

**Does the current process to address labour rights  
violations of Migrant Domestic Workers in Hong Kong  
Provide an Effective Remedy?**

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**September 2017**

## **Abstract**

This thesis examines whether the process to redress complaints of labour rights violations provides an effective remedy to migrant domestic workers (MDW) in Hong Kong. The term ‘effective remedy’ is a ‘term of art’ used to identify a range of actionable human rights obligations to ensure redress measures are appropriate to the nature and gravity of the harm caused. If the necessary due diligence is exercised in fulfilling the government’s obligations, many labour rights violations should be recognised as more serious violations of human rights in the form of forced labour. However, the Hong Kong government is failing to recognise its affirmative obligations to provide a process that ensures effective remedies.

A seven-month research study in 2015 of 80 MDWs in Hong Kong resulted in four significant findings; first, there is a high prevalence of forced labour which is not recognized or are miscategorised as simple labour disputes. 53 of the 80 MDWs studied were identified as being in forced labour situations. Interrelated with this finding, many of the victims did not identify themselves as such and did not seek a remedy. Only 12 MDWs made claims to the Labour Department, while 41 chose not to. In instances with no claims made, 24 MDWs returned to their employer accepting the mistreatment as part of their situation. Second, some indicators of forced labour were difficult to apply and had to be specially adapted to the nature of domestic work. Third, the research confirms the gross imbalance of power in the relationship between the MDW and the employer. Fourth, MDWs experience a variety of barriers to obtaining a remedy, which are significantly exacerbated by government policies and private actors. The study also exposed a lack of an appropriate legal and regulatory scheme to protect MDWs, further undermining any effective remedy.

# Table of Contents

<b>ABSTRACT</b> .....	<b>2</b>
<b>LIST OF FIGURES</b> .....	<b>8</b>
<b>LIST OF TABLES</b> .....	<b>9</b>
<b>ACKNOWLEDGEMENTS</b> .....	<b>10</b>
<b>AUTHOR'S DECLARATION</b> .....	<b>11</b>
<b>CHAPTER 1. INTRODUCTION</b> .....	<b>12</b>
<b>1.1 BACKGROUND</b> .....	<b>13</b>
<b>1.2 CONCEPTUAL FRAMEWORK FOR STUDY</b> .....	<b>15</b>
<b>1.3 PURPOSE OF THE STUDY</b> .....	<b>18</b>
<b>1.4 RESEARCH QUESTION</b> .....	<b>18</b>
<b>1.5 SIGNIFICANCE OF RESEARCH</b> .....	<b>19</b>
<b>1.6 ORGANISATION OF RESEARCH</b> .....	<b>21</b>
<b>CHAPTER 2. LEGAL FRAMEWORK</b> .....	<b>24</b>
<b>2.1 INTRODUCTION</b> .....	<b>24</b>
<b>2.2 BACKGROUND – JUDICIAL REVIEW</b> .....	<b>25</b>
<b>2.3 THE PROHIBITION OF FORCED LABOUR</b> .....	<b>29</b>
2.3.1 LEGAL FRAMEWORK.....	30
2.3.2 DEFINITION AND CRITERIA.....	33
<b>2.4 OBLIGATIONS UNDER THE CONVENTION</b> .....	<b>39</b>
<b>CHAPTER 3. METHODOLOGY</b> .....	<b>47</b>
<b>3.1 INTRODUCTION</b> .....	<b>47</b>
<b>3.2 DATA COLLECTION</b> .....	<b>49</b>
3.2.1 SAMPLING OF MDWS.....	49
3.2.2 SAMPLING OF KEY INFORMANTS.....	51
3.2.3 DATA SOURCES.....	51
<b>3.3 METHODOLOGY</b> .....	<b>59</b>
3.3.1 METHODOLOGICAL FRAMEWORK.....	59
3.3.2 ADAPTATION TO HONG KONG.....	61
3.3.3 INDICATORS ADAPTED TO DOMESTIC WORK.....	62
3.3.4 METHODOLOGY DEVELOPMENT .....	63

