, economic development and business competitiveness’ (SWHC). However, following an ‘evidence based approach’ as favoured by the Standard Working Hours Committee, it is clear from the lived experiences of domestic workers that the particular combination of a live-in requirement and no working-hours restrictions needs addressing. In part this goes back to the lack of recognition of domestic work that was outlined above: domestic workers are, in fact, an extremely valuable part of the force which drives the Hong Kong economy – one major sectoral contribution is in the enabling of others to push forward in the work and business culture that Hong Kong is renowned for. Long local working hours demand a need for migrant domestic workers and simultaneously, migrant workers enable the levels of participation in the labour market that make Hong Kong such an economic success. This sector should be treated with labour standards that acknowledge its worth; allowing the right to rest, recuperation and social time, and promoting better relationships between employers and employees. Learning from the exclusion of migrant domestic workers from minimum wage legislation, it is recommended that it will be a better outcome – economically, socially and in rights – if the living conditions and working-hours of migrant domestic workers
WORKING HOURS AND LIVING REGULATIONS – INTERNATIONAL PERSPECTIVES

International perspectives on working-hours and living regulations in the domestic sector can be a useful comparative tool, to analyse the successes and failures of various policies, and also to examine the unintended consequences that policies have a tendency to produce. Positive cases will be outlined below on the implementation of working-hours regulation and habitation requirements, however it is also useful to point out that Hong Kong is not alone in the criticism it has received regarding these issues in the domestic sector. Middle Eastern states such as Saudi Arabia, Kuwait, UAE, Qatar and Lebanon are noted for their restrictive approaches, particularly the Kafala system; and Singapore, sharing many restrictive attitudes, only last year (2013) belatedly introduced a statutory rest day. The UK also provides a recent example which highlights the negative consequences of restrictive turns with the scrapping of the Overseas Domestic Worker Visa in 2012 resulting in the increase of incidents of abuse. According to reports, during the short period of two years since the scrapping of the ODW visa, the tying of employee to their employers visa for a maximum of six months has sharply increased practices such as inadequate sleeping quarters, inadequate rest time, with-holding of documents and instances of trafficking. (Kalayaan). A common thread in these cases is the confluence of labour issues into immigration policy. An over-concern on immigration matters leads to lack of regulation on labour issues at hand, such as working hours and live-in demands. Fundamentally, however, this report recommends that it is far more useful to look to other States for positive examples of best practice than to self-regulate against countries which are examples of poor practice.

CANADA

As with Hong Kong, the Live-in Caregiver Program in Canada requires careworkers to live with their employer for the period of their service; however working-hours for live-in caregivers are regulated by the Employment Standards Act (2000) which provides for all labour sectors. Within this daily working-hours should be limited to 8 hours, unless by written agreement between the employer and employee; and weekly working-hours are limited to 48 unless there is written agreement and an approval from the Ministry of Labour. There must be 11 consecutive hours off work each day, 24 consecutive hours off work each week, or 48 consecutive hours off work in every 2-week period. And overtime must be paid at the rate of 1.5 after 44 hours of work in a week. In addition to standard labour protections, migrant workers are covered by the specific protections of the Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009. Crucially this places the onus on the employer to keep records of the employment, states that labour officers have the right to inspect without a warrant, and outlines penalties
and prosecution. Finally, available pre-departure information for live-in caregivers that they cannot give up any of these employment standards rights, and any agreement to do so would be invalid.

NEW YORK

The State of New York (USA) introduced a Domestic Worker's Bill of rights in 2010 recognising the specific considerations for this sector, implemented through a rights framework (albeit it un-entrenched) as domestic workers were excluded from other labour law. It defines a legal working day of 8 hours maximum, and three paid days off after one year of employment. It also makes a requirement for remuneration differentiated by the living situation, with overtime pay at the rate of 1.5 times the regular rate of pay after 40 hours of work for live-out domestic workers and 44 hours for live-in domestic workers. As with Hong Kong in New York, a worker must be remunerated if she agrees to work on her day of rest; crucially however, this should be at the overtime rate of 1.5; and it is specified that the weekly day of rest should coincide with the worker's day of worship, recognising the right of workers to practice their faith and right to social life. However, the bill only covers full time workers, and does not cover those related to their employer, which particularly for migrant workers can leave open routes for exploitation. Following this lead, similar Bills of Rights have also been implement in the states of Hawaii and California.

SOUTH AFRICA

Within the Basic Conditions of Employment Act (BCEA) South Africa introduced a Sectoral Determination for the Domestic Worker Sector in 2002, recognising that there are specific labour issues that can only be addressed in sectoral specificity. It sets maximum working-hours at 45 per week, or 9 hours a day for a 5 day week, or 8 hours a day for a 6 day week. It also caps overtime at 15 hours a week and sets definitions for Standby and Night-work, both by nature and by time. Both of these additions to the ‘standardised’ working day require compensation. Finally, daily rest must be 12 consecutive hours, or 10 hours for live-in workers in addition to 3 hours for meal times. However, while the Sectoral Determination provides for “sleep-in” workers, through remuneration, it still does not adequately account for suitable private space or access to social time for workers. Within the Sectoral Determination documented migrant workers should be afforded the same treatment and protections as national domestic workers.

SPAIN

Spanish Royal Decree 1620, made in 2011, declared new regulations for domestic workers, including a working week of 40 hours maximum, to an agreed schedule, daily rest of 12 hours minimum, and weekly rest of 36
consecutive hours. Workers are entitled to live out during leave, and should be compensated for Standby hours. The decree also accounts for matters of enforcement, which is proposed by a reduction in administration charges to employers as an incentive to comply. With data from 2004 showing that ‘36 per cent of all female migrant workers in Spain find work as domestic workers’ (ILO 2013:35) and the number of domestic workers has only grown since then even proving fairly resilient in the economic downturn, Spain has recognised through this decree that in employers must be involved in improvements of labour conditions.

URUGUAY

As the first country to become a signatory of the ILO Convention 189 Uruguay is considered to be leading in positive practice for domestic workers in a number of ways. Using a process of collective bargaining employment conditions in domestic work since 2006, negotiations have produced a premium for time service, compensation for night work, and the creation of the Domestic Worker Day on August 19 as a paid holiday. Whilst regional differences may be argued in the case of Uruguay, fundamentally the negotiation process of collective bargaining gives voice to government, employers and workers. The recognition given to domestic workers through a named public holiday acknowledges the value of this work, and furthermore these introductions are relatively recent, showing

While the brief discussion of all these examples may be critiqued further, they are useful to show that domestic workers need not be excluded from national labour standards, and furthermore a number of nations have seen the value in providing specific protection requirements for the sector based on the household and the nature of the work: ‘While much remains to be done to make this a reality, some countries have shown that better legal protection of domestic workers is in fact possible and viable’ (ILO 2013:43). We may summarise a number of measures, namely:

- the restriction of the working day to be 8 hours, a weekly limit of 40-44 hours, with any additional hours at an overtime rate of 1.5.
- the documentation of hours worked, including agreed rest time, and a strong standard employment contract that outlines the legal obligations of both the employer and employee.
- the definition of standby and night-work, and overtime or remuneration accordingly.
- the definition of daily rest periods as well as working-hours, at between 10-12 consecutive hours.
- the pronounced freedom to use the rest day as chosen by the worker.

POINTS FOR IMPROVEMENT

Drawing from this, there are a number of points which would be most
valuable in improving labour conditions and relationships in the domestic sector. These are put forward in the belief that they can be beneficial to society as a whole, and also recognising the steps that have already been taken in Hong Kong, such as: the right to organize; coverage under the Employment Ordinance; the strength of access to reconciliation, tribunals and courts; and contracts with minimum standards required by the Immigration Department in Hong Kong. Taking into account these foundations are the following points for improvement:

1.) There is a real need to give recognition to the domestic sector, both socially and legally. The need to extend protection of workers to the privacy of the domestic household is vital, not only in Hong Kong but in many other countries. This calls for a re-evaluation of the value of domestic labour, not only in the actual work but also in the freedoms it enables for employers and others.

2.) There is a need for the recognition that the home is neither a safe nor fair working environment; and this demands the re-evaluation of the conception of the home as “off-limits” for regulation, with the recognition that domestic labour is labour. Currently the sanctity of the household stands better protected than the rights of workers. The reasons given to exclude domestic work due to sectoral peculiarities are precisely the reasons to offer specific protections, related to the sector and the household.

3.) There are specific issues relating to domestic work and its construction as a feminine sector. Women are disproportionately effected by the under-valuation of the domestic sector and restrictive policies in terms of status, livelihood, accommodation and mobility.

4.) The informality that characterises the domestic sector needs to be shifted towards a formal labour relationship, involving documentation of agreements, and with awareness raising, both on the part of employers and employees. Employers need to be aware of rights as a point of contractual obligation, it should not be the employees responsibility to remind them, eg. sufficient food provision.

5.) Existing provisions, such as the Standard Employment Contract and obligatory rest period of 24 hours in a week need to be strengthened and meaningfully enforced. Currently they are not used to their full potential.

6.) Legal protections for migrant and local workers need to be equal, otherwise it enables migrant labour to be an exploited and expendable workforce that can be used as a cheap alternative. This breeds the unhappy employment dynamic that is often found in domestic situations.

7.) With ageing populations and economic growth in certain parts of the world, the demand for 24 hour care workers will continue to grow; simultaneously as global inequality increases the availability of the workforce requiring adequate labour protection is not an issue that will resolve itself. Recognising that, as stated in CEDAW, that
migration is a global phenomenon and therefore requires cooperation between States. Sending States should be protecting workers by demanding better rights also.

**POLICY RECOMMENDATIONS**

1.) *On Labour within a household:*
   i) With the employment of a worker within ones home should come the understanding that it is a labour relationship and therefore should be subject to regulation.
   ii) Labour inspections in the household are already implemented in Ireland and Uruguay, and are stated as a right in Canada.

2.) *Whilst Live-in is often preferred by employer and employee, live-out still needs to be an option:*
   i) The extent to which domestic workers would live out is difficult to predict, however giving the option to do so would be most beneficial to both employee and employer, and may very lead to more harmonious employment relationships. Giving privacy and adequate rest would improve both labour and employment dynamics.

3.) *Documentation needs to be employed as a key improvement measure across the board for many issues relating to regulation of working-hours, working-standards and payment:*
   i) This will involve a strong shift to formalise employment relationships in the sector. Formalisation through explicit contracts and documentation should reduce the paternalistic dynamic often taken between employer and employee in a domestic situation.
   ii) Contracts and other documentation should be made available in the language of both the worker and employer. In places, such as Hong Kong, where large numbers of workers hail from the same places, this should be highly feasible.
   iii) Documentation and records will be available for labour inspections.

4.) *Rest periods need to be established by governments not just between employer and employee:*
   i) These should include an allocated time for taking breaks for meals three times a day.
   ii) The meaningful implementation of the rest day, including substitution with notice.
   iii) Stand-by periods should be compensated for by alternate rest-time or remuneration.

5.) *Enforcement must be enacted in a meaningful sense:*
   i) Policy and legislation must be preventive in practice rather than corrective in disputes.
   ii) Penalties, including prosecution, must be significant repercussions for the employer.
   iii) Governments need to apply more resources and manpower for enforcement purposes, including sharing of information for enforcement and prosecution.
6.) *Sharing of best practice between States is a valuable tool:*

i) This includes sending governments sharing with pre-departure training and other measures.

ii) There should also be considered a tripartite of constituents: governments, workers and employers, placing some amount of responsibility at all levels.

**CONCLUSION**

While domestic work, by its nature, places a unique demand on the worker often of full-time live-in service, this expectation is built upon a foundation of gendered, historical inequality. For domestic workers to provide and maintain quality labour standards, they should at least be afforded general labour protections that apply across all sectors, but is particularly apt for sector specific regulation also that takes into account the unique nature of the work. Not least, standards should be regulated in terms of rights; rights to adequate rest, to private and family life, to sufficient food and to be afforded some level of personal decision. The particular combination of a live-in requirement and lack of working-hours regulation is a green light for increased exploitative situations, and cannot be sustained both from a basic rights perspective, but also in light of positive implementation examples from other regions. Living-out from the place of work should be an option, and where this does not occur it should be replaced by a compromise of bringing labour regulations in to the home.

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JUSTICE FOR ALL MIGRANT DOMESTIC WORKERS

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VICTIM OF RAPE & PHYSICAL ABUSE IN MALAYSIA

Justice for Erwiana and All Migrant Domestic Workers Committee
RESEARCH ON MALPRACTICES OF EMPLOYMENT AGENCIES, THE ADEQUACY OF EXISTING LEGISLATION FOR REGULATION AND AVENUES FOR RESTORING JUSTICE

Joanne Chan

INTRODUCTION

With mounting demand of domestic labour for working families, there are currently about 320,000 foreign domestic workers (FDWs) residing in Hong Kong, comprising of over 3% of the total population of Hong Kong.\(^1\) The majority of FDWs originates from Indonesia and the Philippines and some from other countries such as Thailand, India, Nepal, Sri Lanka and Bangladesh. More than 98% of them are female. Owing to the hopeless economies in their respective countries where unemployment, dire poverty, unreasonably low income and lack of social welfare persist, the FDWs had no alternative but to sacrifice their enjoyment for the livelihood of their families and work in other countries. However, they experience social exclusion and discriminatory treatment in Hong Kong compared to their counterparts. One striking example is the New Conditions of Stay of the Immigration Department exclusively imposed on the FDWs, in which the notorious “two-week rule” stands, compelling them to leave Hong Kong two weeks after termination of their employment contract. Regarding their salaries, employers are only required to pay a minimum allowable wage of HK$4,010 to the FDWs as opposed to HK$30 hourly wage for other workers, as FDWs are not protected by the Minimum Wage Ordinance. Another problem is the rampant physical, verbal and sexual abuse of FDWs by their employers, which is demonstrated in many recent news, such as Erwiana\(^2\) and Rowena’s\(^3\) case. Other plagued issues such as unregulated working hours, arbitrary termination, the potential removal of maternity rights also haunt the FDWs.

With the blatant disregard of the basic human rights of these vulnerable FDWs by the society, more issues arise to further deprive the FDWs. The focus

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of this research paper is the exploitation of the FDWs by the unscrupulous employment agencies and the evaluation of relevant laws and avenues for restoring justice. Before advancing to discussion, it is useful to learn about the procedures of working as a FDW in Hong Kong. In order to work as a FDW in Hong Kong, they must process their applications at the recruitment agencies, as direct hiring is abolished by the workers’ respective governments. Before working in Hong Kong, the FDWs need to receive practical trainings on handling household chores and language skills in their home countries, which are usually conducted by the employment agencies there. Then, placement fees may be charged from them. For the Philippines, the employment agencies are forbidden from charging FDWs with placement fees, pursuant to the Guidelines for Household Service Workers by the Philippine Overseas Employment Administration (POEA). However, the agencies could charge for training, medical check-up and other miscellaneous expenses, which could be arbitrarily decided by the manipulative agencies, for over PhP58,000. As for Indonesia, the placement fee of FDWs is set at Rp. 15,550,000, an equivalent to HK$15,550, which encompasses all the training fees and other miscellaneous expenses. It is mandatory for FDWs to sign a standard employment contract as specified by the Director of Immigration stating their conditions of stay and employment so as to be imported to Hong Kong. Upon arrival in Hong Kong, the principal agencies in Hong Kong will take charge of the FDWs and help them settle in the boarding houses, waiting for the day of working at the employer’s residence. Nearly 60 per cent of domestic workers in Hong Kong are in debt, according to surveys of 2,000 women conducted by the charity Enrich from 2008 to 2012, hinting the growing problem of human trafficking and forced labour.

The lamed policy of employment through recruitment agencies has provided an undesired opportunity for these agencies to exploit profits at the FDWs’ expense. The deployed FDWs are currently facing various problems which substantially affect their livelihood and well-being, which will be detailed in the following sections. International covenants such as the International Covenant of Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labour Convention (ILO) will be closely referred to outline the obligations of the HKSAR government towards the FDWs. The relevant laws and regulations governing the operations of the recruitment agencies in Hong Kong including the Employment Ordinance will then be evaluated against the international standards. Following this is an overview of the avenues for claims and complaints against the malpractices of the recruitment agencies and an evaluation on the adequacy of such measures for

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4 PhP refers to Philippine Peso. The amount is equivalent to approximately HK$10,330. This is from a case of a maid who received trainings and medical examinations by an agency in Manila and was unaware of the illegality of the placement fee collection in the Philippines.

5 This arrangement is affirmed under a decree (KEP 186/PPTK/VII/2008) of the Director General for Training and Placement of Manpower, dated 10 July 2008.

6 Labour Department. Form ID 407, detailed in Guidebook for the Employment of Domestic Helpers from Abroad (ID 969).

the aggrieved FDWs. Lastly, recommendations will be given as a call for action for different authorities and stakeholders to improve the status quo.

**METHODOLOGY**

This research is based upon both primary and secondary sources. The primary sources include information obtained from the domestic helpers and case managers through interactions at the Mission for Migrant Workers Limited (MFMW) and enquiries to different government bodies at their offices. For secondary sources, a wide range of articles, journals and booklets from the concerned groups for FDWs and relevant government agencies including the Immigration Department, the Labour Department and the Equal Opportunities Commission.

**MALPRACTICES OF THE RECRUITMENT AGENCIES**

*Illegal collection of placement fees*

The recruitment agencies in Hong Kong develop ingenious ways to exploit the innocent FDWs. A major malpractice of the recruitment agencies, which severely undermines the FDWs’ livelihood, is the illegal collection of commission as placement fees. Pursuant to the Employment Ordinance and the Employment Agency Regulations, the maximum commission which may be received by the employment agency is 10% of the first month’s wages, i.e. $401. Nevertheless, according to a study in 2013 by MFMW, 77% of the FDWs encountered problems with illegal fees and overcharging of recruitment agencies. Another study by Catholic Commission for Labour Affairs found that more than 60% of the workers paid their recruitment agencies more than the maximum amount allowed by local legislation, some of which were even charged 20 times this allowed rate.

Taking advantage of the FDWs’ lack of knowledge of the law, some employment agencies collected extravagant commission by cash from the FDWs before they are allowed to work in the employer’s residence. In order to evade legal liability of contravening the law, the employment agencies do not issue any receipts regarding the placement fees. It is also commonplace that the agencies instigate the employers to terminate their contract within a short period of time of employment. For instance, they often call the employers to ask if the FDWs are performing their duties perfectly and encourage them to change a new one even if they just make an insignificant mistake. After termination of employment, the agencies can then charge extra placement fees for a new employer. The placement fees were so disproportionate to the FDWs’ salaries that the helpers may not earn anything after performing hard

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8 Set in Employment Ordinance (Cap 57) and Regulation 10(2) of the Employment Agency Regulations (Cap 57A).
Another tactic is to deduct the agency commission from the workers' salary. Instead of charging the over-payment directly from the FDWs, some agencies request for the commission from the employer and ask the employer to deduct the fee from the workers' salary. However, the FDWs are usually instructed to sign to confirm the receipt of full wages before the illegal deduction.

It is also common for the agencies to force the FDWs to enter into a loan agreement with finance companies in disguise of illegal collection of excessive commission. The IMWU survey found that 34 per cent of Indonesian migrant domestic workers were asked to sign a loan agreement. After the FDWs sign the contract, the agency will collect the full amount and may occasionally give a part to the workers. However, the workers will have to pay according to the loan repayment schedule. Otherwise, they may be harassed and threatened by phone calls from finance companies. Besides, there are identified cases where the FDWs are asked to obtain loans with false documents provided by the agencies, including bogus employment contract with fake details about the employer. As usual, the loan is usurped by the agencies while the uneducated FDWs may risk prosecution for involving in these illegal activities plotted by the agencies. Using this tactic, the notorious agencies can manipulate the FDWs effortlessly with the debt bondage while concealing their illegal collection of agency fees.

**Contractual deception**

Working in an unfamiliar environment without proper education of the local law, the FDWs are susceptible to the instructions and suggestions by the agencies to accept unreasonable and even illegal work arrangements. Surprisingly, many employers in Hong Kong are also ignorant of the law and misled by the agencies.

There have been numerous reported cases at the community organisations of FDWs being deceived by the agencies to work in places other than that specified on the employment contract. For instance, some are asked to work in the residences of the employer's relatives whilst some even have to work outside Hong Kong. A striking case is that of a helper who was supposed to work in a 680-sq. feet flat was brought to the Mainland and made to work in a big house with 2,800 sq. feet as well as to plant vegetables in a farm.

Besides, the agencies further deprive the FDWs of their basic rights to enjoy day leaves which include statutory holidays, rest days and paid annual leaves. Under s. 17 of the Employment Ordinance, the FDWs should be entitled to not less than 1 rest day (for 24 consecutive hours) in 7 days. Regardless of this, it is a common practice for agencies to forbid the FDWs from taking leaves in the first three months of their employment, emphasising the need of getting acquainted to the work environment and understanding the

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employer’s needs. Many FDWs also have their statutory holidays granted under s. 39 of the Employment Ordinance deducted without compensation.

