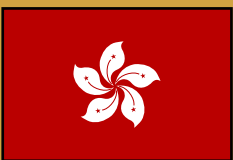




Photo credit: United Nations/Lin Joe Yin



RECEIVING COUNTRIES

Hong Kong SAR (China)



A. TERRITORY CONTEXT

Hong Kong, although a part of China, is a special administrative region (SAR) created in 1997 after the expiration of the United Kingdom's 99-year lease on the territory. Under the principle of "one country, two systems", Hong operates under a different political system from mainland China and maintains a relatively high degree of autonomy, enjoying executive, legislative and independent judicial power. Hong Kong SAR's independent judiciary functions under the common law framework, and The Basic Law, Hong Kong SAR's constitutional document, ensures equality before the law, and respect for the rights and freedoms of its residents, including freedom of assembly and movement, freedom of religious belief, and freedom to join trade unions.¹

Hong Kong SAR is one of the most densely populated places in the world. It has a population of 7.1 million², enjoys a very high human development index. Hong Kong SAR is primarily a receiving territory of labour migrants. Foreign workers include professionals as well as domestic workers, with the latter making up approximately 4 percent of the population and are overwhelmingly women. As of April 2013 Hong Kong employs more than 300,000 foreign domestic workers.³ The overwhelming majority of these domestic workers are women, most of whom originate from the Philippines (152,807) and Indonesia (151,382).⁴

1 Available from: <http://www.gov.hk/en/residents/government/political/#/en/residents/government/law/>

2 Available from: <http://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf> |

3 Available from: http://www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS_201584/lang--en/index.htm

4 *Global Migration 2012, Trends, Patterns and Conditions of Migration, Asia Pacific Mission for Migrants*. Available at: www.apmigrants.org/downloads?dir...Researches...file...2012...

Human Development Index	Rank 21 (Very high)
Stock of immigrants 2010	2,741,800
Annual growth rate of immigrant population	0.9%
Immigrants' share of the population	39.5%
Proportion of female immigrants	56.5%

B. KEY GENDER AND HUMAN RIGHTS ISSUES

In general, Hong Kong SAR is perceived to enjoy a high level of civil liberties. Human rights protection is enshrined in the Basic Law and its Bill of Rights Ordinance (Chapter 383). The Bill of Rights Ordinance puts the International Covenant on Civil and Political Rights (ICCPR) into effect in Hong Kong SAR. Any legislation that is inconsistent with the Basic Law can be set aside by the courts.

Although the territory's administration generally respects the human rights of the citizens, there are concerns that the right to freedom of assembly has been unduly restricted by the Public Order Ordinance and that police have abused their powers when using heavy-handed tactics towards protesters. Other core areas of concern include covert surveillance tactics that violate the right to privacy, a lack of legal protection for homosexuals, and a lack of respect for labour rights.

Additionally, in 2011, the right to abode and the debate on whether to grant permanent residency to migrant workers who have been working and living in Hong Kong SAR for at least seven years sparked a public controversy, and highlighted how domestic workers are often perceived and treated differently from others who migrate for work. Hong Kong SAR's Basic Law allows that persons not of Chinese nationality can apply for permanent residency if they entered on valid travel document, ordinarily resided in Hong Kong SAR for a continuous period of seven years, and have taken the territory as their place of permanent residence.

However, domestic workers are excluded from this provision of the law. In 2011, the High Court held that the Basic Law applies equally to all people, including domestic workers. This decision was heralded by human-rights advocates as an important step forward in eliminating discrimination against migrant domestic workers. However, in March 2012, the High Court's decision was overturned by the Appeals Court which held that sovereign authority has the power to admit, exclude and expel certain categories of aliens.⁵ Critics argue that gender, race and nationality are what lie at the heart of such unfair treatment towards domestic workers.

C. KEY STAKEHOLDERS

Labour laws in Hong Kong SAR are administered by the Labour Department, which is charged with improving the utilization of human resources by providing a range of employment services to meet changes and needs in the labour market to: ensure that risks to people's safety and health at work are properly managed by legislation, education and promotion; foster harmonious labour relations through promotion of good employment practices and resolution of labour disputes; and improve and safeguard employees' rights and benefits in an equitable manner.

Migrant Forum Asia (MFA) is a regional network of non-governmental organizations (NGOs), associations and trade unions of migrant workers, and individual advocates in Asia who are committed to protecting and promoting the rights and welfare of migrant workers. MFA acts as a facilitator and a regional communication and coordination point between member organizations and advocates, forging concerted action to address discriminatory laws and policies, violence against women migrants, unjust living conditions, unemployment in the homeland and other issues affecting migrant workers.⁶

The Hong Kong Federation of Asian Domestic Workers (FADWU), founded in 2010, seeks to unite the unions representing domestic workers of different origins into one federation in order to struggle for common rights and conditions in Hong Kong SAR. It used the campaign for adoption of the International Labour Organization's (ILO) Convention on Domestic Workers as a unifying tool, and with technical and financial inputs from the ILO, affiliated six domestic worker unions in Hong Kong SAR, the Philippines, Nepal, and Thailand. The founding unions are: the Indonesian Migrant Workers Union; the Hong Kong Domestic Workers General Union; the Filipino Domestic Helpers General Union, Hong Kong; the Union of Nepalese Domestic Workers in Hong Kong; the Overseas Domestic Workers' Union – HK; and the Thai Migrant Workers' Union Hong Kong.⁷

D. RATIFICATION RECORD

The following table illustrates Hong Kong SAR's ratification status of international treaties related to women migrant workers.⁸

5 Ivan Broadhead, "Hong Kong Court Overturns Case Granting Foreign Maids Residency", *Voice of America*, 27 March 2012. Available from: www.voanews.com/content/hong-kong-court-overturns-case-granting-foreign-maids-residency-144645995/180641.html