3.3.5 DEVELOPMENT OF INDICATORS.....	65
<b>3.4 CHALLENGES ENCOUNTERED DURING THE RESEARCH .....</b>	<b>67</b>
3.4.1 CHALLENGES IN METHODOLOGY.....	67
3.4.2 CHALLENGES IN APPLYING INDICATORS OF FORCED LABOUR.....	70
3.4.3 ETHICAL DILEMMAS.....	72
3.4.4 RESEARCHER BIAS AND PERSPECTIVE.....	75
<b>CHAPTER 4. DUTY TO IMPLEMENT AN EFFECTIVE REMEDY .....</b>	<b>78</b>
<b>4.1 INTRODUCTION .....</b>	<b>78</b>
<b>4.2 DUTY TO IMPLEMENT HUMAN RIGHTS.....</b>	<b>80</b>
4.2.1 INTERNATIONAL OBLIGATIONS.....	80
4.2.2 DOMESTIC IMPLEMENTATION.....	83
4.2.3 THE RIGHT TO A REMEDY.....	84
<b>4.3 COMPONENTS OF EFFECTIVE REMEDIES .....</b>	<b>89</b>
4.3.1 PROCEDURAL COMPONENTS OF A REMEDY.....	91
4.3.2 SUBSTANTIVE COMPONENTS OF A REMEDY.....	99
<b>4.4 SPECIAL ATTENTION TO THE VULNERABLE .....</b>	<b>103</b>
<b>CHAPTER 5. VULNERABLE GROUPS .....</b>	<b>107</b>
<b>5.1 INTRODUCTION .....</b>	<b>107</b>
<b>5.2 CONCEPT OF VULNERABILITY.....</b>	<b>108</b>
5.2.1 RECOGNITION OF VULNERABILITY.....	108
5.2.2 IDENTIFICATION OF VULNERABILITY.....	112
5.2.3 EQUALISING VULNERABILITY.....	115
<b>CHAPTER 6. BARRIERS TO REMEDIES .....</b>	<b>121</b>
<b>6.1 INTRODUCTION .....</b>	<b>121</b>
<b>6.2 SOCIAL AND CULTURAL BARRIERS .....</b>	<b>123</b>
<b>6.3 INSTITUTIONAL BARRIERS .....</b>	<b>128</b>
6.3.1 LEGAL FRAMEWORK – RECOGNITION OF RIGHTS.....	128
6.3.2 ACCESSIBILITY.....	130
6.3.3 JUDICIAL AND ADJUDICATORY INDEPENDENCE AND REVIEW.....	130
6.3.4 LEGAL ASSISTANCE AND REPRESENTATION – EFFECTIVE CLAIMING.....	131
6.3.5 LACK CAPACITY AND AWARENESS OF GOVERNMENT.....	132
6.3.6 FEES, COST AND CLAIMING.....	132
6.3.7 LACK OF CORROBORATIVE EVIDENCE.....	133

6.3.8 ENFORCEMENT.....	133
<b>6.4 STRUCTURAL BARRIERS .....</b>	<b>134</b>
6.4.1 STIGMA, AND LACK OF UNDERSTANDING OF THE NEEDS OF THE POOR.....	134
6.4.2 CORRUPTION.....	135
6.4.3 FORMAL PROCESSES.....	135
6.3.4 EXCESSIVE DELAYS.....	136
6.3.5 LEGAL STANDING.....	136
6.3.6 DISTRUST OF AUTHORITIES.....	137
 <b>CHAPTER 7. CONDITIONS IN HONG KONG .....</b>	 <b>141</b>
<b>7.1 INTRODUCTION .....</b>	<b>141</b>
<b>7.2 REDRESS MECHANISMS .....</b>	<b>143</b>
7.2.1 CONCILIATION.....	144
7.2.2 MINOR EMPLOYMENT CLAIMS ADJUDICATION BOARD (MECAB).....	145
7.2.3 LABOUR TRIBUNAL.....	147
7.2.4 OTHER REDRESS MECHANISMS.....	148
<b>7.3 COMMON VIOLATORS.....</b>	<b>148</b>
7.3.1 EMPLOYMENT AGENCIES.....	148
7.3.2 EMPLOYER ABUSES AND THE CONTRACT.....	151
7.3.3 GOVERNMENT POLICY.....	151
 <b>CHAPTER 8. ANALYSIS OF THE PREVALENCE OF FORCED LABOUR AND CONDITIONS OF WORK.....</b>	 <b>157</b>
<b>8.1 INTRODUCTION .....</b>	<b>157</b>
<b>8.2 THE HIGH PREVALENCE OF FORCED LABOUR IN HONG KONG .....</b>	<b>158</b>
8.2.1 PREVALENCE OF FORCED LABOUR.....	158
8.2.2 ABUSE OF VULNERABILITY.....	160
8.2.3 EXCESSIVE WORK HOURS.....	162
8.2.4 DEBT BONDAGE.....	163
8.2.5 DECEPTION.....	165
8.2.6 INTIMIDATION AND THREATS.....	165
8.2.7 ABUSIVE WORKING AND LIVING CONDITIONS.....	166
8.2.8 RESTRICTION OF MOVEMENT.....	166
8.2.9 RETENTION OF DOCUMENTS.....	166
8.2.10 ISOLATION.....	167
8.2.11 PHYSICAL/SEXUAL VIOLENCE.....	167