Furthermore, some agencies collude with the employers to exert pressure on the FDWs to sign documents which put them in disadvantageous positions. For instance, after termination of employment, when the employer brings the helper to the agency for the final arrangements, the agencies are inclined to stand on the employer’s side and deliberately misinterpret the law concerning the helper’s rights. They required the FDWs to sign documents to waive their rights to claim for the wages in lieu of one-month notice from the employer. On the other hand, some agencies allege that employers can hire Indonesians, Sri Lankans, Indians and Nepalese and pay them less than the minimum allowable wages, which blatantly contravenes the Race Discrimination Ordinance.

**Withholding and confiscating identity documents and mobile phones**

From a report by Amnesty International\(^\text{12}\) and Indonesian Migrant Workers Union (IMWU)’s survey\(^\text{15}\), the vast majority of the FDWs had their documents withheld by either their employer or the agency. The confiscation of their identity documents severely restraint their freedom to travel abroad and seek for assistance as a transient Hong Kong citizen. In many cases, this mean that the FDWs are coerced into working for the employers even the contract terms are not complied with and they receive maltreatment. Some agencies even recommend the employers to collect the helper’s mobile phones so that they will become more submissive and obedient. Without a proper avenue to communicate with others, the FDWs are rendered more vulnerable to the suppression by the agency and the employer. They also suffer from tremendous sense of insecurity and fear.

**Failing to fulfill their duties and responsibilities**

Many agencies are reluctant to help the FDWs in advising them of their rights and entitlements. Some also refuse to help retrieve the FDWs’ belongings and documents from their employers. Receiving complaints against the employers, the agencies placate the FDWs by promising to deal

\(^{12}\) Amnesty International. (2013). Exploited for Profits: Failed by Governments – Indonesian Migrant Domestic Workers Trafficked to Hong Kong. Of those who were asked and responded to the question, 51 out of 93 stated that they did not receive a weekly day off.


\(^{14}\) Amnesty International. (2013). Exploited for Profits: Failed by Governments – Indonesian Migrant Domestic Workers Trafficked to Hong Kong. Of those who were asked and responded to the question, 86 out of 93 stated that their employer or placement agency in Hong Kong kept their identity documents, such as their passport, KTKLN, Hong Kong ID card, and/or employment contract.

\(^{15}\) ITUC, IMWU and HKCTU. (2013) Final Report on Malpractices of Recruitment Agencies toward Indonesian Domestic Workers in Hong Kong (unpublished), in collaboration with the Institute for National and Democratic Studies (INDIES). IMWU’s survey found that 74% had their documents confiscated by their employer or the placement agency.
with their problems. However, a lot of FDWs expressed that even after reporting their cases of abuses and mistreatment to the agencies, their cases were not followed up. Many clients from Mission for Migrant Workers Limited pointed out that the agencies had close relationships with the employers and thus tend to turn a blind eye to their predicament. They also found it daunting to communicate with the agencies because of language barrier and the unhelpful attitude of the agencies.

**OBLIGATIONS OF THE HKSAR GOVERNMENT**

There are a lot of international treaties calling for affirmative actions of the governments to eliminate human trafficking for protection of human rights. Among them, ICCPR is ratified by the HKSAR government. Article 8 stipulates that no one shall be held in any form of slavery or in servitude. Forced or compulsory labour is also prohibited. Such provision is incorporated as Article 4 in the Bill of Rights Ordinance (Cap 383). Further, ICESCR, ILO Nos. 29 and 105 and the Convention on the Elimination of Discrimination against Women (CEDAW) lay down the international standards of handling labour force and ensuring protection for workers which are expected to be observed by Hong Kong as a state party. In particular, the ILO Convention No. 29 interprets the correlation of human trafficking and forced labour and expands the scope of these terms as concrete concepts to extirpate the misunderstandings of public associated with human trafficking. Basically, forced labour is constituted where the work or service is involuntary and enacted under the menace of a penalty. With the application of universal concepts, it becomes easier for people all over the world to understand the essence of human trafficking and encourages the governments to enact local legislation and positive measures to tackle the persisting problem.

However, even with the ratification of the aforementioned international treaties, the government falls short of their requirements to curb human trafficking proactively. The enforcement of legislation including sanctions and prosecution of perpetrators and social support for victims is not strict and effective. Such problem is never given adequate attention despite the overwhelming amount of international treaties produced to urge the government for immediate actions. Consequently, the agencies continue to circumvent the law to coerce the FDWs to work under unreasonable terms with debt bondage, deception and confiscation of identity documents.

**EVALUATION ON EXISTING LAWS AND REGULATIONS**

**Licensing**

All employment agencies have to apply for licenses to the Commissioner for Labour in order to operate legally in Hong Kong, the breach of which

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16 Christian Action, Submission on “Policies relating to Foreign Domestic Helpers and Regulation of Employment Agencies”

17 Section 52, Employment Ordinance (Cap 57).
will attract a fine of $50,000.\textsuperscript{18} The Commissioner may refuse to issue, renew or revoke the license under circumstances where the employment agency is likely to be used for illegal or immoral purposes;\textsuperscript{19} the person operating is convicted of an offence or fraud, dishonesty or extortion;\textsuperscript{20} or knowingly supplied false information to commissioner.\textsuperscript{21} It can be seen in the relevant provisions that the punitive consequence of not adhering to the licensing regulations is not sufficiently serious to deter the agencies from malpractices. The Commissioner for Labour has issued more than 2500 employment agency licenses in 2013.\textsuperscript{22} However, in 2012, the Commissioner for Labour revoked only two placement agencies’ licences and four in 2013.\textsuperscript{23} Given the avalanche of cases against the agencies regarding illegal collection of commission and identity document confiscation, it is apparent that many unscrupulous agencies are able to circumvent the regulation of the licensing system and avoid being stripped off of the right to operate. In addition, although the Commissioner is entitled to inspect the place of business of the agencies and investigate suspected offences, it is of rare occurrence for the officers to investigate without compelling evidence, which contributes to the negligible number of agencies being revoked of licenses.\textsuperscript{24}

\textit{On fees and commission}

As aforementioned, the law stipulates that the employment agencies could only collect a maximum of 10\% of the FDW’s first-month salary as commission.\textsuperscript{25} The agencies are also prohibited from charging other fees from the workers.\textsuperscript{26} If the agencies contravene the above, they will be liable on conviction to a fine of $50,000.\textsuperscript{27} Again, the deterrent effect of the fine is questionable, given that the potential profits far exceeding the amount of fine are highly tempting. According to the provisions regarding licensing, even if the agencies are discovered to collect extra commission, it does not necessarily follow that the Commissioner will revoke the license from them.

\textit{Human trafficking}

There is no specific legislation addressing the critical problem of human trafficking. As suggested by Justice Centre Hong Kong and Liberty Asia, the legislation is “scattered across different ordinances, leading to
significant legislative gaps and critical difficulties with enforcement.” 28 This is a fair observation of the anti-human-trafficking law in Hong Kong. Under Section 129 of the Crimes Ordinance (Cap 200), “a person who takes part in bringing another person into, or taking another person out of, Hong Kong for the purpose of prostitution shall be guilty of the offence of trafficking in persons to or from Hong Kong”. Besides, the conditions of stay for FDWs are enlisted under the Immigration Ordinance (Cap 115) while physical violence oppressing workers is unlawful according to the Offences against the Person Ordinance (Cap 212). The Employment Ordinance (Cap 57) and the Employee’s Compensation Ordinance (Cap 282) are enacted to protect the workers from the exploitation of employer.

Nevertheless, the Crimes Ordinance solely focuses on the transnational element of human trafficking and does not address the exploitation of local workers, including the FDWs, comprehensively. Besides, its scope is narrowed down to a large extent to sex workers, excluding the majority of workers who pursue other professions. The other ordinances also fail to tackle the gaps of enforcement, prosecution, victim support and access to justice. The scattered legislation increases the difficulty of enforcement as the responsibility is diverted across various government bodies without holistic guidance on well-planned collaboration. The severe problem of human trafficking is downplayed by the lack of recognition by the local legislation as a serious offence or crime.

**AVENUES FOR CLAIMS AND COMPLAINTS AGAINST AGENCIES**

*Small Claims Tribunal*

Victims can file a claim against the employment agencies at the Small Claims Tribunal to restore justice for being overcharged of commission. The Tribunal deals with claims which do not exceed $50,000 and are associated with service charges, debts and consumer claims. 29 No legal representation is allowed and no legal advice is given to the claimants. The civil litigation in the Tribunal usually takes at least several months. The claimant has the burden to provide sufficient evidence to support his claim and explain his case to the court. The winning party can recover the costs incurred, but legal cost is not recoverable.

The Tribunal gives the FDWs an opportunity to claim back the excessive commission paid to the agencies. However, this mechanism alone is inadequate to address this unjust condition. Firstly, as the Tribunal is only responsible for claims of small amount, the FDWs may not recover full payment from the agencies. Unfortunately, many of them are charged with commission exceeding the prescribed amount. Instead of being allowed to subdivide the claim to bring it within the Tribunal’s jurisdiction, they could only forgo the portion of the claim above $50,000. Secondly, bearing in mind the lack of

28 Justice Centre Hong Kong & Liberty Asia. (2014, March). How many more years a slave? Trafficking for forced labour in Hong Kong.

education and communication skills of the FDWs, the prohibition of legal representation and non-provision of legal advice undermine the success rate of their claims. Thirdly, the long span of proceedings at the Tribunal causes the FDWs to abandon their claims as they have to finance their accommodation and food in Hong Kong on their own after the termination of contract. There are also other uncertainties, such as how long will the visa be extended by the Immigration Department for each application and the fees payable, whether the agency will attend the court, whether the agency is financially sound and even after winning the case, whether the agency will comply with the court order. Furthermore, in order to increase the likelihood of succeeding the claim, the FDWs will have to gather strong evidence, which may only be available with further expenses and effort. The psychological pressure and distress will also necessarily follow the long-lasting proceeding.

**Employment Agencies Administration**

The Employment Agencies Administration (EAA) is responsible for administering Part XII of the Employment Ordinance and the Employment Agency Regulations. It inspects the operation of employment agencies and aims to cease malpractices of the agencies that harm local employees. Being mistreated by the agencies, the FDWs can report to the EAA. Upon sufficient proof, the EAA will investigate the case and sanction the erring agencies.

However, the EAA is not efficient in dealing with the FDWs’ cases against the employment agencies. One fatal shortcoming of the EAA is its lack of power to carry out its duties. In general, the EAA has no legal mandate to take affirmative actions against the agencies, such as to require the agencies to hand over information about their operation and prosecute the perpetrators after close surveillance of their operations and case investigation. Disappointingly, it only adopts a passive role in relying on reports from the victims and their evidence for initiating investigation. Additionally, the administration of the EAA lacks transparency. It does not reveal the procedures of case handling through publicly accessible channels like the Internet. Besides, there is no specific guidelines regarding its cooperation with other law enforcement bodies such as the Police Force which renders the EAA an isolated organisation without proper back-up.

**Hands-on conciliation of Philippines Consulate General**

Another possible avenue for complaints exclusive for the Philippines migrant workers is the hands-on conciliation offered by the Philippines Consulate General. First, the worker has to lodge a complaint with the Philippine Overseas Labour Office of the Philippines Consulate General. A conciliation meeting between the agency representative and the complainant will be arranged in which the conciliator will sit in and others are not allowed

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to join. There will be a discussion on the worker’s circumstances and her pleas for a larger settlement. Towards the end of the meeting, the worker can choose between settlement and endorsement to the Philippine Overseas Employment Agency (POEA) in the Philippines in order to have further conciliation meetings. If settlement is still not attained, then the case will be referred to the National Labour Relations Commission (NLRC), in which a court hearing will be conducted and the erring agencies will be sanctioned with possible revocation of license.\(^\text{32}\)

However, this method is only available for Philippines migrant workers who applied for employment via agencies in Philippines with a counterpart in Hong Kong. The worker will need to pass through a long process of pursuing settlement by conciliation meetings. It is also observed that the agencies employ various tactics to evade liability. For example, they ask the worker to meet at the agency instead of the Consulate to settle the case, reschedule the meetings to delay the conciliation and insist that the worker’s case will fail due to lack of evidence.\(^\text{33}\) Besides, the conciliators tend to urge the worker to settle the case by proceeding through the conciliation very swiftly, discouraging the worker to further pursue her case to the POEA and NLRC and even acting biased with no intention to strive for justice for the worker.\(^\text{34}\)

**RECOMMENDATIONS**

*Improvements on legislation*

As discussed, the malpractices of employment agencies, including forcing the FDWs to take out loans, confiscating their identity documents and deceiving them into working against the contractual terms, will probably amount to human trafficking. To our surprise, most of these agencies are not prosecuted under the legislation due to the narrow interpretation of human trafficking. Therefore, it is recommended that the definition of human trafficking be broadened to include forced labour. The government can adopt the definition provided by the United Nations Trafficking Protocol (2000)\(^\text{35}\) and introduce it to the Crimes Ordinance to criminalise human trafficking in all forms. This will combat human trafficking in a broader sense – no matter it occurs across borders or within a country, what the exploitative purposes are and whether it is organised by crime groups.\(^\text{36}\)

Alternatively, the government can create a sensible and flexible definition through close reference to international standards such as ILO Nos. 29 and 105. After laying down the foundation with a flexible definition, it is anticipated that a comprehensive anti-trafficking law be established to

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\(^{33}\) *ibid*.

\(^{34}\) *ibid*.


encompass human trafficking in all forms.

In order to produce a desirable deterrent effect on the illegal activities of employment agencies, the sanctions of the breach of Employment Ordinance in relation to illegal collection of commission and operation without license must be increased. Fines can be charged in respect of the overcharging amount, so that the agencies will not risk contravening the law for more profits exploited from the workers.

In addition, legislation on labour should be amended to provide better protection to the FDWs. Firstly, the two-week rule of the Immigration Department should be relaxed for the FDWs to pursue their cases and complaints against agencies without worrying about the visa extension and the slim possibility of finding a new employer. Secondly, the live-in requirement should be abolished to allow the FDWs to choose whether or not to live at the employer’s residence. This can ensure that they would not be bound by the fear of having no accommodation after termination and decide to continue working even under oppression. It will also be commendable if the government waives the fee of visa extension for FDWs who file their cases at courts and other government bodies against the agencies and their employer. In short, discriminatory restrictions on FDWs should be abandoned so as to encourage them to pursue justice for themselves through all possible means.

In amending the labour legislation, the government can deem the ILO No. 189 as a framework. As a matter of principle, it urges the governments to respect and promote elimination of discrimination in respect of employment and condition and elimination of all forms of forced or compulsory labour.\(^{37}\) This can be achieved through combating abuse, harassment and violence, informing the domestic workers of their terms and conditions of employment, regulating working hours, setting minimum wage, allowing free choice of residence, etc.\(^ {38}\) The government should implement these measures gradually through local legislation, while ensuring a strict enforcement of the law.

**Enforcement of the law**

Without strict enforcement, the licensing requirements stated in the Employment Ordinance are merely futile. It is suggested that the government should impose stricter licensing and carry out closer monitor to the agencies. Although it is acceptable for the government to dedicate the accountability of handling agencies to the Commission for Labour, it must ensure that the Commissioner approves, rejects or revokes with sound justifications. For instance, the Commissioner can request the applicants for detailed executive plan about their operations and perform site visits to their office on a regular basis. Through closer supervision after approval, the Commissioner should also investigate potential collusion of the agencies with finance companies from which the workers are asked to pay for loans. If the agencies do not comply with the law, the Commissioner should take immediate action to sanction them.

\(^{37}\) Article 3, ILO No. 189.

\(^{38}\) Articles 5, 6, 7, 9, 10, 11, ILO No. 189.
Regarding the inadequacy of means of restoring justice, for the Small Claims Tribunal, it is advised that free legal advice be offered to the workers, which is similar to the services by the Labour Relations Division of the Labour Department. As for the hands-on conciliation meeting of the Philippine Consulate, the workers should be allowed to be accompanied by legal professionals and their friends so as to improve transparency and minimise bias. A detailed guideline about the conciliators’ roles and responsibilities can be compiled to maintain transparency and impartiality. Serving as the only organisation handling complaints against employment agencies, the EAA should utilise its resources efficiently through careful planning and obtain more power from the government to discover various cases of exploited FDWs and help gather evidence for future litigation and prosecution. It should create a website and propaganda to advocate their services to the needy and explain to the public their procedures of case handling. This would enhance the public understanding about the work of EAA and ascertain the FDWs’ access to justice.

**Collaboration between the Consulates and the HKSAR government**

Since the labour exploitation by employment agencies is a cross-border issue, the consulates of the FDWs’ respective countries must devise regulations on the agencies by concerted effort. At this initial stage, the government can have meetings with representatives of the consulates to discuss the status quo of the malpractices of agencies and the existing laws and regulations of their own countries. Then, the government and the consulates can set up a work group to make both short-term and long-term plans to tackle the problem gradually after prioritising different problems. For instance, they can supervise the operations of agencies suspected to commit offences. Besides, the government can further discuss with the consulates about the ambit of power and administration of the EAA so that they can accommodate the government’s new policies.

**Empowerment of the workers**

Last but not least, considering that one of the main causes of the agencies’ malpractices is the workers’ ignorance towards the local legislation and their entitlements therein, the government and pro-migrant-workers organisations should publish comprehensive materials covering the FDWs’ rights and all relevant laws affecting them. They can also hold talks in the Causeway Bay and Central to inform them of their entitlements using more informal ways with interactions. In addition, the government can consider making it mandatory for the agencies to teach the FDWs about their rights so that they will less likely fall into traps of the agencies and the agencies will be discouraged from deceiving the FDWs.
CONCLUSION

Vaunting as an international and cosmopolitan city with world-leading respect and protection of human rights, Hong Kong disappointingly fails to catch up pace with international standards as laid down in various treaties including the ILO, ICCPR and ICESCR. The FDWs continue to be oppressed and exploited by unscrupulous employment agencies, as they circumvent the law and make use of social exclusion and indifference towards the FDWs. Ranging from illegal collection of commission, contractual deception to confiscation of identity documents, the agencies employ various tactics to coerce the FDWs into forced labour. The culprit of these malpractices is the loopholes of the local legislation, which include the narrow definition of human trafficking, scattered ordinances with drifting focus on the essence of trafficking, inherent discrimination against FDWs in labour legislation and weak sanctions on illegal practices of agencies. In the aspect of enforcement of the law, current mechanisms are insufficient to assist the FDWs with their cases against agencies due to lack of power, transparency and efficiency. Facing these difficulties, it is recommended that the government should amend the legislation by reference to international indicators of human rights and criminalise human trafficking in all forms. Stricter licensing system should be imposed to deter the agencies’ malpractices at the expense of the FDWs. With the cross-border nature of this problem, the government should actively seek for solutions with the consulates of the FDWs’ home countries and cooperate with pro-migrant-worker organisations to empower the workers with knowledge about their rights.
RESEARCH ON PHYSICAL ABUSE OF FOREIGN DOMESTIC HELPERS BY THE EMPLOYER

Tony Tsang

INTRODUCTION

Background

In light that foreign domestic helpers (FDHs) make up approximately 3% of the population of Hong Kong and nearly most of them are women, physical abuse, even to the less extent like occasional and minor beating, is definitely intolerable in the Hong Kong society, which has a sounding legal system and am proud to offer justice to those who seek for it. Nonetheless, in these years, physical abuse cases towards the FDHs by the employer have been exposed by the mass media. The numerous wounds of Erwiana Sulistyaningsih aroused stunning attention from the Hong Kong society. Apart from this landmark case, the case of Kartika, which I will discuss it more in-depth below, cannot be neglected as well. Let us recall—in last September, a Hong Kong couple, Tai Chi Wai and Catherine Au Yuk Shan, were sentenced to jail because of assaulting their Indonesian maid, Kartika Puspitasari (although they are currently appealing the case to avoid jail). But after all and to our sadness, they may still be part of the iceberg and there are more physical abuse cases waiting to be unveiled by the mass media.

Relevant Statistics

As shown from the statistics of the Mission for Migrant Workers, 16% of the clients the NGO was serving in 2011 had experienced physical or sexual assault (sexual assault is not the focus of this research paper because I am trying to focus on and deal with the most common type of physical abuse, which usually is not stemmed from sexual motive). Two years later, apart from sexual assault, in August 2013, survey conducted by the Mission for Migrant Workers, Migrants Review (MFMW Ltd., 2012 December), p 66.

Migrant Workers showed that 18 percent of the domestic helpers had suffered physical abuse.\(^4\) Generally speaking, this does not necessarily show that the situation for physical abuse against the FDHs has worsened; however, in the Hong Kong society, such scenario is still worrying and frustrating. Particularly in light that the survey was conducted with 3000 FDHs, 18% indicated that 520 FDHs had suffered from physical abuse, including all sort of unlawful physical abuse, for instance, with the use of fingers, by throwing objects, or pulling the hair of the FDHs.\(^5\)

Furthermore, in a recent survey conducted by the MFMW and the AMCB-IMA to 1000 FDHs, 11% of the respondents alleged that they had experienced direct physical violence from the employer or his/her family.\(^6\) Additionally, Caritas Hong Kong previously expressed that they have received more than 4000 calling for help from the FDHs concerning physical abuse.\(^7\) All the above statistics showed that the physical abuse is one of the problems for the FDHs to suffer and has certain potential to become the greatest problem after all, if all those misconducts of the employer were unpunished in the criminal court and everyone could see that physical abuse towards those “sub-humans” will bear no cost from the perspective of tort law.