6 Available from: www.mfasia.org/about-mfa

7 Available from: www.fadwu.org

8 Data from International Labour Organization. Available from: www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO::P11200_COUNTRY_ID:103578

TREATIES	RATIFICATIONS
MCW	-
CEDAW	14 October 1996 (through a communication of the UK to the UN SG) ⁹
ICCPR	20 May 1976 (ratification of UK)
ICESCR	20 May 1976 (ratification of UK)
ICERD	29 December 1981 (accession of China)
ILO C29 Forced or Compulsory Labour	1 July 1997
ILO C87 Freedom of Association	1 July 1997
ILO C97 Migration for Employment	1 July 1997
ILO 98 Right to Organize and Collective Bargaining	1 July 1997
ILO C100 Equal Remuneration	-
ILO C105 Abolition of Forced Labour	1 July 1997
ILO C111 Discrimination in Employment	12 January 2006
ILO C138 Minimum Age for Employment	28 April 1999 (communication of China to ILO)
ILO C143 Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers	-
ILO C181 Private Employment Agencies	-
ILO C182 Prohibition on the Worst Forms of Child Labour	8 August 2002 (communication of China to ILO)

E. COMPLIANCE WITH CEDAW

DISCRIMINATION

Hong Kong SAR passed the Race Discrimination Ordinance¹⁰ into law in July 2008. However, the law has a weak definition of indirect discrimination and does not cover discrimination on the basis of nationality, citizenship and residence, effectively excluding migrant workers. NGOs have criticized this law as not providing full compliance with international human

⁹ Available at: http://www.bayefsky.com/html/uk_t2_cedaw.php

¹⁰ Available from: www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/7B5C41B095863F7C482575EF0020F30A?OpenDocument&bt=0

rights standards¹¹, and human rights treaty bodies have raised concerns about the lack of protection against discrimination and abuse of foreign domestic helpers.¹²

POLICY MEASURES

Hong Kong SAR's labour policy provides that local workers shall enjoy priority in employment over foreign workers. Despite this, the administration introduced the Quality Migrant Admission Scheme in June 2006, aiming to attract highly skilled or talented people from the mainland and overseas to settle in Hong Kong SAR. The scheme is quota-based and operates on a points-based system. People admitted under this scheme are allowed an initial stay of one year in Hong Kong SAR, even without an offer of local employment. The Supplementary Labour Scheme, first introduced in February 1996, also allows employers to apply for admission of foreign workers at technician level or below from outside Hong Kong SAR. There are no industry-specific quotas under the Supplementary Labour Scheme, and applications are considered on a case-by-case basis. However, to ensure that priority is extended to local workers in hiring, vacancies must first be advertised in newspapers.

DOMESTIC WORKERS

The Immigration Ordinance regulates the entry, hiring and employment of migrant workers.¹³ Employers are required to submit to the Immigration Department, by post or in person, an application for employment of domestic worker from abroad.¹⁴ It stipulates that the employer will strictly observe the worker's conditions of stay as well as the wage level, live-in and accommodation requirements.¹⁵ The employer must also submit evidence that he or she is financially capable of hiring a domestic worker. In general, the employer must have at least 15,000 Hong Kong dollars (1,919 US dollars) household income per month for each domestic worker to be employed. The Immigration Department may also require the employer to attend an interview regarding his or her application.¹⁶

The Immigration Ordinance prohibits domestic workers from engaging in unauthorized work, or work outside the lists of tasks considered domestic duties under the Schedule of Accommodation and Domestic Duties. As such, domestic workers cannot work for a person other than the employer, clean another residence, or perform non-domestic duties. There are employers who contravene these rules by, for example, ordering domestic workers to work in shops or business establishments, in order to save money. In practice it is difficult for domestic workers to refuse as they fear termination of their employment.¹⁷

11 *China, UPR Stakeholder Report 2009, People's Republic of China (including Hong Kong and Macao Special Administrative Regions)*, (A/HRC/WG.6/4/CHN/3) (2009).

12 *Ibid.*

13 Available from: <http://www.hkii.org/hk/legis/en/ord/115/>

14 UNIFEM, *Legal Protection for Migrant Domestic Workers in Asia and the Arab States*, (Bangkok, 2007).

15 Hong Kong SAR, Immigration Department, *Frequently asked questions: Foreign domestic helpers* (webpage, n.d.). Available from: www.immd.gov.hk/ehhtml/faq_fdh.htm

16 *Ibid.*

17 UNIFEM, *Legal Protection for Migrant Domestic Workers*.

TRAFFICKING

According to the US Department of State's 2012 Trafficking in Persons (TIP) Report, Hong Kong SAR is a destination and transit territory for men and women from mainland China, the Philippines, Indonesia, Thailand, and elsewhere in South-East Asia, some of whom are victims of human trafficking for the purposes of domestic servitude or forced prostitution. Victims, attracted by the promise of financial rewards, are usually deceived by criminal syndicates or acquaintances about the nature of their future jobs, and upon arrival are forced into prostitution to repay money owed for their passage. According to the 2012 TIP report, "foreign domestic workers from the Philippines and Indonesia are generally charged the equivalent of [US]\$1,950 and \$2,725 respectively, by recruiters in their home countries. These debts may comprise more than 80 percent of workers' salaries for the first seven to eight months of employment."¹⁸

Hong Kong SAR does not have specific anti-trafficking laws, but the Immigration Ordinance, Crimes Ordinance, and other relevant laws prohibit some trafficking-related offences. In 2011, the administration convicted six sex traffickers but there were no convictions for forced labour.¹⁹ Other efforts to prevent trafficking have included the distribution of guide books, in several languages, to foreign domestic workers that explain their rights and the services available to them. Additionally, law enforcement has been trained on investigative techniques to identify trafficking and, 12 trafficking victims were identified in 2011. Generally, victims who are recognized by Hong Kong SAR authorities are not penalized for unlawful acts committed as a direct result of their being trafficked. However, the Government's limited definition of sex trafficking and uneven implementation of victim identification procedures may lead to some victims being deported for immigration violations. The lack of a comprehensive law to prohibit and prosecute all forms of trafficking and protect victims violates article 6 of CEDAW on trafficking and is contrary to General Recommendation No. 19 on gender-based violence.