8.2.12 WITHHOLDING OF WAGES.....	167
<b>8.3 IMBALANCE OF POWER .....</b>	<b>168</b>
8.3.1 CASE 1 – ALMA.....	169
8.3.2 CASE 2 – JENNY.....	171
<b>8.4 ‘I HAVE NO CHOICE’ .....</b>	<b>174</b>
8.4.1 CASE 3 – VERA.....	175
8.4.2 CASE 4 – CHRISTINE.....	176
<b>8.5 COMPARISON – SIMILAR METHODOLOGY AND FINDINGS.....</b>	<b>176</b>
8.5.1 PREVALENCE OF FORCED LABOUR IN MFMW CLIENTS.....	177
8.5.2 OTHER RESEARCH.....	177
<b>CHAPTER 9. ANALYSIS – BARRIERS TO REMEDIES .....</b>	<b>184</b>
<b>9.1 INTRODUCTION .....</b>	<b>184</b>
<b>9.2 DATA ANALYSIS.....</b>	<b>185</b>
<b>9.3 SOCIAL AND CULTURAL BARRIERS TO REMEDIES .....</b>	<b>189</b>
9.3.1 THREAT OF REPRISALS.....	189
9.3.2 LACK OF AWARENESS BY MDW.....	195
<b>9.4 INSTITUTIONAL BARRIERS TO REMEDIES .....</b>	<b>198</b>
9.4.1 LACK OF LEGAL FRAMEWORK.....	199
9.4.2 ACCESS TO AUTHORITIES AND REDRESS.....	201
9.4.3 A LACK OF REPRESENTATION.....	202
9.4.4 LACK OF GOVERNMENT AWARENESS.....	204
9.4.5 LACK OF CORROBORATIVE EVIDENCE.....	210
9.4.6 LACK OF AWARENESS OF REDRESS.....	213
9.4.7 LACK OF ENFORCEMENT OF JUDGMENTS.....	215
9.4.8 GOVERNMENT POLICY AS REPRISALS.....	220
9.4.9 EXCESSIVE DELAYS.....	222
9.4.10 FEES OF COST AND CLAIMING.....	225
<b>9.5 STRUCTURAL BARRIERS TO REMEDIES .....</b>	<b>226</b>
9.5.1 POLICE CORRUPTION.....	226
9.5.2 CORRUPTION AT CONCILIATION.....	230
<b>9.6 CONCILIATION AS A BARRIER.....</b>	<b>231</b>
9.6.1 BENEFITS OF FORMAL PROCESSES.....	233
9.6.1.1 FORMAL MECHANISMS.....	233
9.6.1.2 PROTECTING THE VULNERABLE.....	237
9.6.1.3 PRIVATISATION: LOSSES TO SOCIETY.....	240

9.6.1.4 DISCRIMINATION.....	243
<b>9.6.2 PROCEDURAL JUSTICE AS FAIRNESS.....</b>	<b>245</b>
<b>9.6.3 THE IMPACT OF CULTURE.....</b>	<b>249</b>
<b>CONCLUSIONS AND RECOMMENDATIONS.....</b>	<b>253</b>
<b>APPENDICES.....</b>	<b>263</b>
<b>APPENDIX 1 – INDICATORS SCREENING FORM.....</b>	<b>263</b>
<b>APPENDIX 2 – INFORMATION SHEET AND CONSENT FORM .....</b>	<b>264</b>
<b>APPENDIX 3 – SEMI-STRUCTURED INTERVIEW QUESTIONNAIRE.....</b>	<b>268</b>
<b>BIBLIOGRAPHY</b>	<b>273</b>
<b>TREATIES.....</b>	<b>273</b>
UN GENERAL ASSEMBLY	275
<b>CASE LAW .....</b>	<b>276</b>
INTERNATIONAL	276
REGIONAL	276
<b>REGIONAL TREATY BODIES.....</b>	<b>277</b>
DOMESTIC CASES	277
<b>OTHER SOURCES .....</b>	<b>277</b>
<b>NEWS ARTICLES .....</b>	<b>283</b>