**Reason for Choosing this Research Topic**

A major reason for me to choose physical abuse as the research topic is that compared to unpaid salary or wrongful termination of contract, assault (legally speaking, nearly all reported physical abuse case is battery, rather than assault) or battery is more serious in the nature of harm caused upon the foreign domestic helpers, more influential to the social trend, more notorious to the reputation of Hong Kong, and thus most unacceptable in both legal, social and international perspective. Moreover, unpaid salary and salary in lieu of notice could be settled and recovered one day but never could physical abuse. The wounds, bruises, scars and all physical pain and sufferings may be carried by the FDHs for life-long and money could not fully represent the damages for both physical and psychological injuries, after the violence caused by the employer. The case becomes worse if the capacity of the FDH to work has been damaged after being physically abused.

**LITERATURE REVIEW OF THE EXISTING LAW AND POLICY**

**The Basic Law**

First and foremost, the Basic Law acted as the constitution of Hong Kong to safeguard everyone’s fundamental human rights. Article 11 signifies the

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\(^4\) We must do more to protect foreign domestic helpers.


\(^7\) Foreign domestic helpers in Hong Kong.
supremacy of the Basic Law.\footnote{Article 11(2): “No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.”} Meanwhile, not only protecting the rights of the local Hong Kong citizens, the rights of the FDHs are also guaranteed since they belong to the category of “other persons in the Region”.\footnote{Article 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.”} Therefore, they should be provided with the same protections for their rights and freedoms when staying in Hong Kong.

The Bills of Rights Ordinance

Second, the Bills of Rights Ordinance (Cap 383) (BORO) offered same protection to the rights of the FDHs as any ordinary Hong Kong citizens. That is according to the Basic Law\footnote{Article 39: “The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.”} and in light that the Hong Kong government has “ratified the ICCPR and incorporated it into the BORO.”\footnote{Migrants Review, p 52.} Article 3 of the Ordinance emphasizes that no torture or inhuman treatment should be allowed.\footnote{Article 3: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”} In addition to that, being a party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,\footnote{Meredith McBride, Hong Kong’s misguided laws failing to halt abuse of foreign domestic helpers (South China Morning Post, 2014 January), retrieved from http://www.scmp.com/comment/insight-opinion/article/1406060/hong-kongs-misguided-laws-failing-halt-abuse-foreign?page=all.} Hong Kong has the responsibility to protect the FDHs from any possible violence. Therefore, Hong Kong should never accept physical violence towards the FDHs by their employers.

From the Criminal Perspective

Third, concerning physical abuse, battery is undoubtedly an offence under the Hong Kong criminal law. Since assault, from the legal perspective, does not consist of physical contact, it is mostly not the case concerning the physical violence and “battery” is the most appropriate term to describe what those employers have unlawfully done. There are four elements for battery to be established. First, there should be intention of bodily contact.\footnote{Collins v Wilcock [1984] 1 WLR 1172.} The second element is the infliction of force while such force needs not to be directly applied.\footnote{DPP v K [1990] 1 WLR 1067.} Third, there must be the presence of the act, which means that the body contact did occur.\footnote{Collins v Wilcock.} Every body contact counts while throwing things to hurt a person belongs to battery. Forth, the force must be unlawful and offensive, which means that it either causes physical injury or is outside the
acceptable usage of daily force.17

The Offence Against the Person Ordinance (Cap 212) is in charge of the offences of battery. They included common assault under section 40,18 assault occasioning actual bodily harm under section 39,19 Wounding or inflicting grievous bodily harm under section 19.20 The most serious offence of that other than causing death is shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm under section 1721 and its difference with section 19 is the presence of intent to cause grievous bodily harm. Once the four elements mentioned above are proven, it is at the judge’s discretion to evaluate the seriousness of the case and to determine the punishment, for jail or fine or both.

From the Perspective of Tort

Compared to the criminal standard of “beyond reasonable doubt”, the standard for tort, which basically focuses on compensating the victim, is much more lower, i.e. “on the balance of probabilities”. However, it also needs the establishment of those essential elements for the claimant to succeed. Other factors related to tort law are important for the case to establish. Apart from the duty of care and breach of duty (which are required in the general tortious claim), the test for causation and remoteness is important as well, since direct and deliberate infliction of force should be shown.22 It is well noted that if defences like volenti non fit injuria23 stands for the defendant, the claimant may not be able to succeed the case. Finally, by showing a general picture, the damages claimable are compensatory damages, nominal damages, aggravated damages as well as exemplary (punitive) damages.24

Comparison with Another Jurisdiction

By comparing the offence for the common type of battery committed by the employer with the jurisdiction in the United Kingdom, the punishment for battery is set out in statute under section 39 of the Criminal Justice Act 1988. When the offence is tried summarily, the maximum punishment is

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18 Section 40: “Any person who is convicted of a common assault shall be guilty of an offence triable either summarily or upon indictment, and shall be liable to imprisonment for 1 year.”
19 Section 39: “ Any person who is convicted of an assault occasioning actual bodily harm shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years.”
20 Section 19: “Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years.”
21 Section 17: “Any person who- (a) unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to any person; or (b) shoots at any person; or (c) by drawing a trigger or in any other manner, attempts to discharge any kind of loaded arms at any person, with intent in any of such cases to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for life.”
23 Nettleship v Weston [1971] 2 QB 691.
six months imprisonment. This shows that the UK standard for common battery is lighter than that in Hong Kong (with the maximum punishment of imprisonment for one year).

Since Hong Kong is basically using the common law cases decided by the English courts before 1997, its position in tort is very similar to that of the UK jurisdiction. For the tortious claim concerning trespass to the person, the test of directness was also approved in the English Court of Appeal in 2002.

For other matters concerning of human rights, the UK has similar protection to that guaranteed by the BORO in Hong Kong and the position for valuing the ICCPR was the same.

**Other Ordinances related to Employment**

Additionally, the Employment Ordinance (Cap 57) is also relevant as it grants the FDHs the right to sue their employers or later to appeal the case if they find it necessary. Similarly, the Employers’ Compensation Ordinance (Cap 282) included “domestic helper” in the definition of “employee” and allows the FDHs to seek justice from court. Consequently, we can see that access to court is not difficult but the reason why the FDHs suffer from physical abuse is mainly owing to their unwillingness to launch the lawsuit, which will be elaborated below.

**The 189th International Labour Convention (C189)**

On the other hand, C189 passed by the International Labour Organization on 16th June 2011, can also come into place to be the strong evidence in support of the protection guaranteed to the FDHs. Although the Hong Kong government, by following the position of the Central Government, never ratified and approved C189, its influence to the position of the FDHs all over the world is still significant. Echoing with the BORO, article 5 is a clear example against allowing physical abuse to the FDHs by doing nothing. There are three reasons for giving more respect and protection to the FDHs. First, Hong Kong has a long history of importing FDHs, which meant that they had helped the Hong Kong people for a long period of time. Second, in spite of indirectly, the FDHs have substantial contributions to the blooming economy by taking care of the child at home and allowing two parents to work outside.

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25 Section 39: “Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both.”

26 Basic Law Article 8: “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”


28 Section 64: “Prosecution of offences”.

29 Section 2: “Meaning of ‘employee’.”

30 Article 5: “Each Member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence.”

31 Migrants Review, p 47—“Hong Kong, which has started importing foreign domestic workers to meet the shortage of local full-time live-in domestic helpers since the 1970s.”
Third, allowing the presence of the employer’s violence may potentially cause negative feeling and attitude of the FDHs coming to work in Hong Kong, which could make them worried and lower their enthusiasm. Consequently, C189 has a high value and importance to be ratified and followed.

“Live-in” Policy

The Hong Kong government has implemented the mandatory “live-in” policy to force the FDHs to live together in the house of their employer. One of the reasons is to avoid the FDHs to compete with the local domestic helpers by making them less advantageous under the “live-in” rule. Such policy can be shown in clause 3 of the Standard Employment Contract, which stated, “The Helper shall work and reside in the Employer’s residence at…” Thus, the FDHs had no choice but to “live with their employer and work six days a week.” Such policy was always accused to have encouraged more hidden physical abuse, which will be further discussed below.

After revealing the existing law and policy, it is more important for us to understand the mindset of the FDHs and explore the reasons why they keep silent when facing physical abuse. I will look into the matters concerning the roles of themselves (including both their background and belief), the role of the Hong Kong government, the role of their local agency company as well as government, and also the role of their employer, in order to see the liability of each party.

REASONS FOR THE FDHS TO BEAR THE PHYSICAL ABUSE

Desire to Maintain the Job

First, a very strong reason for the FDHs to bear the violence (most often is long-term) is due to their necessity and desire to continue for their work in Hong Kong. The possible factors contributing to that included lack of employment opportunity in the place of origin, owing debts to the agency company (from my own experience, this mainly comes from their local agency company) and the economic pressures they faced to maintain sufficient livings for the family (from my observation, many FDHs I have worked with have more than one child). Their eagerness and keen interest to maintain the job contributes to the result of unlimitedly tolerating the physical abuse of the employer. Despite the fact that seeking helps from either NGO or the government can help them to escape from the violence, they are usually put into the dilemma of either violence together with salary or no violence but no salary. They know that if they choose the later one, there is a high possibility

34 Legal Issue (concerning the Foreign Domestic Helpers).
35 Live-In Policy increases female FDW’s vulnerability to various types of abuse, p12.
of not having salary for quite a long time, as they are not allowed to pursue for a new job if they have a pending lawsuit against the employer. Hence, this is a major reason explaining why lots of FDHs admitted suffering from physical abuse in the survey but there are only a few reported cases because many of them do not want or dare to no salary at all until the release of the judgment (which took a significant period of time).

Disadvantages to the FDHs posed by the “Live-in” Rule

Being policy-oriented, the second reason is the presence of “live-in” policy. Not only does it result to very long working hours and 24-hours on-call service (owing to the unclear distinction between time of work and rest), it makes physical abuse more accessible and convenient for the employer. Under such policy, many FDHs are put alone in the employer’s house, without any supervision by others or channels to report the possible physical abuse. Particularly in light that FDHs are all female, supposed to be weaker than man, and supposed to be living alone in the family of a stranger (which means that the husband/wife of the employer may inflict physical violence on the FDHs, separately or together with the employer), they are subject to physical, mental and sexual exploitation. Among all, physical abuse is the most common form existed in Hong Kong.

Past Indoctrination by their Local Agency Company

According to the quotations of the Mission for Migrant Workers, prior to the FDHs’ entry to Hong Kong, they were indoctrinated in the orientation programme and pre-training by their local agency company (from my observation, especially true for the Indonesian FDHs) to be extra humble and tolerable, even to the extent of being physically abused.36

From my personal contact with Kartika, a victim of severe physical violence, she thought that it has been necessary for her to tolerate the battery in order to safeguard the job. Even though she launched her lawsuit in the Labour Tribunal in Jordan, she was only wishing to claim for the unpaid salary for more than a year but never attempted to claim for the damages caused by the battery of her employer and his wife towards her, even after being encouraged by my supervisor and some migrant workers. Until the end of the three-years limitation period, which is specified under section 27(1) of the Limitation Ordinance (Cap 347),37 she alleged suffering from physical abuse from the employer but never intended to sue against it. Despite the possibility that she may rely on the exception in section 27, her willingness to sue posed the major obstacle for her to get damages.

I believe the reasons for her to refuse such tortious claim concerning

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36 ibid.
37 Section 27(1): “This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an ordinance or imperial enactment or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.”
trespass to person are mingled, for instance, owing to the lack of confidence to succeed, being exhausted to participate in the lawsuit, and so on. However, what the agency company had taught her should be influential to her decision.

**Attitude of the Employer**

With reference to the booklet issued by the MFMW, owing to the economic supremacy of the employer over the FDH, over-expansion of such mode of thinking can cause tendency of slavery and more exploitation against the FDH. Unlike the younger generation, from my observation when helping to write the statement or chronology for the clients, some employers in the middle age tend to think that they should be attended to full and unlimited service after paying the monthly wages to the FDH. Therefore, once the FDHs fail to accomplish their assigned task or have certain negligence or carelessness in fulfilling the household duty, without any witness and thinking himself/herself as the highest “master”, the employers may easily inflict physical violence to the FDHs.

**Negligence of Providing Sufficient Supervision and Assistance by the Foreign Labour Department**

In light that exporting FDHs as labour force is one of the major incomes in Philippines, Indonesia and other similar less-developed countries, what the government there focus more is how to maintain such economic income rather than protecting their human rights when working abroad. As an example, during the training course offered by the Labour Department to them at the FDH’s place of origin, the emphasis is more on the way of how to send the money back, instead of teaching them how to evade or stand against any possible physical abuse. Although after the exposure of the case of Erwiana, the Indonesian Consulate, through the mass media, expressed their strong determination for a transparent and fair trial and urge for justice, I believe that that is only official speech while much effort should they have done to avoid such terrible incident beforehand, rather than to launch their strong complaint and dissatisfaction after the case of physical abuse.

**Lack of Confidence in Attaining Justice**

Last but not least, another reason for the FDH not to launch the lawsuit against the battery committed by their employers is because of insufficient confidence in believing that they can seek justice through the Hong Kong legal system. Being foreigners, they are always worried or afraid that they may be prejudiced or discriminated, regardless of by the police, government officers or the judge. Since I have sat in some of the trial hearings of Kartika in

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38 *Live-In Policy increases female FDW’s vulnerability to various types of abuse*, p13.
39 *ibid*.
40 *ibid*.
the Labour Tribunal, as from my observation, she has been thinking that even spending the money and time to sue for physical abuse, there is no promise for a sounding outcome. With this mindset, she was willing and will be happy only to claim back the unpaid salary. Meanwhile, concerning her case, a reasonable doubt by the judge is that why she had waited for so long (i.e. more than a year) before seeking any legal or social assistance. In the hearing, the employer and his wife refused all the accusation about both battery and unpaid salary while they are currently appealing the criminal case as well. So, although as an audience, I am more sympathetic to the sufferings of Kartika, there is no guarantee that the court will award her all the unpaid salary she was claiming for (apart from her lack of intention to sue for battery).

EVALUATION OF VARIOUS ASPECTS AND SUGGESTIONS OF HOW TO AVOID PHYSICAL VIOLENCE TOWARDS THE FDHS

Legal Amendment

The two-weeks rule implemented by the Immigration Department since 1987 remains controversial. Secretary for Security David Jeaffreson justified the policy for the sake of preventing “job-hopping”. This echoes with the FDH’s desire to maintain the job, which is mentioned above at 3.1. Since all FDHs are required to leave Hong Kong within two weeks of the termination of the employment contract unless they find an employer and work for him/her, this explains why the FDH will bear the physical abuse because they want to keep the job, rather than to travel back to the place of origin, where they will face the same or even more economic pressures there (in light that they owe some debts to their local agency company before they can come to work in Hong Kong). Such policy has already been criticized as being unreasonable and “condemned by two United Nations Committees: the Committee on the Convention on the Elimination of All Forms of Discrimination, and the Committee on Economic, Social and Cultural Rights”. Therefore, it is possible and sounds more convincing if the government can open discussion and consultation for this policy so that it can receive the public opinion and determine in a reasonable manner, whether any amendment to the legislation is necessary. Or more specifically, the government can consider giving a special grant at the discretion of the Immigration Department officers to allow more flexibility to those cases that the FDHs have suffered significant physical abuse or in particular need to find another employment. Although this seems a little bit emotional, I believe that it will have more human warmth and better suit the suggestions in C189.

Furthermore, the government may consider altering the “live-in rule” by allowing consultation. I believe at least some rooms for liberate negotiation between the employer and the FDH should be allowed. It is believed that “had Erwiana been living on her own, or with other helpers, it is likely that she, or

43 Foreign Domestic Helpers in Hong Kong.
someone she knew, would have reported the alleged abuse.” Consequently, though such policy is not necessarily wrong, the case of Erwiana and Kartika should alarm the government and public not to deny the possibility for consultation and thus to attain a better consensus.

C189 urges its member to “establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers” under article 17. In spite the fact that Hong Kong is not one of its members, channel for complaints as well as access to court (which echoes article 16 of C189) is always an essential element. In this aspect, I think so far there are no great problems while the terrible abuse cases were stemmed from the unwillingness of FDHs to report and sue, rather than having no channels or legal aid to launch their lawsuit. Nevertheless, it is still worth noted that the Hong Kong government ought to afford adequate protection once the FDHs report incidences of violence, such as immediate follow-ups and investigation, providing shelter, and a certain degree of consultation should be available to them.

Supervision and Guidelines to the Employer

Apart from the “adequate machinery” stressed in the article 15 of C189, “measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work” are also suggested to be implemented under article 17. Concerning to this aspect, I have several suggestions.

On the one hand, the government should issue a booklet or something similar to specify clearly to every employer of FDH that no physical abuse could be tolerated. It should list out all the categories for common and possible battery and lays down the penalty. As an example, I agree with the suggestions by the Hong Kong Human Rights Monitor to “maintain a list of abusive employers and prohibit them from applying for another domestic helper if they have been convicted of abuse.” If the employers have committed physical abuse, they should not be allowed to hire another FDH and possibly inflict violence on her, at least for a long period of time.

On the other hand, rather than waiting for complaint from the FDH at the office, the government should conduct more interviews to the FDH in a regular period, at least to every FDH once every six or twelve months (but this will highly depend on the resources, or more concretely, the government’s determination of tackling the issue of physical abuse on FDH) and maybe sudden inspections to the house of the employer. The objectives of all these measures are to enhance the mechanism of supervision, by directly aiming at discovering the problem instead of receiving complaints.

Community support

44 Hong Kong’s misguided laws failing to halt abuse of foreign domestic helpers.
46 ibid.
NGOs like the Bethune House and the Mission for Migrant Workers are capable for providing emotional and technical supports to the FDHs. Since they often came to the NGOs for help immediately after they left the boarding house offered by the agency company or the house of the employer, to ease their worry, it is important and useful for the staff in the NGO to offer prompt help so that they can launch their case and claim for damages. Otherwise, it is very hard for them to seek help from the Labour Relations Division alone. From my work of conducting interview, helping to write statement and chronology, I think they are the realistic and necessary helps that the clients would like to have.

Simultaneously, emotional support is also useful for them. When they arrived the Bethune House or the Extension Shelter, they are worried about whether they could receive the unpaid salary, the salary in lieu of notice or whether they would be put into jail. I believe other migrant workers staying in the Shelter could offer their at least certain, if not saying sufficient, emotional support as some of them were from the same place of origin and speak the same language, with the same accent. When these people, who all came to Hong Kong to earn livings for their own family, were able to group and live together, before the lawsuits were fully settled and they could return to their home in Philippine or Indonesia. Since I have usually had lunch together with them, I believe the NGO, like the Bethune House or the Mission for Migrant Workers, can offer their substantial assistance in facing the upcoming challenges. Ultimately, they could be less worried and fearful about the future or the possibility of being discriminated.

**Mass Media Exposure**

The mass media exposure is quite important for the public to get in touch or to follow the case of the FDHs who were physically abused, such as Erwiana and Kartika. One point to note is that the victim should be given more protection. Their emotion should be taken into consideration when the reporters want to interview them.

**Supervision and Propaganda provided in and to both the Local and Foreign Agency Company**

Concerning the time and resources the Hong Kong government tends to spend on, as well as the fact that the foreign agency companies are not controlled by the government, it is rather a difficult task to have good communication with them. However, the government can try to give more propaganda to specify the determination and concrete measures for the FDHs to deal with the physical violence if the employers abused them. If these documents and propaganda can successfully reach the FDHs and inspire those agency companies to give more precautions to protect the human rights of their FDH, the FDHs can be better prepared for any possible violence.
CONCLUSION

Under Article 3 of the BORO, the Hong Kong government shares the responsibility to avoid torture or inhuman treatment to the FDHs. C189 acts as a good reference of the international standards of protecting the human rights of the FDH. After the shocking case of Erwiana and Kartika, “shame and blame are being apportioned” to the Hong Kong government as well as the public. To safeguard human right and the reputation of HK in light of giving sufficient respect and care to the helpful FDHs, more should be done to minimize the possibility of physical abuse by the employer. At the same time, consultation for certain issues concerning the rights of FDHs should be brought to the public.

By collaboration between the Hong Kong government with the foreign government, consultation of the public for the chance of amending the outdated or unsuitable legislation, and giving more care in the NGOs and neighbourhood, we can make a better HK society, for both the local citizens and migrant workers. The slogan of “We are workers! We are not slaves!” of the Mission has given me a strong impression. Let us go hands in hands and say “NO’ to the physical abuse!