FORCED LABOUR

Despite the fact that Hong Kong SAR legislation prohibits forced or compulsory labour, migrant workers continue to be lured to Hong Kong SAR with false promises of employment and then forced into prostitution and other forms of compulsory labour. Some employment agencies registered in Hong Kong SAR have been accused of colluding with agencies in countries of origin to profit from schemes that lead to extreme indebtedness and ultimately forced labour for migrant workers. Agencies in Hong Kong have reportedly illegally confiscated domestic workers' passports, employment contracts and ATM cards and withheld them until their debts have been repaid.²⁰ This violates article 15 of CEDAW on equality before the law, including laws related to freedom of movement.²¹

18 US State Department, *Trafficking in Persons Report 2012 – Cambodia*, (2012). Available from: www.state.gov/j/tip/rls/tiprpt/2012/192367.htm

19 Ibid.

20 US State Department, *Human Rights Report 2010 - Hong Kong SAR*, (2010). Available from: www.state.gov/j/drl/rls/hrrpt/2010/index.htm

21 Jean D'Cunha, *Claim and Celebrate Women Migrants' Human Rights through CEDAW*, UNIFEM, (New York, 2005). Available from: http://www.unifem.org/materials/item_detailc768.html

EMPLOYMENT

Due to the shortage of local full-time live-in domestic helpers, migrant domestic workers, who are almost exclusively female, have been allowed to work in Hong Kong since the 1970s to free housewives from household chores and allow them to take up employment in the growing Hong Kong economy. The demand for migrant domestic workers has increased continuously over the past three decades.

Hong Kong SAR is one of the few territories analyzed in this study which covers migrant domestic workers under the national labour laws and regulations.²² Hong Kong SAR's Employment Ordinance (Chapter 57) regulates conditions of employment and applies to all workers, including migrant domestic workers.²³ Many aspects of the labour law provide best-practice examples of a gender-sensitive legal framework for the onsite stage of migration. For example, the ordinance provides important benefits including: one day of rest in seven; time off during public holidays; annual leave; one month notice for termination, or one month's pay in lieu of notice; payment of wages and a definition of allowable deductions by employers.²⁴ Since the employment of migrant domestic workers is clearly covered by the law, disputes between employer and worker can be taken to the Hong Kong Labour Department, and if the dispute cannot be conciliated, the Department will recommend resolving the matter in the Labour Court.

Providing coverage under the labour law is a first step towards meaningful protection for migrant domestic workers. However, there are provisions in the regulations that provide migrant domestic workers with fewer rights than other workers. For example, Hong Kong SAR's live-in requirement for domestic workers has been criticized by the Committee on Elimination of Racial Discrimination (CERD) as it tends to result in longer working hours, and shorter rest and holiday periods. Additionally, the Two-Week Rule requires foreign domestic workers to leave Hong Kong SAR within two weeks of their contract expiring or being terminated. NGOs, as well as the committees for CEDAW, CESC, and CERD, have criticized this regulation as discriminatory and have called upon the Hong Kong SAR administration to abolish it.²⁵ The CEDAW Committee in its General Recommendation 26 on Women Migrant Workers noted that when a migrant worker's right to stay in the territory depends on her employment, her employer may be able to abuse that opportunity for coercion. If she is detained for violating those restrictions, she also is at risk of violence from officials while in detention.²⁶

22 UNIFEM, *Good Practices to Protect Women Migrant Workers, report from high-level government meeting of countries of employment* (2005). Available from: www.unwomen-eseasia.org/projects/migrant/Docs/GdPracticesReportWebPubV1.pdf

23 Available from: <http://www.labour.gov.hk/eng/legislat/content2.htm>

24 Hong Kong SAR, Department of Labour, *Guidebook for the Employment of Domestic Helpers from Abroad* (webpage, n.d.). Available from: www.immd.gov.hk/en/forms/forms/id-e-969.html

25 China, *UPR Stakeholder Report 2009*.

26 CEDAW Committee, *General recommendation No. 26 on women migrant workers*, (CEDAW/C/2009/WP.1/R) (UN Doc A/64/38 at 15, 2008) (Forty-second session, 2008). Available from: www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf

EMPLOYMENT CONTRACT

Labour and employment issues are governed by Hong Kong's Employment Ordinance which outlines the rights, duties and responsibilities of the employer and employee. Under the Supplementary Labour Scheme (SLS), employers who are unable to secure suitable local staff are allowed to hire foreign workers at technician level or below.²⁷ Under the SLS foreign workers are only allowed to work for the employers, in the positions, and for the duration of employment as stipulated under their employment contract, and they must return to their place of origin on expiry of their contracts.