## List of Figures

Figure 1 - Frequency of forced labour.....	159
Figure 2 - Frequency of indicators.....	160
Figure 3 - hours worked daily - 6 days .....	163



**List of Tables**

Table 1 - Hong Kong Domestic Worker Population 2015 & 2016..... 142

## **Acknowledgements**

I would like to express my gratitude to my Supervisor Martin Jones and my thesis advisor Simon Halliday for their guidance and support during PhD research.

Besides my supervisor and advisor, I would like to thank the staff of the Mission for Migrant Workers (St. John's Cathedral, Hong Kong) for their assistance and support during my field work, in particular, Cynthia Abdon-Tellez, Edwina Antonio-Santoyo, Revd. Dwight Quijano Dela Torre and Juvy Abuan Bustamante.

Lastly, I would like to thank Betty Listianti-Wagner and Holly Allan of Help for Domestic Workers (St. John's Cathedral, Hong Kong). I will be forever grateful for the experience during three years volunteering with the two of you. I credit this experience as one of the defining moments that placed me on this academic path. Thank you for teaching me almost all of what I know about the plight of domestic workers in Hong Kong. I also want to thank Rev. Catherine Graham and Alexandra Barr for their support and encouragement.

## **Author's Declaration**

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, University. All sources are acknowledged as references.

## Chapter 1. Introduction

The focus of this thesis is on the policies, legal framework and redress mechanisms adopted by the Hong Kong government to address labour rights violations of Migrant Domestic Workers (MDWs). Labour rights violations occur on a continuum, ranging from contractual violations on one end to varying degrees of exploitation to the most serious forms of violations of forced labour. To examine the question, I will draw on the international human rights law and accepted conventions that: highlight Hong Kong's obligations to provide effective remedies; define the concept of an effective remedy; identify the barriers MDWs face in securing a remedy; and the effectiveness of conciliation in mitigating the barriers to remedies.

Although Hong Kong is specifically obligated under the Forced Labour Convention No.29 (1930) and other international conventions that should offer protection, MDWs who arrive in Hong Kong often find themselves in forced labour situations with no mechanism for appropriate and effective redress. This thesis will identify the affirmative obligations for Hong Kong as a party to the Convention, linking it to existing convention obligations and domestic applications to protect and redress breaches of the covenant. It will cover two issues. First, whether effective remedies are available for the human rights violations of forced labour, and secondly, whether the remedies for domestic labour disputes are effective and fair.

The research conducted for this and other research studies conducted on the plight of MDWs have established that MDWs are in forced labour situations contrary to International Human Rights law.<sup>1</sup> Many of the documented abuses suffered by MDWs are also very clearly criminal in nature. Despite these findings, the Hong Kong government is failing to ensure effective access to remedies and continues to view all issues related to MDWs as labour issues which are directed to non-judicial mechanisms such as conciliation, a form of Alternative Dispute Resolution (ADR). These redress mechanisms are inadequate and in contravention of International Human Rights Law, and a violation of Hong Kong's obligations as a party to various international conventions and to the domestic Labour Ordinance. The redress

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<sup>1</sup> International Labour Organisation (ILO), *Forced Labour Convention, C29*, 28 June 1930, C29

mechanisms established by the government for what are classified as MDW labour issues, coupled with official government policies as they apply to MDWs, fail to protect them from abuse, fail to adequately redress their grievances, fail to serve as a deterrent to future abuse and exploitation, and fail to penalise the employers, the recruitment and associated lending agencies when there are violations of domestic and international law.

While addressing the obligations of Hong Kong Special Administrative Region (HKSAR) throughout the thesis I will use the term ‘state, party or government’ to refer to the Hong Kong government. This distinction is necessary since Hong Kong is a Special Administrative Region of the People’s Republic of China and not a state as normally understood in international conventions. Hong Kong enjoys a great deal of autonomy in its domestic affairs under the ‘one country, two systems’ framework. This separation of domestic management is the underpinning of the ‘Joint Declaration’<sup>2</sup> between the United Kingdom and China on the return of Hong Kong to Chinese rule.