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47 We must do more to protect foreign domestic helpers.
Report

Booklet

Website
TRACING TRAFFICKING THROUGHOUT THE MIGRANT’S JOURNEY

Katherine Nasol

INTRODUCTION

IN JANUARY 2014, Erwiana Sulistyaningsih, an Indonesian domestic worker, came forward to demand justice against her abusive employer. When fleeing home to Java, she was found in critical condition at the Hong Kong International Airport – covered in cuts and burns with only HK$70 in hand. Pictures of Erwiana spread across the world, and her story caused uproar. Thousands of migrants, as well as NGOs and service organizations, reprimanded the Hong Kong government for creating conditions of forced labor, trafficking, and debt bondage. Now, seven months later, Erwiana’s case is still unresolved. She has not obtained her stolen wages, the criminal persecution against her employer, and money claims from her recruitment agency. Even with many behind her, she is facing government neglect.

Erwiana’s fight has shed light on the realities of trafficked migrants, and, as a result, the Hong Kong government is facing international condemnation. According to the 2014 Trafficking in Persons Report, the US State Department maintained Hong Kong’s status as a Tier 2 ranking, stating that the city has not fully complied with the Trafficking Victim Protection Act and other international standards. They have stated that more than 320,000 domestic workers in Hong Kong are victims of debt bondage because of agencies’ exorbitant fees. With urgent calls from the international community, Hong Kong has a global duty to protect those exploited within its region.

Yet, how do citizens become at risk to trafficking during the migration process and how can it be stopped? In order to fully prevent trafficking, it is important to understand how trafficking can be found throughout a foreign domestic helper’s migration journey.

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OVERVIEW AND RESEARCH PROCESS

This research paper aims to understand how Filipino and Indonesian migrant workers are vulnerable to trafficking throughout their travels from the sending country to Hong Kong. In order to understand this topic, I will be asking the following questions:

What elements of trafficking are present throughout Filipino FDHs’ migration journeys?
- What practices are used by the recruitment agencies in sending countries that create debt bondage and illegal recruitment?
- How do recruitment agencies in Hong Kong initiate debt bondage?
- What policies in Hong Kong create conditions for forced labor?

By answering these questions, I hope to identify policy failures and gaps that must be addressed in order to combat trafficking against Filipino and Indonesian FDHs.

METHODOLOGIES

In order to answer my research questions, I will be using the following strategies:

• **Semi-structured Interviews:** With the help of the Asia Pacific Mission for Migrants (APMM), I will be analyzing interview transcripts of community organizers, domestic workers, welfare workers, and executive directors. The transcripts are based upon the issues of overcharging, illegal collection, and illegal recruitment in Indonesia, the Philippines, and Hong Kong.

• **Policy Reports and Briefs:** I will be analyzing policy reports on trafficking in Hong Kong such as the 2014 US Trafficking in Persons Report, Amnesty International’s “Exploited For Profit, Failed By Governments,” and Liberty Asia’s policy brief, “How Many More Years A Slave?”

• **Secondary Sources:** I will be collecting information from past research papers that have discussed the forced labor and debt bondage of Hong Kong FDHs such as Lee and Peterson’s “Forced Labor and Debt Bondage in Hong Kong” and Nicole Constable’s “Maid to Order.”

• **Campaign Statements:** Through connections with Indonesian and Filipino migrant organizations, I will be gathering data from participant observations at migrant groups meeting, campaign statements, and hearings against illegal recruitment and trafficking.

DEFINITIONS

Before discussing the migration of trafficked foreign domestic helpers, it is important to define human trafficking, forced labor, and debt bondage.

*Human Trafficking*
Human trafficking is the trade and exploitation of human beings. According to the Palermo Protocol, human trafficking must have three components: an act, a means, and a purpose. The act can include formal or informal recruiting; harboring a person; transferring a person one person to another; and/or receipt, or to meet the victim at agreed places on their journey. The means relates to the mental state of the victim, and the power dynamic between the trafficking and the trafficked. In order for a case to be considered trafficking, there needs to be proof that the trafficker has used threats, coercion, abduction, and abuse of power. Means does not have to be considered if the trafficked person is under 18. Lastly, trafficking must have an exploitative purpose, or in other words, a reason as to why the perpetrator has trafficked another human being. Purposes can include the prostitution of others, sexual exploitation, forced labor, slavery or similar practices, organ removal, and/or other types of exploitation.

**Forced Labor**

In regards to FDHs in Hong Kong, the most common exploitative purpose is forced labor. As stated in the ILO Convention on Forced Labor No. 29, forced labor is all work or service where a person is under menace of penalty, or loses rights and privileges, and the person did not offer themselves voluntarily. Debt Bondage

The UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1957) defines debt bondage as a situation where a person's labor is used as payment for a loan. Debt bondage has been a major crime against migrant workers, and with the increase in education and awareness, more FDHs in Hong Kong are reporting crimes of debt bondage and illegal collection.

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9 ILO Convention on Forced Labor No. 29.
10 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. (1957).
TRACING TRAFFICKING THROUGHOUT THE MIGRANT’S JOURNEY

In order to trace trafficking throughout the migration process, it is important to start with the conditions of the home country. In under-resourced countries, such as the Philippines and Indonesia, high inequality, mass unemployment, and socio-economic and political repression make it difficult for citizens to afford an education, find a job, and to support loved ones and families. Because of such conditions, many are forced to migrate and find jobs away from home. Sending countries may even promote the migration of their own people. For instance, the Philippines government promotes the Labor Export Policy, which encourages citizens to migrate to be temporary laborers in wealthy countries. Migration temporarily boosts the economy through remittances, even though they fail to address the true root causes of economic failure.11

THE SELLING OF MIGRANTS: HOW SENDING COUNTRIES AND HONG KONG TRADE CITIZENS

Recruitment agencies take advantage of these conditions. Agencies in sending countries will receive jobs orders from agencies in Hong Kong, and advertise these opportunities to those in the local community. After recruitment, workers must pay and undergo trainings, medical examinations, and final exams. The trainings can also harbor trafficking elements. For instance, Indonesian workers are brought to training camps where they are kept indefinitely until the agency receives a job order, limiting their own freedom of movement.12

During the training process, workers are forced to pay recruitment fees to their agencies often a few nights before their flight to Hong Kong. Fees can cost HK$13000 to HK$21000, which is equivalent to three to seven months of salary, and agencies commonly confiscate the worker’s passport and identity documents as collateral.13

If the worker is unable to pay, the agency refers the worker to a money lending company where they must fill out a form to open an account and take out a loan. Workers can be forced to sign 5 – 12 blank post-dated checks while not receiving a loan receipt. Many workers may also be unfamiliar with the loan process, and this lack of education leads many migrant workers to sign these checks without understanding the consequences of how it will affect their salaries abroad.

Agencies can also use salary deduction to obtain fees. For instance, Indonesian agencies will deduct around HK$2850 from workers’ salaries for the first six months, when their salaries may be around HK$3500. These salary deductions are often 80% of the workers’ salary, leaving little money for their own survival in Hong Kong and for their families back home.14

12 Amnesty International, International Secretariat, United Kingdom. (2013.) “Exploited for Profit, Failed By Governments: Indonesian Migrant Domestic Workers Trafficking To Hong Kong.”
14 Amnesty International, International Secretariat, United Kingdom. (2013.) “Exploited for Profit, Failed By Governments: Indonesian Migrant Domestic Workers Trafficking To Hong Kong.”
DECEPTION CONTINUES: ARRIVING IN HONG KONG

When migrant workers arrive in Hong Kong, agency control continues. Hong Kong agencies take away their passport and employment contract, leaving workers with their temporary Hong Kong ID and a photo-copy of their identity documents. They are then taken to pay a loan to the Hong Kong agency to cover a fee for their agencies abroad. According to Hong Kong law, only 10% of the FDH’s salary can be deducted, yet these loans are used to go around the law.\(^{15}\) Workers rarely receive a copy of these loans, and at times, do not even receive the actual money. Often, they are asked to confiscate their medical documents, school grades, and even their family’s land certificate.\(^{16}\) This process leaves workers restricted and bound to their agency.

During the first few months of paying the loan, workers are afraid to speak out because their job can be terminated at any time. This unequal power structure leaves workers vulnerable to abuse from both the agency and the employer.

MORE THAN A SLAVE: FORCED LABOR UNDER CITY LIGHTS

When workers are placed with their employers, they realize that their work environment is not what they expected. According to a 2013 survey conducted by the Mission For Migrant Workers, 87% of clients reported working long working hours with an average of 16 hours a day. Clients have also reported being forced to sleep in closets, laundry rooms, kitchens, hallways, and washrooms. Workers have received insufficient food, usually eating the spoiled leftovers from their employer, and have experienced emotional and physical abuse.\(^{17}\)

Additionally, the continuous debt bondage creates an emotional toll, especially when they are the main economic breadwinners for their families. These conditions lend itself to forced labor since many workers are afraid to speak against their employer because they are trapped in paying agency loans, extraneous fees, and necessities for loved ones.

Hong Kong’s legislation also worsens this repressive labor environment. For instance, the city’s “two-week rule” states that if either party terminates the two-year contract prematurely, they are only able to stay in Hong Kong for two weeks before being sent back home.\(^{18}\) Many workers may lose their jobs because their employer may terminate the contract only after a few days or months after arrival, and with only two weeks, it is difficult to pursue legal challenges.

Another troubling legislation is the live-in policy, which states that it is mandatory for the migrant worker to live with the employer. This policy


\(^{16}\) Amnesty International, International Secretariat, United Kingdom. (2013.) “Exploited for Profit, Failed By Governments: Indonesian Migrant Domestic Workers Trafficking To Hong Kong.”

\(^{17}\) Mission for Migrant Workers. (2014 April.) Statistics on MFMW Counseling, Shelter, and other Emergency Services for 2013.

has led to many issues such as long work schedules, lack of rest days, and minimized safety and privacy. In addition, migrant workers are subject to Hong Kong’s low minimum allowable wage (MAW) and their “overtime” hours are not being regulated or paid for. As a result of these policy gaps, the live-in allows employer to enact worker abuse without fear of repercussions.

**REDRESS: LACK OF RECOURSE FOR FOREIGN DOMESTIC WORKERS**

Even when workers are educated about their rights as overseas workers, it is difficult to prosecute against their employer and agencies. Firstly, agencies hardly leave a “paper trail,” or hard evidence workers can use against them. Agencies rarely provide receipts and copies of transactions and checks to the workers, and the agency name may not be mentioned on loan papers, even though these agencies referred workers to these money lenders.

Secondly, there are obstacles in prosecuting against the agencies in the sending countries since Hong Kong’s labor department only deals with agencies within Hong Kong. For example, if Filipino workers have complaints, they must undergo the hands on conciliation process, where they must call the consulate and claim what they have paid. Yet, workers are only able to obtain a conciliation meeting, instead of a hearing to try the case. In addition, they only can receive half of the amount they paid if they are successful.

Thirdly, Hong Kong’s lack of regulation adds more distress. Part of the Labor Department, the Employment Agency Administration (EAA) is the main body in charge of regulating Hong Kong based agencies, but they do not have the evidential expertise to go through the agencies’ data. As a result, there is passivity, low transparency, and low success rate in cancelling agency licenses. In addition, if a worker would like to try their agency for trafficking, they must string along many ordinances in order to build a case. Since Hong Kong does not have an anti-trafficking law, migrants workers are unable to use a specific legislation against their agencies. These lack of efficient recourse mechanisms demonstrate that there must be more done to protect migrant citizens.

**MOVING FORWARD: RESISTANCE, RESEARCH, AND RECOMMENDATIONS**

Although not all workers end up trafficked, the migration journey lends itself to high exploitation. Agencies in the sending countries use fraud, deception, and coercion to recruit workers into accepting jobs abroad. They are able to keep workers in control throughout the journey through passport confiscation, debt accumulation and sham loans, with the help of money

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lending companies. When workers travel to Hong Kong, the Hong Kong agency also charge excessive fees through illegally deducting more than 10% of the worker’s salary. They will ultimately use physical and emotional harassment techniques if the worker does not pay. In addition, the jobs workers are deceived into accepting can end up to be abusive situations. These poor work conditions are exacerbated through legislation like the low minimum allowable wage, the live-in policy, and the two-week rule. Workers thus work in slave like conditions, are in debt bondage to their agencies, and provide little back to those at home. Even if workers are educated about their rights and would like to pursue a case, unregulated and inefficient recourse mechanisms stop them from claiming illegal fees, and prosecuting their employer and agency.

Ultimately, migrant trafficking is due to policy gaps and failures found with the Philippine, Indonesian, and Hong Kong governments. The Philippine and Indonesian government is unable to provide employment, welfare, and social services to their own citizens, forcing them to go abroad. In Hong Kong, the government is failing to regulate recruitment agencies and employers as well as continuing obsolete laws that are exacerbating the trafficking of migrants. As a result, there is a dire need for governmental changes that address these multi-national policy failures.

Many migrant workers are leading the fight for just treatment and systematic change. In 2007, Indonesian migrant groups and unions such as ATKI, LIMI, and IMWU led protests which successfully lowered the recruitment agency fees from HK$21000 to HK$13000. In 2013, Filipino migrant workers created a movement called TIGIL NA! (End Now) Movement of Victims Against Illegal Recruitment and Trafficking. Ever since, the group has organized and mobilized to address current problems of recruitment and lending agencies.

As a result, migrant workers, community-based service providers, and NGOs are now calling for the following to address labor trafficking:

**Redistribute wealth to social services, affordable education, and job production in the sending countries.** If migrants are forced to leave their homes, the Philippine and Indonesian governments must redistribute its wealth towards social services, job creation, and education to better the lives of its citizens. Even though remittances can temporarily help a country’s economy, mass migration is a sign of underdevelopment instead of progress. Mass inequality, thus, leaves citizens vulnerable to trafficking, and to other mass human rights abuses.

**Provide multi-national and inter-agency mechanisms for regular accountability of recruitment agencies and employers.** Recruitment agencies in Hong Kong and the Philippines must be regularly investigated for illegal practices such as identity document confiscation, sham loans, and illegal collection. Other recommended practices are to minimize excessive fees in the migration process, and to fire government officials who favor and/or ignore illegal collection by recruitment agencies.

be enforced punishment such as high financial penalty, license cancellation, suspension, and transparency to workers themselves or even imprisonment. This also includes having effective recourse mechanisms for migrant workers to reclaim stolen wages.

**Adopt and enforce a comprehensive definition of trafficking that adheres to international conventions.** Currently, Hong Kong’s definition of human trafficking only focuses on prostitution, and is not on par with many international conventions. It ignores migrant trafficking in its definition, making it difficult for legal services and migrant workers to build a legal case against their agencies. Hong Kong’s Ordinances are not enough to protect workers from exploitation.

**Abolish laws that create an environment for forced labor.** For Hong Kong, these legislations include the two week rule and mandatory live-in policy. The Hong Kong government must create legislation that ensures the rights and welfare of migrant workers such as enacting maximum hour regulations for all workers, raising the minimum allowable wage or better, treating migrant workers as workers and part of the local labour force thus including them in the legislated minimum wage, criminalizing passport and identity confiscation, and returning direct hiring practices.

**Provide protection, welfare, and support for overseas workers.** The sending country’s governments must be the main bodies that should be responsible for the protection of migrant workers, not agencies. Because agencies are a source of repression, it is detrimental for workers to rely on them for support. Instead, sending countries must take care of their workers through, for example, providing competent and efficient consulate officers abroad. For the Hong Kong area, there are limited number of shelter and legal counseling for many migrant workers, with many organizations overworked with the growing number of exploited workers. The government is able to help through funding grassroots organizations, service providers, and non-profits.

**CONCLUSION**

Trafficking is major crime that must be combatted, and it should be seen as not the root cause of injustice, but the symptom of injustice. The real root causes stem from mass inequalities in the sending country, where citizens are forced to migrate. In order to truly protect migrant workers at all stages of their journeys, the governments of sending and receiving countries have a global duty to ensure the human rights of all visitors and overseas citizens.

**ACKNOWLEDGEMENTS**

I would like to thank the Mission for Migrant Workers for providing a fulfilling internship this summer. You have not only provided resources and guidance on this research, but a platform to learn from migrant workers themselves about creating sustainable and just change. I would also like to thank the Asia Pacific Mission for Migrants for providing crucial texts and interview transcripts that really helped build this research. Lastly, thank you to all the migrant workers for sharing your stories, and teaching me how to be a better justice worker. This research is for you, and I am so honored to be fighting for a new just society alongside you.
Table 1

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<td>Other types of exploitation</td>
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RECOMMENDED MODIFICATIONS OF THE STANDARD EMPLOYMENT CONTRACT TO BRING THE CONTRACT INTO COMPLIANCE WITH THE BASIC LAW AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Audrey Li

INTRODUCTION

THERE ARE CURRENTLY around 320,000 full-time foreign domestic workers (FDWs) in Hong Kong. Indonesians and Filipinas constitute 49% and 48% respectively.¹ By law, the employment of FDWs must be evidenced by a written standard contract (the ‘Contract’). The Contract includes provisions on monthly wages, food allowance, accommodation, travel allowance, and entitlements under the Employment Ordinance and Employees’ Compensation Ordinance. Under the current legal framework, FDWs are entitled to a continuous 24-hour rest day every seven days, statutory holidays and progressive annual leave. The Contract also makes it unlawful for employers to ask FDWs to work in premises other than the residence stated in the Contract.² Termination of the contract is possible at the initiative of either the FDW or employer, provided that there is one months’ notice or wages in lieu of notice. The overlap of employment legislation, immigration law and administrative provisions provides the basis for FDWs to make complaints against their employer. However, due to structural disadvantages, the existing Contract has been largely unsuccessful in protecting the rights of FDWs. This essay seeks to identify areas of the Contract that lack comprehensiveness and certainty, thus exposing FDWs to danger of exploitation. The Contract will be analyzed in accordance with international human rights instruments issued by the UN and ILO, with reference to other jurisdictions with a FDW population. Lastly, this essay seeks to propose possible amendments which may enhance the effectiveness of the Contract in protecting the rights of FDWs in HK.

¹ Yung, Linda Chor Wing, and Sam Hak Kang Tang. “Maids or Mentors? The Effects of Live-in Foreign Domestic Workers on School Children’s Educational Achievement in Hong Kong.” p 6
² Clause 4 of Contract
INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

This essay will make extensive reference to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) which have been imported into domestic law under art 39 of the Basic Law (BL). The provisions of the ICCPR have been incorporated into the HK Bill of Rights. However, the prevalent view regarding the ICESCR is that it is merely ‘aspirational’. HK courts have maintained the view that the State has wide discretion to formulate and prioritize socio-economic policies, and the court is not an appropriate forum for their adjudication. Nevertheless, the HK government has argued that the ICESCR has been given effect through provisions in over 50 ordinances, which ‘more effectively protect Covenant rights than … mere re-iteration’. For example, the art 11 right to an adequate standard of living is reflected in the Housing Ordinance (Cap 283). Hartmann J has also argued that art 39 constitutionally underpins the ICESCR, and is therefore a source of constitutional rights in HK.

This essay will also refer to labour rights provided under ILO Conventions, with an emphasis on the ILO Domestic Workers Convention (C189). Although HK has not yet ratified C189, and is not bound by the provisions, there is significant pressure to do so as 19 countries have already ratified the Convention. C189 was passed with 396 favourable votes, 16 negative votes, and 63 abstentions, thus suggesting that the Convention reflects internationally recognized standards. Similarly, the Convention on the Protection of the Rights of Migrant Workers and Members of their Family has received widespread international support, with 47 States party to the Convention and 37 countries’ signatories, including Indonesia and the Philippines, where the bulk of FDWs in HK originate from. FDWs generate $13.8 billion a year, accounting for almost 1% of HK’s annual GNP. More importantly, FDWs play an important role in allowing both parents in a family to engage in full-time work. As FDWs contribute significantly to HK’s economy, it is argued that entitled to enjoy internationally recognized rights.

TRANSLATION

The Contract issued by the Labour Department does not come with any translation into the language of any of the main nationalities that make up the domestic worker population in HK. Given that the educational level of FDWs fluctuates, some domestic workers may sign their contract without fully understanding their rights and entitlements. For example, research shows that Filipino FDWs usually have a higher education level and speak

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3 Mok Chi Hung v Director of Immigration [2001] 2 HKLRD 125
4 Ramsden, Michael Phillip. “Using the ICESCR in Hong Kong Courts.” p12
6 Carls, Kristin. Decent Work for Domestic Workers The State of Labour Rights, Social Protection and Trade Union Initiative in Europe p 6
7 Chinese University of Hong Kong., “Women and Girls in Hong Kong: Current Situations and Future Challenges.” p 248
English, while Indonesian FDWs are trained to speak Cantonese. Art 7 of C189 establishes that States should take measures to ensure ‘domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner’. Consequently, the fact that the sole language of the Contract is in English most FDWs impairs their right to make a fully informed decision about their employment. To some extent, communication has been facilitated by the translation of the ‘Practical Guide for Employment of FDWs’, which is available in a number of languages, including Indonesian, Tagalog and Thai. However, unlike the Contract, the ‘Practical Guide’ is not legally binding. As a contract defines the parameters of the job and formalizes the employment transaction, it is essential that model contracts are in a language that both FDWs and employers are able to understand.