The Immigration Department requires an employment contract to be signed before the issuance of a working visa to domestic workers. The standard Employment Contract (ID407) for all foreign domestic workers is the only contract acceptable to the Immigration Department, and is the only contract between employers and domestic help that is legally enforceable in the Hong Kong Labour Courts.²⁸ The standard Employment Contract provides for: suitable and furnished accommodation; free food or an allowance; rest days; statutory holidays; paid annual leave; maternity protection; free medical treatment; and payment of compensation in case of injury by accident or occupational disease in the course of employment.²⁹ Such standard contracts constitute a good practice as they clearly detail the rights and responsibilities of both the employer and employee, and protect workers by providing a clear standard for regulation, inspection and enforcement by government authorities. One shortcoming of these contracts however, is the rule linking migrant domestic workers' legal presence in Hong Kong SAR with the maintenance of an ongoing contractual relationship with the employer. This system puts in the hand of employers a powerful weapon to intimidate and abuse their workers, as it significantly reduces the chance of employees reporting mistreatment out of fear of termination and subsequent deportation.³⁰

MINIMUM WAGE

Under the Supplementary labour Scheme, employers must pay foreign workers at least the median monthly wages of local workers in comparable positions and they shall "be accorded no less favourable treatment as that enjoyed by local workers under the labour laws."³¹ On 1 May 2011 the statutory minimum wage was raised from 3,580 to 3,740 Hong Kong dollars per month and applies to all foreign workers.

The Director of Immigration only approves those Standard Employment Contracts for foreign domestic helpers wherein the employer agrees to pay not less than the minimum allowable wage. It is illegal for an employer to make an agreement with their domestic helper to pay them

27 Available from: www.labour.gov.hk/eng/plan/iwFDH.htm

28 Hong Kong SAR, Department of Labour, *Practical Guide for Employment of foreign domestic helpers – What foreign domestic helpers and their employers should know*, (n.d.). Available from: www.labour.gov.hk/eng/public/wcp/FDHguide.pdf

29 Available from: <http://www.immd.gov.hk/ehhtml/id407form.htm>

30 UNIFEM, *Good Practices to Protect Women Migrant Workers*.

31 Available from: www.labour.gov.hk/eng/plan/iwSLS.htm

less than minimum wage. An employer who underpays wages as stated in the contract is liable to a maximum fine of 350,000 Hong Kong dollars and three years' imprisonment.³²

The latest minimum-wage ordinance specifically excludes domestic workers who receive free board.³³ The Statutory Minimum Wage came into force on 1 May 2011 and the initial Statutory Minimum Wage rate is 28 Hong Kong dollars (3.60 US dollars) per hour.³⁴ The exclusion of domestic workers who receive free board from the minimum wage protections amounts to indirect discrimination against women since domestic workers are almost exclusively female, making this ordinance contrary to article 11 of CEDAW.

MINIMUM AGE

In general, Employment Ordinance Chapter 57 regulates the employment of children under the age of 18 as follows: Children younger than 15 are prohibited from working in any industrial setting; children 13-14 who are attending school may take up work in non-industrial settings; young persons aged 15-17 may work in industrial undertakings but are prohibited from working more than 8 hours per day and 48 hours per week. Overtime work, working on statutory holidays and working on rest days for anyone under 18 is also prohibited.³⁵ However, for migrant workers, the minimum age may vary depending on the laws of the country from where the foreign worker originated. According to the Hong Kong Immigration Department, foreign workers under 18 are not barred from entering into an employment contract, subject to confirmation that the immigrants' home country has no relevant age restriction on their nationals working in Hong Kong SAR.³⁶

BENEFITS

Migrant workers recruited to work under Hong Kong SAR's Supplementary Labour Scheme are entitled to the following benefits: overtime pay if required to work more than the hours stipulated in the contract; expenses for passage to and from Hong Kong SAR, as well as fees for medical examinations, and for visas or visa extensions; a rest day once a week; 12 statutory public holidays; one week of paid annual leave for every period of 12 months following the completion of the first year of service; free medical care including hospital stays and urgent dental care; work-related injury compensation; food provided free of charge or a food allowance not less than 775 Hong Kong dollars per month; and adequate furnished accommodation (the employer may deduct up to 10 percent of wages or the actual cost of accommodation, whichever is the less, for accommodation costs).³⁷ These benefits constitute good practices in compliance with the CEDAW Committee's General Recommendation 26 which calls upon

32 Hong Kong SAR, *Practical Guide for Employment of foreign domestic helpers*.

33 Hong Kong SAR, Section 7(3) *Minimum Wage Ordinance 15 of 2010*.

34 Available from: <http://www.labour.gov.hk/eng/news/mwo.htm>.

35 Available from: www.labour.gov.hk/eng/legislat/content2.htm

36 UNIFEM, *Legal Protection for Migrant Domestic Workers*, p. 67.

37 Available from: www.labour.gov.hk/eng/public/sld/WhatIWknow.pdf

countries to ensure an adequate standard of living for migrant workers, including overtime pay, weekly days of rest and access to medical care.

REGULATION OF EMPLOYMENT AGENCIES

The legislation that monitors recruitment agencies in Hong Kong SAR includes (1) the Employment Ordinance (Chapter 57), which establishes procedures for issuance of licences to employment agencies, grounds for their revocation, prohibited acts for employment agencies, and provides for the inspection of the business premises³⁸ and (2) the Employment Agency Regulations, which provides that no more than 10 percent of the worker's monthly salary shall go towards paying a recruitment fee.³⁹

Women tend to possess fewer assets than men, or have no assets at all to pay exploitative recruitment and job placement fees typically charged by recruiting agents. Therefore, in the worst cases, women are more likely to avail themselves of "fly now, pay later" schemes where costs and profits are recovered by agents by appropriating the worker's wages over several months, thereby trapping women in debt bondage. Hong Kong SAR's regulation of employment agencies, and capping the recruitment fee at 10 percent of the monthly salary, represent good practices for gender-sensitive legal frameworks for migration, and are good examples of the authorities taking appropriate measures to comply with CEDAW and eliminate discrimination against women in the field of employment.⁴⁰

MATERNITY PROTECTION

Female migrant workers are entitled to 10 weeks' paid maternity leave subject to the following requirements: (i) she has been employed for not less than 40 weeks immediately before the commencement of scheduled maternity leave; (ii) she has given notice of pregnancy confirmed by a medical certificate to her employer; and (iii) she has produced a medical certificate specifying the expected date of confinement, if so required by the employer. The maternity leave pay is equal to 80 percent of the normal wages, payable on the normal pay day. This represents good gender-sensitive practice in line with article 11(2)(b) of CEDAW, which requires the introduction of maternity leave with pay.