This thesis is divided into nine chapters. Chapter 1 will briefly outline the research study, provide a brief background of the research, its conceptual framework, the legal obligations and abuses experienced by MDWs, the purpose of the study, the research questions, highlight the significance of the research, and lay out the organisation of the thesis.

## **1.1 Background**

Migrant domestic workers whose employment contracts are prematurely terminated are directed to file any grievances or disputed claims with the Labour Department. Generally, the disputed claims are related to remuneration and entitlements that are set out in the employment contract and the domestic Labour Ordinance. Some examples include unpaid wages, denial of rest days or vacation pay and refusal to provide return passage to their country of origin. The Hong Kong Labour Department uses a two-step system to address almost all of the issues related to

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<sup>2</sup> Government of the United Kingdom Signed by: Margaret Thatcher and others, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of The People’s Republic of China on the question of Hong Kong (Beijing, 19 December 1987)

MDWs, identifying them as labour claims. The first step after a labour claim is filed by a MDW is the scheduling of a conciliation meeting where the claimant MDW is expected to discuss settlement options directly with their employer with the aid of a Conciliation Officer. The second step is dependent on the outcome of conciliation and the sum of money in dispute. Claims that are \$8,000 and below are filed with the Minor Employment Claims Adjudication Board (MECAB). The hearing before MECAB is administrative in nature under the purview of the Labour Department and is presided over by an Adjudication Officer. If the claim is above \$8,000, it is filed with the Labour Tribunal (LT) which falls under the judiciary and is presided over by a Presiding Officer. The practice at all three venues is to encourage settlement between the parties, even if some aspect of a hearing has begun. The time for resolution of claims can range from 3-4 weeks if settled at conciliation, or 4 months or longer if the matter progresses before the MECAB or Labour Tribunal. Neither MDWs nor their employers are permitted to have legal representation at any of the dispute resolution mechanisms.

Some claims that are filed with the Labour Department involve not only physical assaults on the MDW, but varying forms of psychological coercion. The abuses, coupled with the constant threat of termination, limits the MDW's ability to make free and informed decisions about their daily existence under threats of penalties such as dismissal, loss of wages or the effect of government policies that contribute to forced labour conditions. Despite the documentation of their working and living conditions in claims to the Labour Department, the focus remains on monetary issues and settlement. MDWs suffer a variety of abuses; reports of physical violence are ignored as are many invisible abuses in the form of discrimination based on race and gender and inequities of government policy denying equal protection in work safety standards, standard work hours and exclusion from the minimum wage protections.

MDWs also encounter various barriers to seeking a remedy for labour rights violations resulting from official policies, their representative recruitment agencies or acts of the employer after resistance to demands that fall outside the scope of their employment contracts. The lack of investigation and manner of redress may not provide an effective remedy, as is obligated. The lack of protection in the form of

legal frameworks and effective redress raises the question of Hong Kong's obligations under international law and conventions to which Hong Kong is bound.

## **1.2 Conceptual Framework for Study**

The conceptual framework for this research is that MDWs' employment conditions in many instances constitute violations of forced labour prohibitions, contrary to international law and convention obligations. If these obligations are afforded the reasonable due diligence to ensure protection and effective remedies, there should be mechanisms to assess whether violations of forced labour are evident in MDW complaints and, if found, recognised as a crime, effectively investigated and prosecuted, and reparation in the form of compensation at a minimum to redress the violation is made available. In instances where work conditions do not rise to the level of crimes and are considered labour disputes, an effective remedy is still required and the outcome should be just.

### **1.2.1 Legal obligations**

Hong Kong is obligated under several international conventions to provide an effective remedy to individuals whose human rights have been violated. These include: the International Convention on Civil and Political Rights (ICCPR); the International Convention on Economic, Social and Cultural Rights (ICESCR); and several International Labour Organisation Conventions, particularly the Forced Labour Convention No.29 (1930) which remains in effect in Hong Kong, having been adopted in July 1997<sup>3</sup> after the return of Hong Kong to China by the United Kingdom. These Conventions have been incorporated into the Basic Law of Hong Kong. These instruments require not only that an 'effective remedy' is available to individuals seeking redress for human right violations, but also provides for proper remuneration, rest and reasonable work hours. Since MDWs are legally admitted to Hong Kong through official policies and a regulatory scheme that maintains control over their employment, the obligation to prevent instances of forced labour is