The inherent vulnerability of a FDWs’ situation vis-à-vis the employer makes it imperative that the employment contract contain translations of English provisions. In a sample of 2538 FDWs, 26% suffered some form of abuse but statistics show that only 1% of FDWs brought cases before courts. The discrepancy suggests that FDWs face high barriers in bringing complaints through the judicial process. This is exacerbated by the large wage difference between domestic work in Hong Kong and poorer Southeast Asian countries such as Indonesia and Philippines. The wage of a domestic worker in Jakarta is approximately $75 a month, whereas the minimum monthly wage in HK is currently $4,010. This discrepancy has the potential to result in FDWs being paid less than the legislated minimum wage, as the smaller sum will inevitably be more than what FDWs would receive in their home country. Furthermore, agencies commonly mislead FDWs into believing that those with no previous working experience in HK are paid less than FDWs with such experience. By presenting the contract in a more clear and comprehensible manner, FDWs will gain a greater awareness of their contractual rights, thus decreasing the likelihood of FDWs falling victim to deceit. Translation of the Contract empowers FDWs to protect themselves from exploitation, and enables them to bring seek advice or bring claims against their employer at an early stage. It is also a relatively cheap and practical process which does not affect HK’s social and economic policies.

EMPLOYER’S UNDERTAKING

In previous years, an employer wishing to hire a Filipino domestic worker without the involvement of an employment agency was able to do so through the direct hire program operated by the Philippines Consulate (‘the Consulate’). The practice has been controversially discontinued. The direct hire procedure required the employer to notarize an ‘Employer’s Undertaking’, which provided that the FDWs should be ‘treated humanely’

8 Yung, Linda Chor Wing, and Sam Hak Kang Tang. “Maids or Mentors? The Effects of Live-in Foreign Domestic Workers on School Children’s Educational Achievement in Hong Kong.”
9 Mok, Ronald. “Foreign Domestic Helpers in Hong Kong: Towards Equality of Rights.” Queensland Law Student Review p 110
10 Tan, Carol G S. “Why Rights Are Not Enjoyed: The Case of Foreign Domestic Helpers.” p 355
by the employer and other persons staying in the house.  It is argued that this phrase should be incorporated at the beginning of the standard contract to protect the inherent right of FDWs to equal dignity and respect (ICCPR preamble). Although the Undertaking is no longer in use, it nevertheless reflects the expectations of the Philippines government towards Hong Kong in regards to the treatment of Filipino nationals. The right to be free from cruel, inhumane or degrading treatment is widely recognized as fundamental right by a number of international human rights instruments, including the Convention on the Protection of the Rights of Migrant Workers and Members of their Family, and the ICCPR.

Due to the exclusionary approach adopted by the HK government, FDWs are subject to social stratification and racial discrimination. The Immigration Ordinance (Cap 115) s 2(4)(a)(iv) provides that ‘a person shall not be treated as ordinarily resident in Hong Kong … (iv) while employed as a domestic helper who is from outside Hong Kong’. FDWs are further excluded from the statutory minimum wage (s 7 Minimum Wage Ordinance (Cap 608)), which fosters the perception that FDWs are not entitled to the same level of respect as other migrant workers. Consequently, an overarching provision providing that FDWs must be ‘treated humanely’ should be included in the Contract to hold employers accountable for any violations to FDWs’ inherent right to equal dignity and respect.

**COMMUNICATION WITH FAMILY MEMBERS**

The Employer’s Undertaking expressly provided that the employer allow their FDW to ‘freely communicate with his/ her family in the Philippines’. This condition corresponds with art 17 of the ICCPR, which prohibits ‘arbitrary and unlawful interference with… family, home and correspondence’. The importance of family life is further reiterated in art 23 of the ICCPR, which provides that ‘family is the natural and fundamental group unit of society and entitled to protection by society and the State’. The right to free communication is of particular importance to migrant workers due to the circumstances of their employment. Isolation from their family, friends and other migrant workers increases the chance of abuse and exploitation, as FDWs are unable to seek assistance from people who are sympathetic to their interests. The lack of communication with the outside world also undermines the right to timely protection of the FDWs’ lawful rights and interests under art 35 of the BL.

Currently, the Contract does not contain a provision guaranteeing the right to free and private communication with family members. Although Schedule 3 provides that ‘reasonable privacy’ must be given, employers are able to restrict FDWs’ external communication by imposing house rules against the use of mobile phone and other electronic devices. Due to the weak bargaining power of FDWs and unfamiliarity with local legislation, it is unlikely that they will refuse to comply or negotiate a compromise. This is

11 Clause 3 Undertaking Of The Employer For the Employment of a Household Service Worker (HSW), Philippines Consulate
12 Article 10
13 Article 7
compounded by the ‘training’ receive by many FDWs in their home country prior to departure, which teaches new recruits to be subservient to their employers.\textsuperscript{14} Therefore, the term ‘reasonable privacy’ does not sufficiently protect the right of FDWs to free communication with family members.

Unreasonable restriction of communication between FDW and their spouse and children also violates art 37 of the Basic Law, which establishes the right to ‘raise a family freely’. As FDWs live away from home for long periods at a time, they rely on electronic communication to sustain family relationships and foster emotional bonds.\textsuperscript{15} Studies conducted by the National University of Singapore strongly suggest that without personal space, it is challenging for women to maintain a sense of self-worth and personal identity. Consequently, the right to family life is closely linked to the inherent dignity of the human person (ICCPR preamble). Interaction with family members is particularly important to the well-being of newly arrived FDWs, who often experience difficulties in adapting to a new environment, culture and language. Although allowing FDWs to freely communicate with their family members may result in neglect for their work, the high cost of international calls/texts and relatively low wage is likely to deter FDWs from excessively chatting. Conversely, a clause expressly allowing free communication with family members is likely to encourage employers and FDWs to reach a genuine agreement regarding the issue, taking into account the expectations of both parties.

\section*{ACCOMMODATION}

Clause 5(b) and Schedule 3A has caused hardship to FDWs as the terms ‘suitable accommodation’ with ‘reasonable privacy’ are subject to the interpretation of the employer. What may be regarded as ‘suitable’ and ‘reasonable’ may vary according to the size of the residence, number of family members, and the employer’s cultural background. Given the extremely cramped living conditions in HK, FDWs are frequently forced to sleep in store cupboards, or share rooms with members of the employer’s family.\textsuperscript{16} Due to the mandatory live-in arrangements, FDWs must accept whatever conditions their employer offers them. Policies such as the 2-week rule, restrictions on changing employer, and requirement that FDWs must leave the territory before commencing new employment, deters many workers from lodging complaints. Newly arrived FDWs are also reluctant to leave their employment due to debt bondage, in particular Indonesian workers, who typically pay higher fees than Filipinos due to lack of regulation. Indonesian agencies routinely charge 6 months’ wages worth of agencies fee.\textsuperscript{17} Although employment agencies in HK are prohibited from charging over 10%...
of the first month’s wages of a successfully placed worker, agencies regularly circumvent this prohibition by forcing FDWs to take out ‘loans’ with finance companies. Due to the private nature of domestic work, it is estimated that a significant portion of cases of unreasonable living conditions are unreported.

In order to comply with art 30 of the Basic Law (BL), and art 17 of the ICCPR (BL art 39), it is recommended that more stringent living requirements be adopted to protect the privacy of FDWs. The Employment Ordinance (Cap 57) does not contain provisions governing living conditions for workers residing in their workplace. It is relatively common for FDWs to sleep in common areas in the household. MFMW has found that 30% of FDWs are told to sleep in kitchens, bathrooms, hallways and closets. Consequently, 25% of FDWs reportedly do not feel safe in their employer’s household. Furthermore, a survey conducted by MFMW revealed that 20% of 3004 respondents had a CCTV in their room. ILO Convention C189 stipulates that live-in domestic helpers are entitled to ‘decent working conditions that respect their privacy’. This is more favourable than Clause 5(b) and Schedule 3A, which offers ‘reasonably privacy’. The use of the word ‘respect’ in C189 recognizes privacy as an inherent right, as opposed to a privilege. It is recommended that an express provision that employers and family members “respect the worker’s right to privacy where she has a reasonable expectation of privacy” should be included in Clause 5(b). Given the characteristics of live-in domestic work, this modification places greater emphasis on privacy as a necessary part of FDWs’ employment. It is also more easily enforceable as courts are familiar with the concept ‘reasonable expectation of privacy’, which already exists in an action for breach of confidence. As 30% of 3000 respondents share a room with a member of the employer’s family, this modification ensures that workers are given private space when conducting activities of a personal nature, such as correspondence with family members in their home country, or taking their daily rest.

Due to the typically long and unpredictable working hours of live-in domestic workers, it is important that special attention is given to the need for an adequate place of rest. It is well documented that lack of daily rest has negative impacts on health and a person’s psychological well-being. Art 4 of the ICESCR, entrenched in art 39 of the BL, recognizes the ‘right of everyone to the enjoyment of just and favourable conditions of work… in particular… rest [and] leisure’. Art. 10 of C189 further states that domestic workers should enjoy ‘equal treatment [with] workers generally, in relation to … periods of daily rest … taking into account the special characteristics of domestic work’. At present, the standard contract merely states that the employer must provide ‘suitable accommodation’. However, incidents of domestic workers sleeping next to trash cans, on top of toilet bowls, or on the kitchen floor demonstrates that HK falls short of international standards. Due to the low social status

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18 Employment Ordinance (Cap 57)
19 Ng, Jason Y. “Why Hong Kong’s Government Should Apologise for failing Abused Domestic Workers.”
20 Mission for Migrant Workers. Live in Policy p.7
21 Ibid p.6
22 International Labour Organization. Domestic Work Policy Brief. Working Hours in Domestic Work. p.4
23 Mission for Migrant Workers. Live in Policy p.6
of domestic work, they are the weaker party in an employment relationship and wield limited bargaining power. In the absence of an effective monitoring system, further elaboration of what constitutes ‘suitable accommodation’ is needed. Constituent elements, such as ‘reasonably comfortable’ and ‘sanitary’ will provide greater protection to FDW’s rights to a decent area of rest. Positive examples of ‘suitable accommodation’ should also be provided to supplement existing examples of ‘unsuitable accommodation’ stated in Schedule 3A. It is argued that the current examples of ‘unsuitable accommodation’ merely provide a minimal threshold for the employer, and only protects FDWs from extreme violations.

**LIVE-IN RULE**

The mandatory live-in requirement, imposed by the HK government in April 2003, renders FDWs vulnerable to abuse. According to the UN Committee on the Elimination of Discrimination against Women, domestic workers are ‘particularly vulnerable to physical and sexual assault, food and sleep deprivation and cruelty [from] their employers’ (Recommendation 26). The Erwiana case illustrates how the live-in rule places FDWs at risk of human rights violations, as FDWs are in close proximity to their employers, and isolated from fellow workers. Erwiana was forced to work 21 hours per day and repeatedly beaten with household items. After her injuries became infected and rendered her unable to work, Erwiana was deprived of medical assistance and abandoned at the HK airport. The injuries suffered by Erwiana over a period of 8 months would have been discovered earlier had she been living away from her employer. The live-in requirement isolates FDWs from other migrant workers, thus depriving them of information regarding their rights, related legal procedures, and complaint mechanisms. Consequently, the live-in policy makes it easier for abusive employers to hide their crimes. Although Erwiana’s case may be regarded as an extreme case, a survey conducted by MFMW shows that 58% out of over 3000 respondents have experienced verbal abuse such as name-calling, insults and threats. The survey also revealed that 18% of FDWs experienced physical abuse in the form of poking, hair pulling, slapping, pinching and other forms of physical abuse. As verbal and physical abuse affects a significant number of FDWs, a live-out option is necessary as a precautionary measure to prevent prolonged abuse.

The live-in policy contravenes international labour standards, namely C189 art 9, which provides that domestic workers should be ‘free to reach agreement with their employer on whether to reside in the household’. It also provides that they should not be ‘obliged to remain in the household or with household members during periods of daily and weekly rest’. According to the HK Immigration Department, the purpose of the live-in policy is to prevent FDWs from taking part-time employment in another household, and competing with local domestic workers (LDWs) for work. However,

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25 “Woman Charged in Hong Kong with Torturing Indonesian Maid.” *NY Daily News*
a survey by Caritas Hong Kong points out that FDWs and LDWs are not in direct competition due to the differences in working hours and wages. As FDWs are excluded from the statutory minimum wage ($30 per hour), their minimum monthly wage is $4,010 (excluding food allowance). Assuming that a LDW works 8 hours, 6 days a week, his/her minimum monthly wage would amount to $6,240. Consequently, the live-in policy is unlikely to affect the job prospects of LDWs because FDWs and LDWs serve different markets. Furthermore, there is insufficient evidence that live-out FDWs will take up illegal work if permitted to live away from their employer. In a 2002 survey, none of the respondents who lived outside of the employer’s household had taken up part-time employment elsewhere. By contrast, cases of local employers forcing FDWs to live or work at another household, usually a relative, are relatively common. As there is little evidence supporting the Immigration Department’s claims, it is argued that the positive effect of reinstating the live-out option outweighs the potential negative effects.

Making live-out arrangements an option for employers may relieve the stress of making space for a FDW in the employer’s household. This would be more convenient for both parties and decrease the chance of misunderstandings. Currently, such an agreement between FDWs and employers is void under Clause 15 of the Contract. The Employers of Overseas Domestic Helpers Association has argued that the live-in requirement is grounded on economics considerations, as a live-out option would cause rents to ‘rise immediately’. Joseph Law Kwan-din (Chairman) warned that if 20% of HK’s 300,000 FDWs were allowed to live out, it would cause havoc in the property market as Hong Kong is already short of living space.

However, given that most employers are more likely to rent a bed space in a boarding house rather than a residential apartment, the effect on rental prices may not be as extreme as Joseph Law’s prediction. The assumption that a substantial proportion of FDWs will exercise the live-out option is also flawed, as the majority of employers will be unwilling or unable to pay for additional rent. FDWs may also prefer to live-in to avoid high rent prices and commutes. However, the significance of a live-out option lies in the ability of FDWs to exercise a greater degree of autonomy over their living conditions and mitigate the chance of violence. Although rising property prices are a legitimate concern, cooling measures such as the stamp duty are arguably better suited to control the property market.

The live-in requirement also results in long and unpredictable working hours, as employers expect FDWs to be available at all hours. This attitude is reflected in the deliberations of the HK Bills Committee on the Minimum Wage Bill, where the Committee described live-in domestic work as ‘round-the-clock presence and provision of service-on-demand’. A study conducted by Amnesty International shows that FDWs work on average of 17 hours per day, or 102 hours per week. This falls short of the internationally accepted

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27 Calculation based on a 31 day month
28 Lam, Lana. “Hong Kong urged to sign UN treaty on protection of domestic helpers.” South China Morning Post
standard articulated in Article 1 of the Forty-Hour Convention 1935 (No.47), which states that ‘a 40-hour week [should be] applied in a manner that the standard of life is not reduced as a consequence’. As HK does not yet have a statutory regime governing working hours or overtime, live-in domestic workers are at risk of being severely overworked without compensation. Given the dependence of FDWs on their employers for accommodation and food, FDWs often have no choice but to comply with unreasonable work demands. Thus, the ability to live away from the employer’s household allows FDWs to exercise a certain degree of control over their working hours.

REGULATION OF WORKING HOURS

The principal argument against regulating domestic workers’ working hours is the nature of domestic work, as certain household needs involving young children, the sick and elderly cannot be scheduled. One of the key benefits of live-in care is the capacity to provide a more flexible and responsive service compared to domestic workers who are contracted to work at the home periodically. Due to the multifarious duties of live-in domestic work, it may be impossible to ascertain the actual hours worked for the purposes of effective regulation. However, it may be argued that the vast majority of household tasks do not differ on a day-to-day basis and are easily predictable and quantifiable. The regulation of working hours may also increase efficiency, as there is greater incentive for FDWs to complete tasks within a defined schedule.

The regulation of working hours is specifically stated in the ILO Constitution and the ICESCR as a fundamental right of all workers. Although HK has not yet legislated on standard working hours, it is argued that this issue is particularly important for FDWs, who are under constant pressure to work long hours due to the close proximity with their employer(s). The situation differs considerably from local employees in HK, who are free to leave their workplace after work. An ILO study indicates that there is a significant difference between the hours worked for live-in and live-out domestic workers. In Chile, the average weekly hours for live-out workers is 40 hours and 67.6 hours for live-in workers. The stark difference illustrates the challenges which live-in workers face in drawing clear boundaries between work and rest. Consequently, rules must be introduced into the Contract to protect FDWs right to rest and leisure (art. 4 ICESCR).

In order to preserve the competitiveness of impromptu domestic work, it is crucial that a certain degree of flexibility is maintained to accommodate ad-hoc household needs. Therefore, it is recommended that the measure of acceptable working hours should be stated in hours per week, thus allowing daily working hours to fluctuate. This creates a balance between the need for consistency and the realities of domestic work. The approach of establishing a weekly limit has been adopted in France’s Convention, which sets normal

30 International Labour Organization. Domestic Work Policy Brief. Working Hours in Domestic Work p. 6
weekly hours for full-time domestic workers at 40 per week (Art 15 collective
nationale des salaries du particulier employeur). Similarly, Portugal sets the
weekly limit for domestic workers at 44 hours per week, with the option of
achieving compliance through an average calculated over different weeks (Art
13(1) and (3) Contrato de Trabalho Domestico). Although this option allows
greater flexibility, it may be impractical for the employer and FDW to keep
records of working hours for a long period of time. This increases the risk that
computation of hours worked will diverge between the two parties, as certain
events may be forgotten. The additional leniency in Portugal’s approach
may also undermine the purpose of the regulating working hours in the
first place. Under this policy, FDWs may be forced to work for more than 44
hours a week for several consecutive weeks under a mere promise that they
will be given more rest later. However, the negative impact of overworking
on mental and physical health may be permanent and irreversible, such as
sustaining an occupational injury. Art 13 of C189 states that domestic workers
are entitled to a ‘safe and healthy working environment’ and governments
should take ‘effective measures … to ensure the occupational safety and
health of domestic workers’. Consequently, it is necessary to restrict the scope
of discretion which may be exercised by the employer to protect the health,
safety and productivity of FDWs.

Another option is to set limits for both daily and weekly hours. Uruguay
has enacted a daily limit of 8 hours, in addition to the weekly limit of 44
hours. Similarly, South Africa prohibits employers from requiring their
domestic workers to work more than 8 hours per day if the worker works more
than 5 days a week. There is also a weekly limit of 45 hours per week. The
implementation of a daily limit allows FDWs to receive a reasonable amount
of rest every day, in accordance with the right to daily rest. However, the lack
of flexibility and potentially higher cost of live-in domestic work may harm
the market for FDWs. In South Africa, the imposition of a legal maximum on
working hours did not decrease the number of domestic workers. The Sectoral
Determination 7: Domestic Workers Sector came into force in September 2002,
resulting in a lower percentage of domestic workers who reported working an
average of more than 45 hours a week (the legal maximum). The incidence of
long working hours decreased from 35% in 2000 to 19% in 2007. During this
period, the proportion of domestic workers in South Africa remained fairly
constant. This suggests that the implementation of a maximum daily and/or
weekly limit may not significantly decrease the number of FDWs employed
in HK. On the other hand, it is likely to improve the quality of life of FDWs
and deter employers from requiring FDWs to take up illegal work in another
household.

Due to nature of domestic work, hours when FDWs are on-call must be
taken into account. On-call duty occurs when a worker does not have the
liberty to dispose of her time as she pleases, or cannot leave her employer’s

32 Ibid p 8
33 Ibid
34 Ibid
36 C189 art 10
residence. For example, when a workers is responsible for giving care to children in the absence of their parents. On-call duty represents a major hurdle in the implementation of standard working hours, due to general perception that live-in workers are available at all hours. A study in the Netherlands and the UK found that many live-in domestic workers were expected to work at any time, and are frequently asked to cancel or reschedule their day-off. The occurrence of stand-by duty affects workers’ right to proper compensation and adequate rest. France’s Convention Collective: Art 3 has addressed this problem by providing that the number of on-call hours must be stated in the contract, and remunerated at a rate equivalent to two thirds of a normal working hour. Although this approach is favourable to FDWs, it ignores the realities of domestic work, which is inherently unpredictable. Furthermore, as FDWs in HK are remunerated by a flat rate every month and FDWs are not included in the statutory minimum wage, the computation of on-call remuneration will extremely troublesome.