Except in cases of summary dismissal for serious misconduct, the Employment Ordinance prohibits an employer from dismissing a pregnant worker from the date on which she is confirmed pregnant by a medical certificate, up to the date on which she is due to return to work upon the expiry of her maternity leave.⁴¹ This constitutes gender-sensitive practice in

38 UNIFEM, *Legal Protection for Migrant Domestic Workers*.

39 Kay Lam Chi Yan, *The Second Periodic Report on the Hong Kong Special Administrative Region of the People's Republic of China in light of the Convention on the Elimination of All Forms of Discrimination against Women*, Hong Kong Human Rights Monitor (Hong Kong, 2006), paragraph 25, Part II. Available from: <http://www.hkhrm.org.hk/CEDAW%20News/CEDAW9.pdf>

40 CEDAW, Art. 11.

41 UNIFEM, *Legal Protection for Migrant Domestic Workers*.

line with article 11(2)(a) of CEDAW, which prohibits dismissal on the grounds of pregnancy or maternity leave.

REMITTANCES

The CEDAW Committee in its General Recommendation No. 26 on women migrant workers noted that women migrant workers may be unable to save or transmit savings safely through regular channels due to isolation, cumbersome procedures, language barriers, or high transaction costs.⁴² In an example of gender-sensitive practice, The Asian Migration Centre in Hong Kong SAR has been working with migrant workers on the issues of reintegration and savings since 1993. The programme organizes and trains migrant workers, including foreign domestic workers in Hong Kong SAR, to participate in group savings and collective decision-making, and to create sustainable alternative investments back in their home countries. This illustrates the potential for maximizing the development impact of migration through savings mobilization and productive investment as a reintegration measure.⁴³

ACCESS TO HEALTH SERVICES, WORK SAFETY

The Occupational Safety and Health Ordinance⁴⁴ provides for the safety and health protection of employees in both industrial and non-industrial workplaces. The Ordinance imposes a general duty of care on employers and employees. However, it does not apply to domestic premises where only domestic servants are employed.⁴⁵ Hong Kong SAR's Schedule of Accommodation and Domestic Duties, which is annexed to all contracts for foreign domestic workers, describes the minimum for suitable accommodation that must be provided by the employer. It states that no helper should have to "sleep on made to do beds in the corridor with little privacy or share a room with an adult/teenager of the opposite sex."⁴⁶ Despite this there are many reports of women domestic workers sleeping in spaces with inadequate privacy and locking arrangements, such as in kitchens, corridors, or children's bedrooms, thus heightening their vulnerability to sexual abuse by male employers.⁴⁷ The CEDAW Committee in its General Recommendation No. 26 on women migrant workers noted that lack of privacy and hygiene, or poor living conditions without running water or adequate sanitary facilities violates basic human rights, including rights to protection of health and safety in working conditions as described in article 11 of the Convention.

Hong Kong SAR's Employment Ordinance obligates employers to provide free medical treatment to domestic workers who fall sick or are injured, whether or not it is attributable to their employment. This includes medical consultation, maintenance in hospital and emergency

42 CEDAW Committee, *General recommendation No. 26*.

43 Jean D'Cunha, *Claim and Celebrate Women Migrants' Human Rights through CEDAW*.

44 Available from: <http://www.hkii.org/hk/legis/en/ord/509/>

45 Available from: <http://www.labour.gov.hk/eng/legislat/content4.htm>

46 Available from: www.immd.gov.hk/ehtml/id407g_form.htm

47 Jean D'Cunha, *Claim and Celebrate Women Migrants' Human Rights through CEDAW*.

dental treatment. Employers must also provide paid sick leave to domestic helpers, equivalent to 80 percent of the average daily wage, as long as they have accumulated enough sick days, the leave taken is not less than four consecutive days, and it is supported by a medical certificate. Domestic workers accumulate two paid sick days for each completed month of service during the first year of work, and four days per month thereafter, up to a maximum of 120 days. Employers who dismiss employees that are on sick leave and have not committed serious misconduct, are liable to prosecution and a fine of up to 100,000 Hong Kong dollars.⁴⁸

The Employees' Compensation Ordinance applies to all full-time and part-time employees who are employed under a contract, including migrant workers and domestic helpers. It establishes a no-fault, non-contributory employee compensation system for work injuries.⁴⁹ In case the worker suffers injury by accident or occupational disease arising out of and in the course of employment, it is the obligation of the employer to make payment of compensation in accordance with the Employees' Compensation Ordinance, Chapter 282. Subject to certain conditions, a migrant domestic worker is also entitled to either severance payment or long-service payment in case of dismissal.⁵⁰