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<sup>3</sup> International Labour Organisation list of ratified Conventions pertaining to Hong Kong, see also ILO, *Report to the Director General, GB.270/15* (270 Session, 1997) para. 26-28, see also Hong Kong's Legislative Council Paper No.CB (2) 2617/10-11(01), Information Paper provided by the Hong Kong Special Administrative Region of the People's Republic of China to the Indonesian government at 'Committee Meeting on the Protection of the Rights of Migrant Workers in the Hong Kong Special Administrative Region' at Solo in the Republic of Indonesia 28 September 2011

significant.<sup>4</sup> Forced labour is a violation of human rights<sup>5</sup> and Hong Kong must administer the remedies within established international norms.<sup>6</sup> Although Hong Kong is a party to numerous international conventions, including International Labour Conventions, Hong Kong, does not have specific domestic laws that define and penalise forced labour. Additionally, the Vienna Convention on the Law of Treaties<sup>7</sup> establishes that through ‘acceptance’, ‘approval’ or ‘accession’, a party consents to be bound by the treaty, and that the text of the treaty is established as authentic and definitive. Parties to conventions are also bound to execute their obligations in good faith and may not invoke domestic law or the lack thereof as justification for failure to perform.<sup>8</sup>

### 1.2.2 Identifying abuses

As a result of limited employment opportunities and extremely low wages at home, Hong Kong has long been a destination country for hundreds of thousands of migrant workers from poorer countries in Asia.<sup>9</sup> The Philippines and Indonesia alone account for nearly two-thirds of the 350,000 MDW workforce. These migrant workers, the vast majority of whom are women, find work as domestic workers contracted to employers living in Hong Kong. As a result of the circumstances of their employment and the policies of the Hong Kong government, MDWs as a group are especially vulnerable to physical and sexual violence, economic exploitation, and discrimination.<sup>10</sup> Many of the abuses begin at the time that they sign their contracts with employment agencies that charge illegal fees, creating a debt bondage that has been described as a form of modern day slavery.<sup>11</sup>

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<sup>4</sup> Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 2 edition, N.P. Engel Pub (2005)

<sup>5</sup> International Labour Conference (93 Session) ‘A Global Against Forced Labour’ Report I (B) (2005). See also, Geneva Academy of International Humanitarian Law and Human Rights, ‘What amounts to ‘a serious violation of international human rights law’? August 2014, p.5

<sup>6</sup> Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary

<sup>7</sup> Vienna Convention on the Law of Treaties, No.18232 Vienna 23 May 1969

<sup>8</sup> Ibid (Art. 26) (Art. 27) (Art. 31)

<sup>9</sup> The 2016 Hong Kong Annual Digest of Statistics places the 2015 number of MDWs at 340,380, approximately 4.7% of the population (7,305,700).

<sup>10</sup> UNIFEM - CEDAW Panel on Addressing Women Migrant Workers’ Concerns, [2003] July, New York,

<sup>11</sup> Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, Report of the 3 and 5 *Alliance against Trafficking in Persons* Conferences on Human Trafficking for



Viewed from a distance, Hong Kong is a model for the employment of MDWs<sup>12</sup> compared with other Asian, Middle Eastern and Gulf region countries.<sup>13</sup> Hong Kong's policies and practices as they relate to MDW appear to achieve the goals of filling a need in their society while providing a streamlined, consistent and transparent process for recruitment and placement of MDWs from all around Asia. MDWs are required to have an employment contract,<sup>14</sup> which is signed by both employer and employee, and which outlines the obligations of both parties. The contract, which is for an express term of 2 years, outlines the minimum allowable wage, identifies the location where the employee is to work, identifies the employer with whom the employee is to work, guarantees one rest day of 24 hours per week, describes the living accommodation and, typically, outlines the work that the MDW would be responsible for. Additionally, the employer is responsible for the employee's passage to and from Hong Kong at the start and end of the contract period. The reality, however, is that bad policies on the part of the Hong Kong government, coupled with misplaced priorities in the enforcement of applicable laws and a strong institutional and cultural bias against MDWs, have created an environment of exploitation and abuse.