An arguably better approach for Hong Kong is South Africa’s Sectorial Determination 7, which imposes limitations on the amount of time an employer may require a worker to be on stand-by. As the minimum wage for FDWs is considered extremely low by HK standards, the requirement that on-call hours must be compensated may not be effective in controlling working hours of FDWs. Part D of the Sectoral Determination 7 defines ‘stand-by’ as work done between 8 pm and 6 am the next day, when a worker is permitted to rest but must be available to work if necessary. It limits stand-by duty to 5 times per month, or 50 times per year, and the work must be of an urgent character such that it must be done ‘without delay’. It is argued that the approach taken in South Africa contains more clarity than France’s Convention Collective. It is also relatively simple to implement, as it does not require the government to make an executive decision as to the minimum hourly wage of FDWs. The restriction that work done on stand-by must reach a threshold of urgency adds another layer of protection which recognizes the right of FDWs to adequate rest. Thus, the regulation of standard working hours should include provisions governing the use of on-call services.

**FOOD**

The Contract does not sufficiently protect FDWs’ right to an adequate standard of living, which includes access to adequate food as stated in art 11(1) of the ICESCR. Under s 5(b) in the Contract, the Employer is required to ‘provide food free of charge’ or provide a monthly food allowance. The absence of any regulation as to the amount or quality of the food has resulted in FDWs being under-fed, or offered food which is expired. This contravenes the fundamental right to be free from hunger, enshrined in art 11(2) of the ICESCR. In order to address this problem, it is argued that further elaboration is needed to define the responsibilities of Employers who elect to provide food for FDWs. The Contract should clearly state that ‘food’ does not include items that are expired, rotten or unfit for human consumption. The number

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of daily meals should also be specified during contract formation to prevent Employers from withholding food at their discretion. As FDWs lack the ability to choose the kinds of food they receive, any allergies or abstentions from certain foods for religious reasons should be recorded and taken into consideration by the Employer.

CONCLUSION

To conclude, the Contract provides minimal protection for FDWs’ rights to adequate working and living conditions. In comparison to countries such as France and South Africa, the provisions of the Contract lack clarity and allow employers to exercise their own subjective judgment over issues such as accommodation, food and working hours. Due to the vulnerability of FDWs in HK society, and the lack of effective complaint mechanisms, the simplicity of the Contract results in human rights violations. In order to promote greater awareness of labour rights and encourage the prompt filing of complaints, it is necessary that a dual language model contract be adopted. Lastly, the Contract should be amended to allow live out arrangements (upon agreement between the employer and FDW) as the live-in requirement has been shown to exacerbate the susceptibility of FDWs to abuse.

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THE MYTH OF JOB-HOPPING: DECONSTRUCTING THE CLAIM OF CONTRACT EXPLOITATION AGAINST FOREIGN DOMESTIC HELPERS

Lorraine Lau

INTRODUCTION

The expression “job-hopping” is colloquially understood as an employee changing employers in a short succession of time. Regarding foreign domestic workers (FDWs) in Hong Kong, it suggests that the FDW deliberately ends her contract prematurely, or provokes her employer to do so through misbehavior, to seek a new employer in a short period of time. The term carries negative connotations as the FDW is viewed as exploiting her contract for benefits.

Under Clause 7(a) of the Employment Contract for a Domestic Helper recruited from abroad, the employer is required to provide the FDW with both free passage and free return passage from and to her place of origin. Hong Kong’s two-week rule, implemented in 1987 under “New Conditions of Stay”, allows FDWs to stay in Hong Kong for a maximum of 14 days after the termination of their contract or the expiry date of their stay in Hong Kong as stated on their passport, whichever is earlier, before returning to her country of origin. Based on these policies, the image of the job-hopping helper is constructed as such: she supposedly ends her contract without a reason, or misbehaves so that her employer ends the contract, and earns severance payment as well as travel allowance to her place of origin. Then, instead of flying home, she goes to a nearby city before returning to Hong Kong to find

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1 “The expression ‘job-hopping’ implies that the helper terminates her employment prematurely (or alternatively the helper deliberately behaves so badly that the employer has no choice but to do so) with a view to obtain employment with a new employer.” “The Two-Week Rule,” Hong Kong Human Rights Monitor, http://www.hkhrm.org.hk/english/reports/env/env0796d.htm.

2 Employment Contract for a Domestic Helper recruited from abroad, Clause 7(a).

3 Connelly, R.J. Paper Submission on “Policies relating to foreign domestic helpers and regulation of employment agencies” for LEGCO Panel on Manpower (LC Paper No. CB(2)870/13-14(14), Hong Kong, 2014), 2.

4 “The Two-Week Rule.”
another contract, thus pocketing the money for a flight ticket.5 6

On February 20, 2014, Lai Tung-kwok, Secretary for Security, claimed that 1,372 of 40,000 work visa applications to the Immigration Department from June 2013 to January 2014 had been allegedly suspected of job-hopping.7 Joseph Law, chairman of Hong Kong Employers of Overseas Domestic Helpers Association, also claims that job-hopping occurs on a daily basis: of the 8 to 10 complaints the association receives daily, 40% involve domestic workers leaving their jobs early without explanation. Law believes that FDWs collude with agencies to job-hop, earning an air ticket and wages in lieu of notice at the end of each contract.8

Such claims become questionable when the interests of both the migrant workers and the Hong Kong government are taken into account. In this paper, I aim to refute claims of FDWs job-hopping as a threat through showing that premature termination of contract is against their financial interests and reviewing the social context behind policies on FDWs in Hong Kong.

This paper will examine the following:
- The financial impact of contract termination on FDWs regarding severance payment, wages in lieu of notice, and placement fee
- The credibility and comprehensiveness of the Security Bureau’s claims and the Immigration Department’s data on FDWs
- Criticism of Hong Kong’s policies on FDWs, including the impact of the abuse case of Erwiana Sulistyaningsih on public sympathy for FDWs
- How the Hong Kong government has been upholding its defense of the two-week rule and the live-in requirement

THE FINANCIAL COSTS OF CONTRACT TERMINATION FOR FDWS

I. Severance payment

One of the Security Bureau’s concerns is that FDWs will be able to collect severance payment from their employers through premature termination of contract.9 However, under the Employment Ordinance issued by the Labour Department, an employer is required to pay severance payment to a helper only if the helper has been employed “continuously for [no fewer] than 24 months”, which is the length of a full 2-year contract, when the contract is terminated or not renewed.10 At the same time, ending the contract after 2 years cannot be called job-hopping, as the helper has completed the required

7 Ibid.
8 Ibid.
9 Tsang, “‘Job-hopping’ foreign domestic workers.”
10 Foreign Domestic Helpers: Rights and Protection under the Employment Ordinance. Hong Kong: Labour Department, 2013, 4.
period of time. Moreover, the Ordinance states that helper can only collect severance payment if the contract is not renewed for reasons of redundancy, meaning that the employer has decided that he or she will no longer employ domestic helpers in the future. Consequently, the charge of helpers job-hopping to earn severance payment is baseless, as the choice to issue severance payment depends completely on the employer.

II. Wages in lieu of notice

According to Clause 10 of the Employment Contract, either the employer or helper may terminate the contract “by giving one month’s notice or one month’s wages in lieu of advance,” so that the other party will be given time or resources to see a new contract. Job-hopping rests on the assumption that a helper can receive one month’s wages by provoking her employer to fire her; however, upon Clause 11 of the Employment Contract negates this idea.

Clause 11 states that the employer is excused from payment if the helper has been guilty of misconduct including “[willful disobedience] at a lawful and reasonable order”, “fraud or dishonesty”, or “being neglectful of... her duties”. The helper is allowed to end the contract without payment on the grounds that she has been “subject to ill treatment by the employer” or “fears physical danger of violence or disease.” If a helper suddenly quits without any of the above reasons, she is required to pay a month’s salary to her employers. Even if an FDW informs her employers in advance of quitting, or if she forces her employers to terminate the contract without notice through misconduct, she is unable to receive one month’s wages.

It should be noted that proving abuse is often difficult for FDWs, especially as they are required to live in their employers’ apartments, making it easier for the employer to hide evidence of abuse. Furthermore, it is financially unattractive for FDWs to pursue a case, as cases tend to last 6 months to 1 year; they are unable to work during that period, and required to pay for their accommodation as well as $160 each time they renew their visitor’s visas. As a result, many choose not to do so, and are required to pay abusive employers one month’s wages in lieu of notice upon quitting. This shows termination of the contract by either party without notice does not benefit the helper financially, and is more likely to produce an economical loss than a profit.

III. Placement fee

Placement fees, defined by the Philippines Overseas Employment Administration (POEA) as “the amount charged by a private employment

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11 Ibid.
13 Clause 11.
15 Connelly, “LC Paper No. CB(2)870/13-14(14),” 1.
16 “Hong Kong: the government has to put an end to the exploitation of migrant workers,” Amnesty International Press Release, April 27, 2014.
agency from a worker for its recruitment and placement services,"¹⁷ are collected in all home countries of migrant workers. Agencies in Hong Kong are allowed to collect placement fees of up to 10 percent of the FDW’s first-month salary: this means a maximum of $401 HKD, as the Minimum Allowable Wage for FDWs in Hong Kong is $4,010 HKD as of October 2013.¹⁸ However, in reality the charges can go up to 50 times that amount.¹⁹ According to a study conducted by Amnesty International, Indonesian migrant workers usually pay a total of $21,000 HKD over 7 months.²⁰ Similarly, the Mission for Migrant Workers reports that 72 percent of their clients have complaints against overcharging recruitment agencies: 86 percent of complainants pay over $10,000 HKD, while 40 percent pay over $20,000 HKD.²¹ Agencies can avoid being caught through loopholes such as monthly salary deduction or instructing the FDW to transfer their money through 7-Eleven. By withholding receipts, they give FDWs little evidence to use against them.²² For example, in the Philippines, where collection of placement fees for overseas household workers have been declared illegal since 2006,²³ agencies charge fees from their clients under different names such as “training fee” or force the FDW to take out fraudulent loans.²⁴

The amount of placement fees assigned to a FDW exceeds those of a migrant worker’s monthly salary and a one-way flight ticket combined. As mentioned, the Minimum Allowable Wage for FDWs in Hong Kong is presently $4,010,²⁵ while an airplane ticket from Hong Kong to the Philippines or Indonesia costs approximately $1,000 HKD. The sum of these totals at about $5,010 HKD, far below the costs of placement fees and loans a FDW would have to repay for the contract. A FDW is still obligated to complete her agency fees after termination of a contract, and is required to begin another round of payment if she chooses to begin a new one. Even if a FDW were to pocket the cost of one month’s salary and a flight ticket, job-hopping would not relieve her financial weight, but instead culminate it in a cycle of debts.

¹⁸ The Minimum Allowable Wage for FDWs was increased by the Labour Department from $3,920 to $4,010 on October 1, 2013. “Foreign Domestic Helpers.” Labour Department: The Government of Hong Kong Special Administrative Region.
²⁰ Ibid.
²³ “The POEA Governing Board, in a meeting duly convened, resolves… to prohibit the collection of placement fee from our Household Workers, whether collected prior to their deployment or on-site thru salary deduction. Any collection in violation of this prohibition will be considered a grave offense punishable with the penalty of cancellation of license.” Governing Board Resolution No. 96, Series of 2006.
²⁴ “FDWs in HK,” Mission for Migrant Workers.
QUESTIONING THE DATA FROM THE IMMIGRATION DEPARTMENT

According to Lai Tung-kwok’s statement, 1,372 (3.4 percent) of 40,000 applications to Immigration Department from June 2013 to Jan 2014 have been suspected of job-hopping, of which 178 were rejected and 158 were voluntarily withdrawn. Dolores Balladares, spokesperson of the Asian Migrants Coordinating Body (AMCB-IMA), argues that these 1,372 applications are “based on unreasonable and arbitrary criteria”, since there has been no verification for any of the suspected applicants. While the Immigration Department’s standard for “job-hopping” is if a FDW has had her contract terminated 4 to 7 times within a year, the Department holds no data about why the contracts have been terminated or who terminated them. Other reasons for frequent contract termination, such as abuse from employers, are not taken into account. Overall, this suggests a lack of evidence on whether or not the suspected FDW has been job-hopping. As the Hong Kong government allows the Immigration Department to have an independent jurisdiction, the latter has final say over the Labour Department on a FDW’s working visa, and a FDW is unable to sue if refused a working visa. As Balladares states, the 158 FDWs who withdrew their applications cannot be conclusively categorized as job-hoppers as well.

One should note that job-hopping is not actually illegal in Hong Kong, and that migrant workers, like local workers, are legally entitled to change jobs if they do not feel satisfied with their current position. In the case of FDWs, a case of what appears to be job-hopping for financial gains may actually be a case of escaping numerous inadequate living conditions.

EXAMINING HONG KONG’S POLICIES ON FDWS

Interestingly, Lai’s statement was made shortly after the story of Erwiana Sulistyaningsih, an Indonesian domestic worker allegedly abused by her employer until she was unable to walk, was exposed to the public. Erwiana’s story, publicized in January 2014, has not only sparked international outrage, but also raised the question of whether Hong Kong’s live-in requirement for foreign domestic workers is safe. The Hong Kong government has fallen under much criticism, with groups claiming that Hong Kong’s present policies are what allow such abuses to take place.

Hong Kong’s policies on FDWs have long been a controversial topic. Even before Erwiana’s story was publicized, the Hong Kong government has been receiving calls for policy amendments from global organizations such as the United Nations and Amnesty International. This paper will examine criticisms of two major policies, the two-week rule and the mandatory live-in requirement, and how the government may be using claims of job-hopping to

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28 Balladares, “Stop the lies.”
defend these regulations.

I. The mandatory live-in requirement

The mandatory live-in requirement, which compels FDWs to reside at their employers’ residences, has been criticized for subjecting FDWs to possible poor working conditions including long hours, insufficient food, interrupted rest days, lack of privacy, and physical or sexual abuse. Forcing helpers to live-in makes their living situations dependent on the employer’s will. It can also deprive them of privacy, especially when the helper is forced to share a room or sleep on the floor due to lack of space in the apartment. While activist groups acknowledge that some helpers may prefer to live-in with their employers, since that is a cheaper option, they argue that this should be a choice and an agreement between employers and employees, not a forced regulation.

II. The two-week rule

The two-week rule had been implemented in April 1987 under the policy “New Conditions of Stay”. Up to that point, migrant workers in Hong Kong with 6-month visas were allowed to stay in Hong Kong for the duration of the visa even after termination of their contract, which led to some workers ending their contracts prematurely and taking up illegal employment; the two-week rule successfully removed this problem by allowing FDWs to stay for only 14 days after termination of contract or expiry of date of stay as stated in their passports. However, it has been censured for disproportionately limiting time for migrant workers to find new employment in Hong Kong, which has caused many to stay in abusive situations. As barrister RJ Connelly commented in a submission to the Legislative Council (LEGCO) panel in 2014: “A four-week or six-week rule would achieve exactly the same result without unfairly penalizing workers who find themselves unemployed.” The desperation of FDWs to secure a new contract as quickly as possible makes them dependent on agencies, which exposes them to the risk of more exploitation, such as high placement fees and salaries below the Minimum Allowable Wage. Even if a helper finds employment within 14 days, the two-week rule requires her to return to her home country and wait for a new visa to be issued, taking up valuable working time. The rule makes it financially difficult for abused helpers to file cases against their employers as well, since they are unable to work during the 6 to 12-month time period of the case. For all of the above reasons, the two-week rule has been criticized for undermining the human rights of domestic workers by entrapping them in a potentially abusive work situation.

29 Employment Ordinance 3(a).
31 Dolores Balladares, interview by author, August 14, 2014.
32 Connelly, “LC Paper No. CB(2)870/13-14(14),” 1.
33 Ibid.
34 Exploited for Profit, Failed by Governments, Amnesty, 8-9.
THE INFLUENCE OF THE ERWIANA SULISTYANINGSIH CASE

The Erwiana case was problematic for the government because it brought to light the potential that domestic helpers could suffer under the current policies. Although her employer allegedly abused her frequently throughout her 8-month employment by beating her, pouring hot water on her, threatening to kill her family, and withholding her salary and travel documents, Erwiana was refused help from her employment agency, who claimed she must first repay her debt before they would intervene.³⁵ Living in her employer’s apartment, Erwiana was subject to two meals of bread and rice daily, sleeping hours from 1 to 5 PM, and no holidays or doctor’s visits, which led her wounds to become infected until she was unable to walk.³⁶ The publicity of her case was hugely influential, gathering much public sympathy and causing a crowd of 5,000 migrant workers and activists to gather at a protest march on January 19.³⁷ Her story highlighted the level of abuse that helpers could potentially suffer under the live-in requirement, and how placement fees and the two-week rule made it difficult for FDWs to break the cycle of debt and abuse.

JOB-HOPPING AS A DEFENSE OF HONG KONG’S POLICIES

The Hong Kong government’s rationale of these policies is that they are obligated to first protect the rights of local workers. Nicholas Chan, Commissioner for the Labour Department, has argued that since the local workforce should have priority in employment, while imported workers “should only be allowed where there is a confirmed manpower shortage in a particular trade that cannot be filled by local workers.” Thus FDWs are allowed in Hong Kong because of the lack of local domestic workers, and changing the live-in requirement would be considered “seriously [undermining] the interest of local non-live-in domestic workers.”³⁸ He also claimed that the threat of FDWs giving local workers more competition by taking other types employment in Hong Kong.³⁹ Likewise, a discussion paper provided to LEGCO by the Labour and Welfare Department claimed: “The ‘two-week rule’ is required for maintaining effective immigration control, preventing job-hopping and imported workers working illegally after the termination of contracts.”⁴⁰ Following these claims, the government appears to be maintaining the current policies on FDWs in order to protect the interests of local workers.

³⁶ Ibid.
³⁹ Ibid.
Under the attention of the Erwiana case, however, the government faced mounting pressures to reform their regulations. The claim of job-hopping, appearing only one month after the broadcast of Erwiana’s plight, subverted accusations toward the government by illustrating that FDWs have been equally exploiting the system. Moreover, it seemed to enforce that the live-in requirement and the two-week rule are necessary to prevent migrant workers from further abusing their contracts. The idea that migrant workers have been exploiting their contracts would confirm that regulations are needed to keep them in place, if not tightened.

**CONCLUSION**

This paper argues that the threat of FDWs job-hopping for economical benefits is basically nonexistent, since they are unable to profit by it under the current system; instead, the accusation is likely a scare used by the Hong Kong government to deflect the public from the real problem to protect exploitative policies such as the live-in requirement and two-week rule. Unfortunately for FDWs, it is easy for the public to take the government’s word at face value. If no action is taken, FDWs may face both increased stigma and the possible threat of tighter regulations that will further limit their rights. The Hong Kong community, comprised of many employers of domestic helpers, should be aware of the truth behind the claims of job-hopping. Instead of blaming and punishing FDWs for leaving their jobs early or suffering in publicized cases, the government and citizens of Hong Kong should reevaluate the fairness of the region’s current system for migrant workers. If FDWs are guaranteed decent working conditions, the number of premature contract terminations may decrease in the future after all.

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SOCIAL MEDIA USAGE WITHIN THE MIGRANT POPULATION OF HONG KONG: A QUANTITATIVE STUDY

Henry Lee Heinonen

RATIONALE

THIS SURVEY IS part of my research in Hong Kong during the months of May, June, and July, which focused on migrant activism. This research mostly consisted of qualitative methods, and the lion’s share of my qualitative data will be featured in a forthcoming paper to be coauthored with Professor Rachel Silvey of the department of Geography at the University of Toronto. Here, I will divulge some basic observation, which spurred me on to create a survey. My research revealed extensive usage of social media amongst the Indonesian migrant activist groups of Victoria Park, specifically within the Indonesian Migrant Workers Union and PILAR (United Indonesian Migrant Workers Against Overcharging). Almost every person I met in Victoria Park over the span of my fieldwork used some form of social media
and instant messaging, and most of the groups I encountered run online group pages on social media networks, where outsiders can learn about their goals and activities. As well, I saw that instant messaging services are used extensively to rapidly coordinate demonstrations.

Like other researchers in this field, I am building my research on the foundations laid out by several noted scholars. Nicole Constable has discussed migrant activism in both the Indonesian and Filipino communities of Hong Kong in her book Maid to Order in Hong Kong (2007), alongside accounts of more subtle forms of resistance taken by migrant workers in their employers’ homes. Amy Sim (2009) has described how grassroots action within the Indonesian migrant community of Hong Kong has been somewhat effective in combatting state oppression. I hope to contribute an interesting finding to the current literature of migrant resistance in Hong Kong – the use of social media amongst migrant workers.

As there is no existing data concerning the social media usage of migrant workers in Hong Kong, I thought it valuable to conduct a small-scale survey in order to get an initial view of how many people use social media, what services they use, and how often they use these services. So, working in partnership with the Mission for Migrant Workers and the Indonesian Migrant Workers Union, I designed and distributed a survey. This is a first step of many in understanding the role of digital resources in transnational communities of Hong Kong.

Based on observations made during my qualitative research, I was aware of the use of social media amongst migrant workers. However, the extent to which social media is used was an unknown. As there was almost no data on this subject to begin with, this study was based on research questions rather than a null hypothesis with specific falsifiable parameters. The questions are as follows:

- How much do migrant workers in Hong Kong use social media?
- How, and how often, is social media used by migrant workers?
- What are the most popular social media services?
- Are there significant differences in social media usage between the Indonesian and Filipina communities?