RIGHT TO TAKE PART IN CULTURAL LIFE

Article 13 of CEDAW obligates States parties to "take all appropriate measures to eliminate discrimination against women in economic and social life in order to ensure, on a basis of equality of men and women, the same rights." Good practice CEDAW-informed legal rights and obligations include an equal right to participate in recreational activities, sports and all aspects of cultural life.⁵¹ Hong Kong SAR provides a good example of gender-sensitive measures to eliminate discrimination against women in social life, by ensuring that migrant domestic workers get one rest day in seven and by providing for freedom of movement for these workers, which enables social and cultural bonds to be built that can develop into a supportive community. Such bonds are critical to diminish feelings of isolation and alienation, which have deleterious effects on the psychology of the migrant domestic workers. Moreover, such support networks can contribute to a positive migration experience for the migrant domestic workers, and a willingness to renew contracts after they have completed their first term. The territory of employment will also benefit from better-trained migrant domestic workers who are more conversant in the local language, culture and society. Providing areas for migrant domestic workers to gather in safety and security during their rest days is important. In Hong Kong SAR, certain public areas are known to be gathering spots for different nationalities of migrant domestic workers, Filipinos, Indonesians, Thais, Nepalis, and others, and many of the migration associations conduct all their activities on that one rest day, often in these public areas where migrant domestic workers gather.⁵²

48 Hong Kong SAR, *Practical Guide for Employment of foreign domestic helpers*.

49 Available from: <http://www.labour.gov.hk/eng/legislat/content1.htm>

50 UNIFEM, *Legal Protection for Migrant Domestic Workers*.

51 UNIFEM, *Gender Equality Laws - Global Good Practice and a Review of Five Southeast Asian Countries* (March 2010). Available from: http://cedaw-seasia.org/docs/Aw_GEL_incover050609Feb10.pdf

52 UNIFEM, *Good Practices to Protect Women Migrant Workers*.

EQUALITY BEFORE THE LAW

Freedom of Association

Migrant workers in Hong Kong SAR do not have the right to bargain collectively.⁵³ This restriction violates article 15 of CEDAW on equality before the law, which includes laws related to freedom of association and protection of the right to organize. Although migrant workers may not be able to bargain collectively, they do have the right to organize, and employers may be fined up to 200,000 Hong Kong dollars for terminating an employee because of their involvement in union activity. Hong Kong SAR recognizes migrants' unions under the Registry of Trade Unions Ordinance.⁵⁴ In Hong Kong SAR, a vibrant and varied group of migrant associations exists, which includes the Thai Regional Alliance, United Filipinos–Hong Kong SAR, Far East Overseas Nepalese Association, Asia-Pacific Mission for Migrants, Association of Sri Lankans, Friends of Thailand–Hong Kong SAR, The Asian Women's Union, the Filipino Migrant Workers Union, and the Association of Indonesian Migrant Workers. Unions of migrant domestic workers and other migrant unions have collaborated with general trade unions like the Hong Kong Confederation of Trade Unions on issues confronting both local and migrant workers, including wage cuts and maternity protection. The Hong Kong Confederation of Trade Unions has supported several initiatives of the Indonesian Migrant Domestic Workers Union by providing space, technical facilities, holding joint press conferences and presence at migrant workers' events.⁵⁵

Several migrant worker unions have come together and formed a coalition body named the Asian Migrant Coordinating Body, which is regularly invited by the Government of Hong Kong SAR to provide input and feedback on policies and regulations affecting migrant domestic workers. The fact that these associations are recognized as legitimate partners and representatives of the migrant domestic workers, and accorded a place in the policy dialogue, is a positive example of empowering migrants, especially women, to exercise choices, access resources, and claim rights.⁵⁶

Women's Access to Justice

Hong Kong SAR has some excellent mechanisms affording access for women migrant workers to officials in order to bring complaints. For instance, the Department of Labour has set up a 24-hour hotline to receive complaints by domestic workers about unlawful treatment. Complaints received are immediately and thoroughly investigated. This is particularly important for workers who are employed in private homes and often cannot make such phone calls except at odd hours when others in the household are away or asleep. The hotline is a good example of efforts to effectively enforce the labour law and ensure that it applies to women migrant workers.

The Legal Aid Department also assists migrant workers in accessing their rights by, for example, helping them to file criminal cases against violent employers or applications to the

53 US State Department, *Human Rights Report 2010*.

54 Available from: <http://www.hkliv.org/hk/legis/en/ord/332/>

55 Jean D'Cunha, *Claim and Celebrate Women Migrants' Human Rights through CEDAW*.

56 UNIFEM, *Good Practices to Protect Women Migrant Workers*.

Wage Security Division for payment in cases where employers have claimed bankruptcy.⁵⁷ The Labour Department also assists injured migrant workers or families of deceased workers in claims of outstanding payments of employees' compensation.⁵⁸

For conflicts or claims arising out of the employment contract or provisions under the Employment Ordinance, both the employer and migrant domestic worker may approach the Labour Relations Division of the Labour Department for assistance. The Division resolves labour disputes through the provision of free conciliation service. If no settlement is reached, the claim is referred to either the Minor Employment Claims Adjudication Board or the Labour Tribunal for adjudication, depending on the amount of the claim. The Labour Tribunal can award a range of Remedies for Employment Protection, including an order of reinstatement or re-engagement, an award of terminal payments or an award of compensation. Awards may be appealed to the appropriate courts. Although the Labour Department receives an estimated 2,000 complaints per year against employers, it has been able to secure convictions in only a few cases (33 in 2004 and 29 in 2003).⁵⁹

However, even if a migrant worker makes the difficult decision to file a complaint she will generally have to negotiate with her former employer for any remedy. The Labour Relations Division gives considerable bargaining power to employers, and this is exacerbated by the Two-Week Rule in cases involving migrant domestic workers. The Immigration Department will extend a migrant domestic worker's visa if she has an active claim with the Labour Department, but normally grants only short extensions (necessitating frequent visa fees) and does not permit the migrant domestic worker to work while she pursues her claim. This provides a strong incentive for the migrant domestic worker to accept any offer from the employer, even if it is less than her legal entitlement.⁶⁰ This raises concerns about Hong Kong SAR's application of the principle of substantive equality under CEDAW. The goal of a substantive approach to equality is to ensure that the outcomes of laws, policies and programmes are gender-responsive. In the case of Hong Kong SAR, the Two-Week Rule in practice makes it difficult for women migrant domestic workers to claim their rights. Therefore, although it appears that there is effective access to justice for women on paper, in practice this is not the case, violating the principle of substantive equality, which requires equality of opportunity, access as well as results and benefits.