The research in support of this thesis, and buttressed by multiple studies conducted over a decade, identifies a variety of issues that continue to result in forced labour for a substantial number of MDWs working in Hong Kong and violations of basic human rights that are routinely ignored. An example that illustrates the issues and one of the most criticised laws is the 'Two Week Rule' for MDWs whose contracts have been terminated. Under this law, MDWs have two weeks to leave Hong Kong once their contract has been terminated or the expiration date of their visas, whichever is earliest. MDWs pursuing a labour claim after termination may remain longer, but must first secure an extension of their visa. However, each extension is for 14 days only and costs the MDW \$198. If the claim is before the Labour Tribunal

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Labour Exploitation/Forced and Bonded Labour, Vienna, 7 and 8 November 2005, Vienna, 16 and 17 November 2006

<sup>12</sup> The term 'Migrant Domestic Worker' is preferred to 'Foreign Domestic Helper' used by Nicole Constable, and is the official term used by the Immigration Department to identify this labour force.

<sup>13</sup> Nicole Constable, 'Obstacles to Claiming Rights: Migrant Domestic Workers in Asia's World City, Hong Kong' Chapter 5, 'Care Migration and Human Rights: Law and Practice' Edited by Siobhán Mullally, Routledge, January 29 2015

<sup>14</sup> 'Employment Contract (For A Domestic Helper recruited from abroad)', Form ID 407

or the MECAB, the average wait is 4 months to get a hearing date. In the meantime, the cost of each extension, and all living expenses must be borne by an already financially encumbered MDW.

The research confirms that this serves as a huge barrier to access to justice. No matter how legitimate the claims of the MDW or how egregious the conduct of an employer or employment agency, few claims are pursued to a final hearing. Most MDWs choose to not pursue legal claims and are resigned to their losses. Those who do make a claim for wages owed or wages illegally withheld accept far less than they are owed because of the punitive cost of making a claim. Others abandon their claims as the costs begin to mount, fearful that their pursuit of a claim might prejudice their ability to find future employment.

### **1.3 Purpose of the study**

Hong Kong is a receiving country for hundreds of thousands of MDW, many of whom are women. They are treated as commodities and susceptible to varying forms of abuses. The purpose of the study is to examine the response of the Hong Kong government to protect and redress forced labour of MDWs against their existing international obligations, which should also be reflected in the domestic law. It will: define the concept of an effective remedy; establish Hong Kong's legal responsibility to provide an effective remedy for human rights violations as a party to International Conventions and under international law; identify the links between international and domestic legal obligations and ensuring the protection and redress of forced labour experiences of MDWs; and establish that the experiences of many MDWs constitute forced labour, an internationally recognised crime and a serious violation of human rights law.

### **1.4 Research question**

1. Do the current measures to address labour rights violations of Migrant Domestic Workers in Hong Kong provide an effective remedy?

Secondary questions:

1. What are the obligations under the Forced Labour Convention?
2. What is an Effective Remedy?
3. What are the barriers to remedies for Migrant Workers as a vulnerable group?

4. Does the use of conciliation (ADR) provide effective access to a remedy?
5. To what extent does forced labour occur within the research subset of workers?

### **1.5 Significance of research**

The research conducted and the evidence developed strongly suggest that conciliation as a form of ADR is insufficient to provide “access to justice” for the Migrant Domestic Workers in Hong Kong; further, it does not meet the requirements mandated by International Law to which Hong Kong is obligated. It provides neither a remedy for human rights violations of forced labour, nor does it adequately address what may be characterized as domestic labour claims (in the majority of cases) to be adjudicated by the Labour Department.

Research also disclosed that there is a high prevalence of forced labour in Hong Kong among MDWS who are not afforded an effective remedy. The data collected found that approximately 66% of the MDW within the sample group were categorised as being in forced labour.

The research conducted and the findings are therefore significant for the following reasons: First, it is original research, in that it attempts to directly link Hong Kong’s international and domestic obligations to prevent, investigate and punish forced labour to the substantial MDW population of Hong Kong. As of the end of 2015 there were approximately 340,380 migrant domestic workers in Hong Kong. This number represents about 4.65% of the population (7.3 million). While there have been other studies that have concluded that forced labour exists in Hong Kong, none have linked Hong Kong’s obligation to provide a remedy, the barriers to those remedies and the effectiveness of that remedy.