Survey Design + Distribution

The survey instrument reads as follows:

[Social Media and Instant Messaging Survey]
This anonymous survey is part of a research project being conducted by Henry Lee, an anthropology student from the University of Toronto, in partnership with the Mission For Migrant Workers. We aim to learn about social media usage amongst migrant workers in Hong Kong. Participation is voluntary – if you don’t want to fill this out, please give the survey to someone else. If you have any questions or concerns, you can contact Henry Lee at lee.henry.hy@gmail.com or the Mission for Migrant Workers at mission@migrants.net

2. What is your nationality? □ Filipino □ Indonesian □ Other: __________

3. How long have you worked in Hong Kong? □ Less than 1 year □ 1 year □ 2 years □ 3 years □ 4 years □ 5 or more years

4. Are you a member of any activist associations or unions? □ Yes □ No
   If yes, what kind (check all that apply)? □ Religious □ Activist □ Cultural □ Regional

5. Do you use social media? □ Yes □ No
   (If you answer no, skip to question 10)

6. Which social media services do you use? (Check all that apply)
   □ Facebook □ Twitter □ Google+ □ Instagram □ Pinterest □ LinkedIn □ Myspace
   □ Tumblr □ Whatsapp □ Kakao Talk □ Line □ WeChat □ Viber □ Tango □ Skype
   □ Other: ______________

   What service provider do you use?
   □ China Mobile □ Smartone □ CSL □ 3 □ Other: ____________

   Do you use a phone or computer?
   □ Phone □ Computer □ Both

7. How long have you used social media?
   □ Less than 1 year □ 1 year □ 2 years □ 3 years □ 4 years □ 5 or more years

8. How often do you use social media?
   □ Multiple times a day □ Once a day □ Once every few days □ Once a week □ Less than once

9. What do you use social media for (check all that apply)?
   □ Activism and advocacy □ Discussing politics and news □ Keeping in touch with friends and family □ Organization activities (such as planning events with your organization)
   □ Other: ______________

10. Social media is important for migrant activism
    □ Strongly Agree □ Agree □ Neutral □ Disagree □ Strongly Disagree

    Thank you for participating!

**DISTRIBUTION**

Half of the 600 surveys were distributed in Victoria Park, Hong Kong, and within an area two blocks just west of the park. I worked with several IMWU members to distribute these surveys, over the course of two Sundays. Distribution was mobile – I walked through the park and went from group to group and person to person asking whether anyone was interested in participating. I covered a good amount of ground through the park, and as the second Sunday was a day when attendance was quite high (due to the elections in the park), I am confident that our sample was reasonably representative of the Indonesian migrant population. The other 300 surveys were distributed
in Central, Hong Kong, by members of the Mission for Migrant Workers.

**FINDINGS**

The Statistical Package for the Social Science (SPSS) for Windows was used to analyze the data collected for this study. Survey responses were analyzed for differences between Filipino and Indonesian group with respects in (a) years of working in Hong Kong, (b) years of using social media, (c) frequency of using social media, (d) numbers of social media service used, and (e) purpose of using social media. Chi-square analyses were conducted to examine whether survey response rates differed by nationality. Only those comparisons that yielded a significant relationship are highlighted.

Of the 600 surveys distributed, 540 were collected – 45% of respondents were Filipino and 54.3% Indonesian. The proportion of younger generations in Indonesians is higher than that of Filipinos. 19.4% of Filipinos are between 18-29 years old, 58.2% are between 30-44 years old, and 22.3% are 45 years old or above, while 39.7% of Indonesians are between 18-29 years old, 55.4% are between age 30-44, and only 4.7% are 45 years old or above. The years of working distribution of Filipinos and Indonesians are similar. About 42% have been working in Hong Kong for 5 years or more. 17.3% have been working for 1 year or less than 1 year.

Exactly 90% of the 540 migrant workers surveyed use at least one social media platform. The most common social media and instant messaging services were:

1. Facebook – 451 respondents (83.51% of the total respondents) use this service
2. Whatsapp – 321 respondents (59.44% of the total respondents) use this service
3. Viber – 228 respondents (42.22% of the total respondents) use this service
4. Skype – 193 respondents (35.74% of the total respondents) use this service
5. Line – 152 respondents (28.14% of the total respondents) use this service

There is statistically significant association between the years of working in Hong Kong and number of years that an individual uses social media (value=455.41, df=25, p<0.001). This indicates that the majority of the survey respondents started to use social media soon after they started their work in Hong Kong.

“Keeping in touch with friends and family” was the most common use of social media amongst survey responders (66.7%) for both Filipinos and Indonesian. The second most common use, selected 180 of the surveys, exactly a third of the responses, is “organization activities.” The third most common, with 109 selections, or 20.18% of the responses, was “activism and advocacy”. The number of years working in Hong Kong has a significant association with migrant workers’ social media use in organization activities and activism. When the amount of years working in Hong Kong increased, there was an increase in use of social media for activism and advocacy, and organization activities (activism and advocacy: value=20.9, df=5, p<0.05;
organization activities: value=18.8, df=5, p<0.05). Indonesians are more active than Filipinos in using social media for organization activities and activism (activism and advocacy: value=13.3, df=2, p<0.05; organization activities: value=7.8, df=2, p<0.05). More than 37% of the Indonesian will use social media for organization activities and 25.9% of them will use social media for activism and advocacy.

*Other findings in the Filipino sample*

Amongst the Filipinas surveyed (243 respondents), 167 were in unions or associations – 72 of which were activist unions or associations. 219 respondents use some form of social media.

The five most common social media and instant messaging services amongst the Filipina respondents are:

1. Facebook – 88.47% of the Filipina respondents use this service
2. Viber – 46.5% of the Filipina respondents use this service
3. Skype – 44.03% of the Filipina respondents use this service
4. Whatsapp – 32.92% of the Filipina respondents use this service
5. Google+ – 21.81% of the Filipina respondents use this service

In response to the statement “social media is important to migrant activism,” 76 respondents strongly agreed, 94 agreed, 24 were neutral, 4 disagreed, and only 1 strongly disagreed.

*Other Findings in the Indonesian sample*

Amongst the Indonesians surveyed (293 respondents), 127 were in unions or associations – 79 of which were activist unions or associations. 263 respondents use some form of social media. 79.18% report using social media multiple times a day.

The five most common social media and instant messaging services amongst the Indonesians sampled are:

1. Whatsapp – 81.56% of the Indonesian respondents use this service
2. Facebook – 79.52% of the Indonesian respondents use this service
3. Line – 45.39% of the Indonesian respondents use this service
4. Viber – 38.9% of the Indonesian respondents use this service
5. Skype – 29.01% of the Indonesian respondents use this service

Interestingly, while there had been some talk amongst members of NGOs about the extensive use of Twitter within the Indonesian community of Hong Kong, this turned out to be somewhat inaccurate. Only 16.38% of the Indonesians surveyed use Twitter. As well, only 7.4% of the Filipinas surveyed use Twitter.

The survey results find differences in patterns of using social media between Indonesian and Filipino groups. It is statistically significant that
Filipinos and Indonesian have different social media preferences \((p<0.05)\). Filipino groups prefer to use Facebook, Skype and viber more. The majority of them use social media at least once a day. Indonesian groups use Whatsapp, Line, Facebook, Tango and WeChat more often, and use social media more frequently – usually multiple times a day. Indonesians are also more active in using social media for organization activities and activism. For both Indonesian and Filipino groups, there is a trend that if an individual stays in Hong Kong longer, they are more likely to use social media for activism.

**Flaws in the survey design**

One of the major flaws in the survey design was the question “Are you a member of any organizations or unions,” as some might read this as “organizations and unions” and check no if they are a member of only one of these categories. Many of the Filipinas surveyed checked no for this question, but indicated that they were in fact a member of an association in the next question. I did not encounter this same issue in the Bahasa surveys collected. I speculate that this could be due to the survey being in the native tongue of the participants, which minimized confusion.

Some might take issue with the survey instrument’s conflation of social media platforms with instant messaging services, as they could be considered distinct categories. However, during the course of my fieldwork I found that this distinction is not normally made within the migrant community, and the survey was designed accordingly.

**CONCLUSION + RECOMMENDATIONS**

This survey found that migrant workers in Hong Kong are using a variety of social media services extensively. Facebook is the most popular social media service through the entire sample. Whatsapp, Viber, Line, and Skype are also popular, albeit with statistically significant differences in usage between the Indonesians and Filipinas. Within the migrant community, social media is used primarily for its most obvious role – keeping in touch with friends and family – but a significant number of respondents use it for activism and organization activities.

Organizations and individuals with an interest in either studying or providing services for the migrant population of Hong Kong might utilize social media, especially Facebook (used by 83.51% of survey respondents), to deepen knowledge of the community, stay informed about important events, and communicate directly with migrant workers.

Researchers would be wise to use social media to keep in touch with individual migrants they are studying. I am aware of other researchers who are currently doing this (including a PhD candidate who is using Facebook to track individuals through their migration processes), but to my knowledge it is not a widespread practice. A researcher wishing to take this advice should be aware of the unique and difficult ethical questions that arise.
when conducting a netnography. Protecting the identity of individuals and navigating the blurry boundaries between public and private online space are key issues one might face. The American Anthropological Association does not currently stipulate the ethics of online research, so it is the responsibility of individual researchers to educate themselves on the issue. A good primer on online research (and its many ethical issues) is the book *Netnography: Doing Ethnographic Research Online*, by Robert V Kozinets (2010), which explores some of the issues I just mentioned in great detail.

Institutions such as the Mission for Migrant Workers already run online pages on social media like Facebook. These pages provide information about the organization, contact information, and news about upcoming events. In the future, NGOs could consider offering services, such as consultations or urgently needed legal advice, to migrant workers through social media (as the Indonesian Migrant Workers Union already does). As well, Whatsapp and other instant messaging services could be used as “hotlines” for communication between NGOs and migrant workers.

**ACKNOWLEDGEMENTS**

*Special thanks to Norman Carnay of the Mission for Migrants Workers for his guidance at every step of this research, Eni Lestari for translating our survey instrument into Bahasa Indonesian, Sringatin for her support, and the IMWU members (especially Yanni, Lilik, Luluh, and Isa) who helped distribute this survey.*

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FOREIGN DOMESTIC WORKERS IN HONG KONG AND THEIR RIGHTS TO STATUTORY MINIMUM WAGE

Hee Yeon Cho

INTRODUCTION

Foreign Domestic Workers (hereafter FDW) in Hong Kong Special Administrative Region (hereafter Hong Kong) have become more or less important components of the Hong Kong society. Yet, their social, economic and legal status have endurably stayed low despite their increased population and attribution in Hong Kong’s society and economy. In recent years, many undesirable aspects of working conditions for FDWs have come into public’s attention; limited legal protection, social discrimination, privacy, security, harassments committed by employers and etc.

Although many other areas need research and public discussion, I will focus mainly on contemplating why Statutory Minimum Wage (hereafter SMW) scheme should apply to FDWs in the context of Hong Kong, in this essay. Therefore, this paper will closely examine international trend including delicate analysis of International Labour Organisation’s (hereafter ILO) Domestic Workers Convention (hereafter C189) promulgated in 2011 and comparative study on different jurisdictional approach to FDWs and their wages. Then, this essay will move on to refute existing counter-argument submitted by Hong Kong Employers of Domestic Helpers Association (hereafter EDHA). Ultimately, this essay will address realistic but also administrative reasonings that support SMW adoption in Hong Kong for FDWs and impacts SMW can have on FDWs in other inter-related aspects of their lives.

There are many studies on immigration policies for FDWs living in their destination countries but it is very rare to find any study that discusses SMW adoption for FDWs. Here in my research paper, I would like to submit an independent argument established based on my study in this subject and working experience at Mission for Migrant Workers (hereafter MFMW) as there are barely any researches done in the relevant area.
According to South China Morning Post (2013), there were approximately 320,000 FDWs in Hong Kong composing 3% of the total population. Please refer to the Pie Chart 1 submitted below for the specific information of ethnic composition of FDWs residing and working in Hong Kong.

The above statistics is extracted from concept paper produced by Bethune House - a shelter operated by the MFMW. As visible from the above pie chart, the main ethnicities composing the whole FDWs are Filipinos and Indonesians. The 1% of others include FDWs coming from - Sri Lanka, Nepal, Myanmar, Bangladesh and Pakistan.

In Vallejos v Commissioner of Registration [2013] 16 HKCFAR 45 it was held that Foreign Domestic Helpers (equivalent to the term FDW used in this research) are not entitled to their rights to permanent residency in Hong Kong. Also as evident in the judgement, FDWs employed in Hong Kong are working under extremely restricted legal constraints. They are obliged to live with their employers’ residence, no coverage under SMW, no over-time work compensation and many other unfair societal treatments.

Although FDWs are exactly the same as other foreign workers coming to Hong Kong to work in banks, universities, stock firms, law firms and etc. the literary nuance of “domestic”, treatment and legal status acknowledged by the Hong Kong government is very different. This research will investigate SMW area in particular.

Some comment that low labour cost is the only reason for hiring a FDW and increasing their wage by applying SMW or raising MAW will considerably lower demand for FDWs which will result in many of them losing their jobs. Please refer to the Graph 1 for the aforementioned opinion.
The Wmin represents SMW that are presumed to have been imposed in Hong Kong’s FDWs market whereas WL1 refers to the current wage level equivalent to MAW. At present the quantity of labour and wage level stay at Q1 and WL1 each respectively. The demand for labour (DL) might decrease from Q1 to Q3 since Wmin would be set at higher level than WL1 as shown in the diagram above. On contrary, at increased wage level, supply of labour will increase from Q1 to Q2. The Quantity Supplied (Q2) exceeds Quantity Demanded (Q3) and hence the gap between Q3-Q2 can be seen as unemployment. This is a possible scenario for FDWs and a reason why some argue that implementation of SMW will have a negative drawback. However, this may not necessarily be true. FDWs in Hong Kong most of the time undertake more than one job. They are often cook, nanny, caregiver for (sick) elderly, cleaner and tutor (Chan, 2005). The range of tasks are quite demanding especially for those working for a family with small children or sick elderlies. In Hong Kong, family formats have transformed into nuclear families from big families and also in many other Asian countries. The change in family size especially in Hong Kong made it difficult for working mothers to ask child care to close relatives residing nearby (Chan, 2005).

The aforementioned inability to ask relatives for help coupled with extremely limited state provision of child cares trigger high demand for FDWs which now became rather an indispensable element of their working career and motherhood. For such a variety requested due to the nature of FDWs’ work and essential need for one, it is more reasonable to give them right monetary award which is not satisfied with current MAW. It should be Hong Kong government’s job to develop their own social welfare scheme to aid working mothers by providing more child cares, not FDWs’ duty to sacrifice and yield for a low wage so expenditure does not become a burden for the employers’ household. Hong Kong government should treat the FDWs equally to other foreign workers as their labour is valuable in the same level to others who are subject to SMW.

“I WOULD NOT HAVE DARED TO GIVE A BIRTH WITHOUT A DOMESTIC HELPER”

Hong Kong’s fertility rate is so low that it ranked 221 out of 224 countries and states (CIA, 2013). Limited state provision of child care, increased role of
women in society, ageing marriage couples and high cost of living are suspected reasons to low fertility rate. The emotional burden can be found from a mother in a study conducted by Professor Chan (2005) where she testified,

“If it is not so common to hire a maid in Hong Kong, we would not have children. How can we manage without an affordable maid? ... Surely I cannot leave my baby at a childminder’s home while I go to work? (why not?) There are no regulations to govern childminders in Hong Kong!”

The more significant impact of FDWs highlighted from Professor Chan’s study and statement from a mother is that FDWs motivate females, especially working mothers, for pregnancy by offering their labour for child care. This immediate factor has a huge impact on Hong Kong’s overall population and their future work force. Up until now, only the impact of FDWs on the economic power of middle class families was highlighted. However, it is now to spotlight what further influence they have brought and are bringing in to Hong Kong’s society from a wider perspective. As evident in Professor Chan’s study, if it is bringing a positive one and working as a substitute for government’s lack of support, this effort should be recognised and compensated in financial terms.

**UNDER STATUTORY MINIMUM WAGE, HOW MUCH WOULD FDWS BE PAID?**

*Table 1: Statutory Minimum Wage in Hong Kong (HK Labour Department, 2014)*

<table>
<thead>
<tr>
<th>Time</th>
<th>November 2010</th>
<th>May 2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount (HK$)</td>
<td>28</td>
<td>30</td>
</tr>
</tbody>
</table>

The SMW was first introduced in 2010 in Hong Kong. As illustrated in Table 1, the SMW was reevaluated at HK$30 in 2011. Furthermore although undecided at present, July 2014, public consultation to increase SMW to HK$36 per hour is on going. Although some are worried about potential unemployment due to increase in SMW, the proposal is less likely to be objected due to high inflation rate, 7.1% (SCMP, 2014). In order to provide a general picture of subsequent result upon application of SMW, I have provided calculation in Table 2.

This calculation exhibited in the Table 2 below assumes three things.

- There are 30 days a month
- A FDW works 6 days per week
- There are 4 unpaid rest days

*Table 2: Prospective wage for FDWs upon implementation of SMW*

<table>
<thead>
<tr>
<th>SMW (HK$)</th>
<th>Monthly Wage - 8 hours per day (HK$)</th>
<th>Monthly Wage - 12 hours per day (HK$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
<td>(HK$30 * 8 hours * 26 days)</td>
<td>(HK$30 * 12 hours * 26 days)</td>
</tr>
</tbody>
</table>
The gap between prospective wage and current MA W evident in Table 2 exhibits two important issues. One, under the current MA W scheme, FDWs are underpaid by too far considering that other normal workers will be paid at least HK$2,230 more for the same amount of work. Hence there is a desperate need to increase their salary ideally by implementing SMW. Two, there is no incentive for long working hours. Therefore, it can be concluded that current MA W allows a room for FDWs to be exploited of their labour as there is no extra cost incurred by the employers for extra hours of labour committed by their employees. Therefore, application of SMW can be a preventive measure to inhibit employers to slave their employees.

**HISTORY OF MAW**

This research paper is a fruit of internship experience at MFMW and during my work I was fortunate to meet many FDWs and listen to their personal living and working experiences here in Hong Kong. Sometimes I tried to have a small discussion and presented opinions submitted by EDHA in order to hear the real life experience and frank answers and views from FDWs.

"WE SHARED THEIR SORROW BUT WE WERE FORGOTTEN AT TIMES OF JOY"

The EDHA likes to justify MA W based on two core reasons. First, MA W gets reviewed regularly by the government authority hence the amount is set after fair evaluations. Second, the MA W increased every time except 1998 and 2003.

However their argument is coming from a rather distorted presentation of data. First, they overlook two significant reductions made in 1999 and 2003 - 5% reduction and $400 decrease each respectively was pursued by the Hong Kong government reasoning bad economy and unemployment situation. The wage decrease decided in 2003 especially was a fatal one. Second, the EDHA seems to take it as a natural and fair step to cut down wages when the economy is bad but they do not seem to consider sharing the joy when the economy is skyrocketing. The increase in MA W has not been in accordance with real GDP rates particularly when the economy was enjoying its boom.
Please refer to the table and graph below for the specific adjustments imposed to MAW over the last decade.

**Table 3: Adjustment on MAW since 1998**

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount (HK$)</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>3,860</td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>3,670</td>
<td>5% reduction due to bad economy and employment situation in HK</td>
</tr>
<tr>
<td>2003</td>
<td>3,270</td>
<td>$400 reduction due to the same reason submitted in 1999</td>
</tr>
<tr>
<td>2005</td>
<td>3,320</td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>3,480</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>3,580</td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>3,740</td>
<td>There was no adjustment in 2009 and 2010</td>
</tr>
<tr>
<td>2012</td>
<td>3,920</td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>4,010</td>
<td></td>
</tr>
</tbody>
</table>

**Adjustments in food allowance is not concerned in this table.**

Furthermore, the EDHA always argues validity of the MAW however, does not confidently present lawfulness of the calculation of MAW.

The grounds for unchanged MAW from years 2003 to 2005 at HK$3,270 and 2008 and 2010 at HK$3,580 were economic struggle and financial difficulties for Hong Kong and its people which is shown through real GDP rates in Table 4 in the next page. As shown in Table 4, Hong Kong economy had a substantial increase in their real GDP in years of 2004, 2005 and 2010. Yet, the amount of MAW increased for FDWs does not reflect such growth.
Moreover the current wage HK$4,010 is only HK$150 more than the wage in 1998 despite more than a decade’s gap. This illustrates two things. One, two deductions in 1999 and 2003 were really critical and substantial in terms of its amount. When it comes to reduction, the Hong Kong government are bold enough to make HK$190 and HK$400 cut down but at times of increase the amount remains rather shy. Two, considering the inflation rate, MAW review was not properly conducted.