Similar problems arise if a migrant domestic worker files a complaint with the Hong Kong Equal Opportunities Commission for employment discrimination or sexual harassment. In theory, migrant domestic workers have the same rights as local workers under the Disability Discrimination Ordinance and the Sex Discrimination Ordinance. Indeed, a special provision in the Sex Discrimination Ordinance prohibits anyone who lives in the household from sexually harassing the migrant domestic worker who works there. This was included because the legislature recognized that a live-in migrant domestic worker might be harassed by people other than the employer (for example, the husband or son of the employer). However, if a

57 UNIFEM, *Legal Protection for Migrant Domestic Workers*.

58 *Ibid.*

59 Peggy Lee and Carole Petersen, "Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers", 29, Centre for Comparative and Public Law Occasional Paper No. 16, (Hong Kong, July 2006). Available from: www.law.hku.hk/ccpl/pub/Documents/16-LeePetersen.pdf

60 *Ibid.*

migrant domestic worker files a complaint against the employer or a member of the employer's family this results in termination of the contract, leaving the migrant domestic worker without a work visa, and thus unable to support herself while the claim is being investigated. Like the Labour Department, the Hong Kong Equal Opportunities Commission depends primarily upon voluntary conciliation to resolve complaints.⁶¹

In trafficking cases, the situation is slightly better. Victims are legally required to assist in the investigation and prosecution of their traffickers and are provided with government-sponsored assistance including shelter, financial and legal assistance, counselling, and psychological support during the investigation. However, they are not allowed to work during what are often lengthy legal proceedings. The fear of having to assist in long trials may make victims reluctant to be identified by authorities. Victims also have the ability to file civil charges for compensation from their traffickers, and can apply for legal alternatives to their removal to countries where they may face hardship or retribution, but victims are often unaware of these options and thus do not often exercise their rights.⁶²

Thus, although migrant domestic workers theoretically enjoy many of the same legal protections as local workers, in practice they find it far more difficult to enforce their rights. Policies of the Immigration Department discourage or prevent domestic workers from coming forth as complainants or as prosecution witnesses.⁶³ For instance, domestic workers found engaged in unauthorized work are themselves liable to prosecution. This policy has the effect of discouraging domestic workers from reporting unauthorized work to the authorities even when they are forced to perform such work by their employers.⁶⁴ Therefore, the reality is that, while there are some avenues through which women may seek justice in Hong Kong SAR, equal access to justice for women migrant workers is still not fully realized.

F. ANALYSIS AND CONCLUSIONS

Because both spouses in Hong Kong families are often working, there is a great need for help in taking care of their children, elderly relatives and the house. As a result, domestic helpers, mostly women from the Philippines and Indonesia, form an important part of the economy of Hong Kong SAR. Despite this, social acceptance of migrant domestic workers remains limited. The controversy surrounding the Evangeline Vallejos right-to-abode case indicates an active policy to prevent integration, and suggests that attitudinal changes relative to gender, migration and human rights in Hong Kong society remains a significant area of development work.⁶⁵

Notwithstanding, Hong Kong SAR must be recognized for some gender-sensitive and rights-based practices, including:

61 Ibid.

62 US State Department, *Trafficking in Persons Report 2010 – Hong Kong SAR (2010)*. Available from: www.state.gov/j/tip/rls/tiprpt/index.htm

63 Ibid.

64 UNIFEM, *Legal Protection for Migrant Domestic Workers*.

65 Ibid.

- Hong Kong SAR ratified the ILO Migration For Employment Convention (C 97).
- Hong Kong's labour law, the Employment Ordinance (Chapter 57), applies to all workers including informal sector migrant workers and domestic workers. Hong Kong SAR is one of the few countries analyzed in this study whose labour laws cover migrant domestic workers and domestic work under the national labour laws, and include regulations and effective enforcement to ensure that migrant domestic workers receive protection as provided under law.
- The Employment Ordinance provides important benefits such as one day of rest in seven; public holidays; annual leave; one month notice for termination, or one month's pay in lieu of notice; payment of wages; and definition of allowable deductions by employers.
- Since the employment of all women migrant workers is clearly covered by the law, disputes between employer and worker can be taken to the Hong Kong Labour Department, and if the dispute cannot be conciliated, the Department will recommend resolving the matter in the Labour Court.
- The Immigration Department requires a standard employment contract to be signed with the employer before the issuance of a working visa to domestic workers.
- The Employment Agency Regulations provide that no more than 10 percent of any migrant worker's monthly salary shall go towards paying a recruitment fee.
- Female migrant workers are entitled to 10 weeks paid maternity leave subject to certain conditions.
- The Asian Migration Centre in Hong Kong SAR has been working with migrant workers on the issues of reintegration and savings since 1993.
- Hong Kong SAR recognizes migrants' unions under the Registry of Trade Unions Ordinance, and any union member whose contract is terminated by her employer due to her involvement in union activities is protected under the labour law. The union can also bring cases to international attention by lodging complaints with the ILO.
- The Department of Labour has set up a Labour Law Enquiry Hotline that receives complaints from migrant workers about unlawful treatment. Complaints received are immediately and thoroughly investigated.
- The administration of Hong Kong SAR allowed the establishment of FADWU in 2010 which advocated for the ILO convention on domestic workers. This organization of domestic workers has helped create a voice and a mechanism for highlighting the violation of human rights and the gender-based violence suffered by migrant domestic workers.

G. RECOMMENDATIONS

The CEDAW Committee has recommended the following reforms be taken in Hong Kong SAR to ensure substantive equality for women migrants:

POLICY REFORM

- Amend the definition of discrimination in the Race Discrimination Ordinance 2008 to include all migrant workers, including all women migrant workers, informal sector workers, and foreign domestic workers.
- Enact a comprehensive anti-trafficking law in line with the Palermo Protocol, including punishments stringent enough to carry a deterrent value.
- Repeal the Two-Week Rule. Since residency permits of women migrant workers are premised on the sponsorship of an employer or spouse, Hong Kong SAR should enact provisions relating to independent residency status. Regulations should be made to allow for the legal stay of a woman who flees her abusive employer or the employer's spouse, or is fired for complaining about abuse.
- Amend regulations to allow for independent residency status for domestic workers, breaking the link between residency permits and sponsorship by an employer. Also repeal the Two-Week Rule and allow for the legal stay of a woman who flees her abusive employer or the employer's spouse, or is fired for complaining about abuse.
- Amend the Occupational Safety and Health Ordinance to include domestic premises at which only domestic workers are employed.
- Amend the law to provide all migrant workers with the right to bargain collectively.
- Amend the law which prohibits migrant workers from working once they have filed a labour complaint.

ENFORCEMENT

- Make greater efforts to identify and criminally prosecute cases of both sex and labour trafficking.
- Ensure that employers and recruiters do not confiscate or destroy travel or identity documents belonging to women migrants. Also, take steps to end the forced seclusion or locking in the homes of women migrant workers, especially those working in domestic service.
- Train police officers to protect the rights of women migrant workers from abuse of the right to freedom of movement.
- Ensure that linguistically and culturally appropriate gender-sensitive services for women migrant workers are available, including health-care services, language and other skills training programmes, emergency shelters, police services, recreational programmes and programmes designed especially for isolated women migrant workers, such as domestic workers and others secluded in the home, in addition to victims of domestic violence. Victims of abuse must be provided with relevant emergency and social services, regardless of their immigration status.

REFERENCES

- CERD 2009 CERD/C/CHN/CO/10-13.
- Chapter 1 Application, Employment Ordinance (Chapter 57), 1968.
- China: Hong Kong Special Administrative Region, paragraph 29, CERD/C/357/Add.4 (Part II) (2001).
- Committee on the Elimination of Discrimination Against Women (2008), *General recommendation No. 26 on women migrant workers*, CEDAW/C/2009/WP.1/R.
- China, State Party report to the Committee on the Elimination of Discrimination against Women, paragraph 191, CEDAW/C/37 CHN/5-6/Add.1 (2004).
- Lee, Peggy and Petersen, Carole. *Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers*, at 29, Centre for Comparative and Public Law Occasional Paper No. 16 (2006).
- Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers.
- Immigration Department, *supra* note 17.
- Hong Kong SAR Department of Labour. *Guidebook for the Employment of Domestic Helpers from Abroad*. Hong Kong: Dept. of Labour.
- ILO (2009), Review of Labour Migration Management, policies, and legal framework in Cambodia.
- Immigration Department HKSAR, Frequently asked questions: Foreign domestic helpers <http://www.immd.gov.hk/ehtml/faq_fdh.htm>
- Kay Lam Chi Yan, The Second Periodic Report on the Hong Kong Special Administrative Region of the People's Republic of China in light of the Convention on the Elimination of All Forms of Discrimination against Women, Hong Kong Human Rights Monitor (2006), paragraph 25, Part II.
- Section 7(3) Minimum Wage Ordinance 15 of 2010, Hong Kong Special Administrative Region.
- Smales, P. (2010), *The Right to Unite: A Handbook on Domestic Worker Rights Across Asia*, Asia Pacific Forum on Women, Law and Development (APWLD, Thailand).
- UNDP Human Development Reports, 2009 & 2010.
- UNIFEM (2008), Legal Protection for Migrant Domestic Workers in Asia and the Arab States.
- UNIFEM (2010), *Gender Equality Laws: Global Good Practice and a Review of Five Southeast Asian Countries*.
- UNIFEM (2005), Good Practices to Protect Women Migrant Workers.
- UPR Stakeholder Report 2009, People's Republic of China (including Hong Kong and Macao Special Administrative Regions), A/HRC/WG.6/4/CHN/3.
- UPR Compilation Report 2009, People's Republic of China (including Hong Kong and Macao Special Administrative Regions), A/HRC/WG.6/4/CHN/2.
- US Department of State Human Rights Report 2010, Hong Kong SAR.

INTERNET

<http://domesticworkerrights.org/?q=node/149>
<http://www.december18.net/article/joint-declaration-celebrating-may-day-2010-asian-domestic-workers-day>
<http://www.hklii.org/hk/legis/en/ord/115/>
<http://www.hklii.org/hk/legis/en/ord/509/>
<http://www.labour.gov.hk/eng/legislat/content2.htm>
<http://www.labour.gov.hk/eng/public/ConciseGuide.html>
<http://www.labour.gov.hk/eng/plan/iwFDH.htm>
<http://www.immd.gov.hk/ehhtml/id407form.htm>
http://en.wikipedia.org/wiki/Foreign_domestic_helpers_in_Hong_Kong
www.radiolabour.net/.../Solidarity-News-2510
http://www.wiegodatabase.org/index.php?option=com_sobi2&sobi2Task=sobi2Details&catid=12&sobi2Id=541&Itemid=88&lang=fr
http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/7B5C41B095863F7C482575EF0020F30A?OpenDocument&bt=0