The most important thing should not be how often MAW is being reviewed or the number of times when it was deducted but should be how it is being calculated and whether or not it is responding to actual GDP growth rate or inflation rate. Although the government argues that MAW is rescheduled annually according to inflation rate, more often it was not. If this essay were to comment on the second part, it is not reasonable to force only FDWs to share the agony when no party is interested in compensating them back when the times are good.

Table 4: Real GDP growth rate in Hong Kong since 1999

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>+1.8</td>
</tr>
<tr>
<td>2000</td>
<td>+10.0</td>
</tr>
<tr>
<td>2001</td>
<td>0.0</td>
</tr>
<tr>
<td>2002</td>
<td>-3.0</td>
</tr>
<tr>
<td>2003</td>
<td>+3.3</td>
</tr>
<tr>
<td>2004</td>
<td>+7.9</td>
</tr>
<tr>
<td>2005</td>
<td>+7.3</td>
</tr>
<tr>
<td>2006</td>
<td>+6.8</td>
</tr>
<tr>
<td>2007</td>
<td>+6.4</td>
</tr>
<tr>
<td>2008</td>
<td>+2.4</td>
</tr>
<tr>
<td>2009</td>
<td>-2.8</td>
</tr>
<tr>
<td>2010</td>
<td>+6.8</td>
</tr>
<tr>
<td>2011</td>
<td>+4.8</td>
</tr>
<tr>
<td>2012</td>
<td>+1.5</td>
</tr>
<tr>
<td>2013</td>
<td>+2.9</td>
</tr>
</tbody>
</table>

Please refer to Graph 3 for general comparison of wages amongst different occupations in Hong Kong which provides a general picture of wage awarding scheme. Cooks and cleaners receive nearly two to four times more than current MAWs for FDWs. One of the limitations of this data is that it does not provide how skillful or professional these occupational people are. Of course we have to admit that this data could well be discussing professional and high
profile cooks who were trained overseas and currently employed at somewhat luxurious restaurants. However, this data is valuable as it works as a guidance to show approximate wage of people in a certain working career who share similar working nature with FDWs; cooking and cleaning. This is an effective resource for comparative studies in relation to wages.

Graph 3: Comparison of monthly salary amongst different occupations in Hong Kong

<table>
<thead>
<tr>
<th>Job</th>
<th>Average Monthly Salary (HK$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounting Supervisor</td>
<td>22600</td>
</tr>
<tr>
<td>Administrative Supervisor</td>
<td>16000</td>
</tr>
<tr>
<td>FDW</td>
<td>7500</td>
</tr>
<tr>
<td>Receptionist</td>
<td>16000</td>
</tr>
<tr>
<td>System Analyst</td>
<td>16000</td>
</tr>
<tr>
<td>Cook</td>
<td>16000</td>
</tr>
<tr>
<td>Waiter/Waitress</td>
<td>7500</td>
</tr>
<tr>
<td>Cleaner</td>
<td>0</td>
</tr>
</tbody>
</table>

JOSEPH LAW, “THEY (FDWS) DON’T HAVE TO PAY ANYTHING!” - REALLY?

Joseph Law representing EDHA on a television debate held by ATV in 2009 voiced out validity of MAW arguing that FDWs do not have to pay anything on their own such as insurance, housing, water and electricity bills and sometimes food. I will submit counterarguments in turn.

First of all, insurance fee should be dismissed in this argument. Section 40(1) of Employees' Compensation Ordinance (Cap 282) states that, “no employer shall employ any employee in any employment unless there is in force in relation to such employee a policy of insurance issued by an insurer for an amount not less than the applicable amount specified in the Fourth Schedule in respect of the liability of the employer.”

An employer who fails to comply with s 40(1) will then have to pay a surcharge to Employees Compensation Assistance Fund Board under Employees' Compensation Assistance Ordinance (Cap 365). The insurance is something that is being covered by every employer for every employee working in Hong Kong. Law’s argument is that he and other people need to pay for his own private insurance whereas for FDWs, employers have the burden to pay for the insurance.

This assertion can be nullified on two grounds. First, he is talking about personal insurance which covers injuries and sicknesses that happen in private sphere. Second, developing from the first reason, it is a simple
legal duty arising from employer - employee relationship. The employees’ compensation insurance has nothing to do with SMW. Although FDWs work inside someone’s private sphere, they still are employers and are obliged to provide insurance for FDWs. Therefore Law’s argument not to increase MAW nor to implement SMW because of insurance fees that occur for employers is invalid. Families who hire a domestic helper themselves become employers and it is sound to fulfil their duty as employers according to relevant legislations like Cap 282 and Cap 365. FDWs are labourers and employees just like any other worker in Hong Kong and they should also be protected legally and given their rights accordingly. In the debate, Law seemed to argue that insurance was something extra awarded to FDWs and it is not.

Secondly, Law points out that FDWs do not need to pay for their housing and bills for water and electricity. However, this is purely due to the compulsory live-in policy. Also, he has to bear in mind that for FDWs, where they sleep is where they work. At this moment where live-in policy is an obligatory for every FDW, it is insensible to ask them to pay for electricity and water at work. This matter would be more suitable for debate when live-in policy is eliminated or SMW are applied to all FDWs. This part could be further developed if I were to discuss abolition of live-in policy along with the implementation of SMW but the focus of this essay should remain only at SMW. The possible impact of SMW on live-out policy should be dealt as miscellaneous later in this essay.

Thirdly, it is not valid to dispute that FDWs do not need to pay for their own food. They can negotiate whether or not to receive food allowance separately, but it does not mean they get their preference. It depends on employer’s willingness to pay for extra. Additionally when they do not receive food allowance, it does not mean they are fed well. Many of them who come to MFMW for consultation often bring up issues with their food provided by their employer - often they are given left overs from two to three days ago and just not enough food in terms of its quantity. There is no specific standard nor description that can be applied to food distributed by employers. Consequently, this leads FDWs spend extra on food in their own budget.

Furthermore, Law also mentioned that domestic helpers do not incur in any expenditure and get to keep all their income which makes the percentage of their disposable income relatively higher than other labourers. This is untrue. FDWs need to buy their own personal goods such as clothes, bath supplies, communication expenses, transportation fee for day offs and other small expenditures like getting hair cut would occur. Moreover, they have family members back in their home country to support where the most income gets spent. Life habits of FDWs are exactly identical to that of others. Most importantly, amount of net income or where FDWs spend their income should not be his concern nor a legal reason to oppose SMW.

"HOW ARE YOU GOING TO DECIDE ON WORKING HOURS?"

Refer to Canadian example and C189 of the ILO

The most common counter-argument submitted by those who oppose
SMW appliance to FDWs is the ambiguous measurement of working hours. However, this problem may simply be solved if we were to follow Canadian example. The state government of British Columbia explicitly set out working hour regulations and over-time charge. According to the contract, the standard working hour for domestic helpers in Canada is eight and they will be able to charge any extra hours after that.

The solution to this problem is rather straightforward although we have to bear in mind that there is no regulated standard working hours exist in Hong Kong. Hence, there could be two scenarios. First, the government through their reform and review of the Employment Ordinance (Cap 57), can come up with certain working hours for FDWs to be stated on their contracts. However if this is impossible, the second scenario can be to revise the Cap 57 but to leave a room for working hour negotiations between employers and employees upon their signing of the contract limiting that the working hour does not exceed maximum working hour which should be decided within Hong Kong’s jurisdiction after consultation with its Labour department.

Since this essay is primarily concerned with SMW only, it spotlighted SMW and working hours in Canadian policy but it should be noted that Canadian law has specific indication in terms of work-free hours between shifts and weeks. This is illustrated in the table below.

<table>
<thead>
<tr>
<th>Statutory Minimum Wage</th>
<th>CAN$10.25 per hour (effective from 1 May 2012) (if converted into HKD, HK$73.96 per hour at 22 July 2014)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Working Hours</td>
<td>8 hours per day or 40 hours per week (over-time charge is applicable to any hours exceeding stated hours)</td>
</tr>
</tbody>
</table>
| Daily Overtime Calculation                 | Hours over 8 per day: 1.5 * regular wage  
Hours over 12 per day: 2 * regular wage |
| Weekly Overtime Calculation                | Hours over 40 per week: 1.5 * regular wage |
| Rest Hour Regulations                      | Domestic helpers shall be free from work for at least 8 hours before they start another shift and 32 consecutive hours free from work each week. |

Currently exhibited Canadian policy is in compliance with C189 promulgated by the ILO. Most importantly, application of minimum wage is stated in Article 11 of C189:

“Each Member shall take measures to ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex.”

Furthermore, the issue of working hours is stated in Sec (f) of Article 7:

“Each Member shall 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 contracts in accordance with national laws, regulations or collective agreements, in particular: (f) the normal hours of work"

As evident above, Canada is accomplishing its recommended duty and obligation as a member of the global society and there is no reason why Hong Kong cannot do it. It is unfair to keep FDWs’ labour at low cost and ask them to sacrifice for their employers although that is how Hong Kong has operated its policy towards FDWs up until now. It is time to change and pay justifiable cost to FDWs who serve multiple and essential roles in Hong Kong’s society.

This research is not asserting that the same hourly rate should be applied to FDWs in Hong Kong, rather it is just introducing a very well developed SMW and working hour regulation schemes in Canada. Apart from Canada, Italy and the United Kingdom and some states in the United States of America like New York and Los Angeles have developed their own SMW and working hour regulations for domestic helpers which apply exactly the same to FDWs. Additionally, this essay is not saying eight working hours in specific should be applied in same manner here in Hong Kong as some might argue that general working hour is longer here. However, the main idea is to set a reasonable maximum working hours to prevent FDWs being exploited physically and mentally. The maximum legal working hours then would enable more efficient calculation of monthly wages.

It is now time to award correct monetary compensation to FDWs who had supplied cheap labour to many families in Hong Kong and enabled expansion of women’s role and economic development. This can be achieved through inclusion of FDWs under SMW. Law pointed out that there are countries who give less salary and treat FDWs worse but as Villannueva pointed out, it is absurd to compare to other states with regressive and less civilised legal and social policy and attitude. It is not reasonable to tell the FDWs to stay silent and be satisfied with what they have now because there are other worse examples in the world because on the contrary, there are other advanced models to follow. It is time for Hong Kong government’s determination and willingness to act on behalf of people who are in less privileged socio-economic group, came from overseas to attribute their workforce in Hong Kong but who are equally important individuals as any other workers in Hong Kong.

WHAT ELSE DOES C189 SAY?

In this chapter, I will tackle relevant parts of the C189 published by the ILO to contemplate reasons why Hong Kong needs to review its overall policies for FDWs and especially those regarding the wage awarding schemes. The whole process of consulting, drafting and promulgating the C189 took ten years according to Cynthia Tellez, the general manager of the MFMW. The C189 is a fruit of long years discussion between different interested parties and effort taken by NGOs working for the rights of the FDWs in the world. As a consequence, it is now being recognised as world class standard
that many countries are adopting in their domestic jurisdictions. Often, the EDHA members would argue that Hong Kong is not obliged to adopt the C189 based on reasons such as that Hong Kong is not a member state of the United Nations and Hong Kong did not sign the specific Covenant. However, I would say this argument is rather an invalid one since the Conventions submitted by the ILO do not mean that only member states and countries should follow such protocol but it takes a very persuasive stance to other states and countries which did not sign specific Convention. The world trend is going for the vast adoption of the C189 by many jurisdictions in a remarkable speed. Therefore the responsibility lies within the Hong Kong government as a member of the international society to make sure their domestic laws are in compliance with conventions decided by the ILO.

The Article 1(b) of the C189 states,

“(b) the term *domestic worker* means any person engaged in domestic work within an employment relationship;”

The definition provided by the ILO does not discriminate FDWs to local domestic workers and hence all the contents laid out in the Convention should be regarded to apply in exactly the same manner for the FDWs. This definition is at the core of the argument for appellation of the SMW as FDWs reserve same rights as other local workers especially in terms of wage awarding mechanisms. Anything different should be regarded as a discrimination against FDWs.

The Article 5 of the C189 states,

“Each Member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence.”

As shown in the Table 2 of this essay, FDWs are definitely being underpaid compared to what other labourers would receive under the SMW scheme, it is a form of abuse of FDWs’ labour force at unreasonably cheap price which is banned by the Article 5 of the Convention which requires an immediate action to be taken.

Furthermore, the Article 6 is as below,

“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.”

The very first part of it advocates fair and equal treatments towards FDWs which should be indifferent to other measures that apply to local domestic workers. This adds more strength to the assertion that FDWs should not be excluded from SMW policy. Their labour should be measured equally into monetary terms via applying SMW.

The Article 7(f) and (g) state,

“Each Member shall 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, through written contracts in accordance with national laws, regulations or collective agreements, in particular:

(f) the normal hours of work;
The Article 7 ensures there should be a decent working environment for all domestic workers which could be achieved by setting a regulation on working hours and specific rest hours and days. In Hong Kong this can be kept if SMW were to be applied as it would work as a preventive measure to stop exploitation of work force of FDWs and effectively reduce excessive working hours that are currently in practice in many of the households.

Additionally, Article 10(1) discusses over-time compensation, “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 in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work” It explicitly contests that domestic workers are entitled same rights for their overtime compensation. This is in line with the argument that domestic workers more or less should share same legal status as other labourers. Therefore, overtime compensation should be put in practice in Hong Kong as well as a part of reviewed wage awarding scheme.

The argument for SMW coverage can be found in Article 11 where it states, “Each Member shall take measures to ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex.”

The SMW first came in force in Hong Kong in 2011 and therefore the Article 11 can be considered in the context of Hong Kong that it ascertains that FDWs should also be covered by the SMW as it applies to any other labourers in Hong Kong.

“IF SMW APPLIES TO FDWS, MOST FAMILIES WOULD NOT BE ABLE TO AFFORD ONE!”

Before moving onto the financial affordability issue SMW might cause, I would like to highlight existing problem regarding financial ability test for employers at present. The current prerequisite for prospective employers to hire a FWD is, “to be a Hong Kong resident with a monthly household income of no less than HK$15,000 or assets of comparable amount to support the expenses for the entire (i.e. two-year) contractual period” (HK Labour Department, 2012). However, this pre-condition is too low in terms of its amount; considering rent, food, clothing, transportation, tele-communication fee and other small expenditures, households with the very minimum prerequisite of course will not be able to afford a FDW in reality. In many cases, employers those who are financially in apt to have a domestic helper (although they were eligible to have a FDW under the current condition) often delay the payment or underpay their FDWs.

Having a low financial pre-condition is to allow not so rich Hong Kong residents to hire a FDW as their service is offered at comparatively cheaper cost compared to one of the local ones. The FDWs hired by middle class or even lower class families assist their employer with child care, caregiver
for elderlies at each household and all other house chores so the employers
can concentrate on their economic activity outside and earn a living for
their family members. As argued by Law, having only HK$15,000 as the
prerequisite increased demand for FDWs, consequently expanded FDW
market in Hong Kong. However, administrative and short sighted efficacy
is not everything. As aforementioned, financial inability of employer often
incur in undesirable circumstances where a domestic helper needs to claim
back her delayed payment or underpayment through Small Claims Tribunal
which takes around a month. Only those who could truly and financially
afford to have a domestic helper shall have one.

It is a very selfish attitude to tell FDWs to keep their wage at a low level so
more Hong Kong families can afford them. It is the same labour offered by the
same people and should be valued at the same level. There is no valid reason
why foreign labour force should be undervalued and their sacrifice should be
considered just because it satisfies Hong Kong locals.

WHAT IS THE WORLD DOING?

Already a number of countries ratified ILO’s C189 - Domestic Workers
Convention. As the term domestic worker includes those who migrated from
their home country to another for work, this should be applied to FDWs in the
same manner. Below is the list of countries that ratified C189 adopted from
the ILO’s website.

Table 6: List of countries that ratified C189

<table>
<thead>
<tr>
<th>Country</th>
<th>Date</th>
<th>Status</th>
<th>Note</th>
</tr>
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<tr>
<td>Argentina</td>
<td>24 Mar 2014</td>
<td>Not in force</td>
<td>The Convention will enter into force for Argentina on 24 Mar 2015</td>
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<tr>
<td>Bolivia, Plurinational State of</td>
<td>15 Apr 2013</td>
<td>In Force</td>
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<tr>
<td>Columbia</td>
<td>09 May 2014</td>
<td>Not in force</td>
<td>The Convention will enter into force for Columbia on 09 May 2015</td>
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<tr>
<td>Costa Rica</td>
<td>20 Jan 2014</td>
<td>Not in force</td>
<td>The Convention will enter into force for Costa Rica on 20 Jan 2015</td>
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<tr>
<td>Ecuador</td>
<td>18 Dec 2013</td>
<td>Not in force</td>
<td>The Convention will enter into force for Ecuador on 18 Dec 2014</td>
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In the context of Asian culture, implicit meaning of the term domestic work as a job carries less weight. It is less important as a job career although it is something that must be done for everyone’s daily living. Also, it is regarded to be women's duties around home at very low cost or no cost at all. The gender majority in this job field occupied with women with 97% in the context of Hong Kong shows a potential reason why domestic workers might have not received enough respect and wage in return to their valuable and needed work. Now, impartial legal and administrative standard like C189 needs to be implemented in a wider world including Hong Kong to ensure the rights of FDWs.

*Italy, America and Canada*

These three countries are the leading examples to follow in terms of wage schemes for FDWs. General policy for domestic workers or caregivers apply equally to FDWs and they are subject to the same benefits. Not only the SMW apply to them but also rest hours, working hours and over-time work charge policies are explicit for both employers and employees. Also, especially in Italy Filipino FDWs are treated with more respect due to several reasons. First, many of them are highly educated for a domestic helper. Often they have their degree in nursing or education. Hence they are viewed to be qualified to take more than one role - tutors for children or ability to offer first aid especially when they are looking after sick elder in the household. Second, Filipinos speak good English which is a definite bonus for employers as the communication can take place more smoothly.
SCOPE

At present, there are very few studies conducted regarding construction of wage awarding scheme for FDWs in Hong Kong and other parts of the world. More studies focus on their immigration process and status as foreigners in their destination country. Also, people are more concerned with wage awarding policy for general Foreign Workers labouring other parts of the economy but not in someone’s household.

Many FDWs are still left rather in a lonely position in our society. They are not as important as other workers and debates why their wages should be increased are always not the priority of each society. Hence, it was unable to collect different government’s press releases or official address about their stance towards FDWs. Although in Hong Kong the wage issue continuously has become a social issue it is not the same in other countries where public policies for FDWs are not so developed.

CONCLUSION

This research paper advocates more than 320,000 FDWs working in Hong Kong about the wage issue. They have long claimed for better and fairer wage to be calculated by the Hong Kong government and since 2011 when the SMW first put in practice in Hong Kong, many FDWs protested to be included in that policy. However, up until now their suggestion is not being accepted.

The summary of major opposing reasons are stated below;
- Complicated calculation on actual working hours
- Complicated calculation on utilities, rents, electricity and water used by FDWs who reside in their employer’s place
- Financial burden on middle class families with domestic helpers

This essay projected other jurisdictions mainly Canada who successfully operate SMW policy for FDWs by regulating working hours. It is looking at more developed and sophisticated system that are in play by another country which can be learned by the Hong Kong government.

Especially in regard to the Asian society where domestic work is not valued fairly, this essay argues that FDWs’ continued contribution to Hong Kong economy should be recognised now followed by increased monetary award in form of SMW. FDWs offered their labour at cheap cost which is desperately needed by huge number of families in Hong Kong which enabled more people in a household to go out and engage in their economic activity which amounted to higher level of income for those families.

The Legislative Council’s argument is that live-in FDWs enjoy benefits that are not available for other domestic workers and therefore including them in the SMW scheme is not suitable. However, as provided earlier in this essay, Canadian government still make sure that FDWs are paid SMW and upon negotiation with their employer, FDWs need to pay their employer maximum of CAN$325 for per month for room and board (Labour Government, 2013) It is not impossible to have SMW for FDWs.
As repeated earlier in this essay, labourers devotion and successful completion of work should be compensated with financial incentives and improved benefits in a capitalist world which Hong Kong promotes itself to be. Mature acknowledgement and attitude in accepting employees’ contribution will not do any harm but would only improve reciprocal relationships between employees and employers.

REFERENCE

Case
1. Vallejos v Commissioner of Registration [2013] 16 HKCFAR 45

Convention
1. International Labour Organisation - Domestic Workers Convention 189 (2011)

Journals


Website


Government Report


Television Programme

The second publication of the Migrants Review gives an opportunity for the researches and essays of our interns and volunteers to be read by the wider public. Authors of these researches and essays are young people from Hong Kong and overseas who chose the MFMW as their placement organization to broaden and deepen their understanding of migration and migrant workers. The MFMW continues to develop our internship/volunteer program to be dynamic and responsive to the needs of our organization as well as those of our interns and volunteers. The topics of these guided researches that explored the different aspects of migration of foreign domestic workers in Hong Kong were chosen by the MFMW and our interns/volunteers not only to satisfy their academic requirements but also to enrich our knowledge base for further improvement on our work.