Second, the use of the ILO indicators revealed some difficulties in their application. I am aware of only one other study that relied on the ILO’s indicators of forced labour as a tool to identify victims and assess the ease of application. The nature of this type of research also highlights the encouragement of Halliday and Schmidt; that, researchers should embrace the realisation that ‘ambiguity and difficulty were the rule rather than the exception in empirical research’ and at times lead to

serendipitous findings that provide insightful realisations that at times help ‘refine a research project’ but which can also result in misfortune.<sup>15</sup> This research is no exception. The initial working hypothesis was that the use of the ILO methodology would readily identify MDWs in forced labour, and most MDWs who fell into that category as a result of labour rights violations would likely file claims against their employers with the Labour Department. A part of the original strategy was to review these anticipated claims to assess the labour claims process. However, the methodology and analysis of the data revealed that the use of some established ILO indicators to assess MDWs who were in forced labour was more complicated in its application. The serendipitous finding was that some indicators of forced labour were difficult to apply in an initial assessment in identifying forced labour and required a deeper evaluation of the specific individual work and living environment. While objective assessment criteria were useful, a closer scrutiny of their day-to-day work and life environment and their interaction with their respective employers was necessary for a definitive assessment conclusion.

Third, because of the methodology applied and mixed data collection methods such as the in-depth screening, and semi-structured interviews and observation, indicators of forced labour were identified that would not have been recorded in thinner quantitative research. Therefore, the number of MDWs in forced labour may be greater than indicated in surveys conducted by organizations like Amnesty International and Justice Centre Hong Kong (discussed later). Indicators of forced labour may be overlooked in other research since they may not capture or account for elements that are not pre-identified on a list of indicators or revealed in interviews or through the resolution process. This finding is therefore a significant contribution to the relevant literature.

Fourth, there is empirical confirmation that there is a high prevalence of MDWs who were in forced labour but accepted their working and living conditions no matter how appalling, and did not see themselves as victims. This finding, a passive acceptance of abuse on the part of the victim, raised concerns about the

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<sup>15</sup> Simon Halliday and Patrick Schmidt, *Conducting law and society research: reflections on methods and practices* (Cambridge University Press 2009)

psychological impact that the abuse had on decisions made or not made on the part of the MDWs. A closer examination suggested that several factors could be identified that contributed to a psychological state of helplessness and isolation. One of the most glaring is Hong Kong's 'live-in' rule, requiring MDWs to live with their employers. By its very nature, this rule turns over almost absolute control of the day-to-day existence of the MDW to the employer. This gross imbalance in the employer-employee relationship diminishes the ability of the MDW to make independent decisions that are free of actual or perceived coercion. The secretive nature of domestic work outside the eye of the public provides the ideal opportunity for untold assaults on MDWs' person, mind and legal rights. This impact on the MDWs and its damaging consequence extends to all aspects of the relationship, including any redress process.

Additionally, most MWDs that were assessed to be in a forced labour situation chose not to seek any form of remedy or file official complaints for the variety of abuses suffered at the hands of their employers. Most that fell into this category did not see themselves in that status.

Fifth, on a broader and conceptual level, this research contributes to and expands the discourse on an under-researched issue and the necessity of adopting a holistic approach to ensuring the implementation of human rights principles as part of an effective remedy. The research also raises the question of whether the use of ADR mechanisms is appropriate given the special vulnerability of groups such as MDWs. Forced labour in domestic work is a significant women's rights issue, since the majority of domestic workers are women.<sup>16</sup> The research emphasises the similarities of the phenomenon across geographical boundaries and implicates government policy, awareness and negligence in the implementation of human rights obligations.

## **1.6 Organisation of research**

Chapter 2 will establish the legal framework for the prohibition of forced labour and the obligations on the Hong Kong government to ensure implementation of those obligations. These obligations emanate from the Forced Labour Convention No.29

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<sup>16</sup> Margaret L Satterthwaite, 'Crossing borders, claiming rights: using human rights law to empower women migrant workers' (2005) 8 Yale Hum Rts & Dev LJ 1, p.4

(1930) specifically and more generally the ICCPR the ICESCR and the Palermo Protocol. I will examine a recent case for judicial review in the Hong Kong Court of First Instance which provides a doctrinal analysis of the obligations of the Hong Kong government and examines the definition of forced labour and the criteria for identifying victims using the “Palermo Protocol” as an additional instrument to elucidate these obligations. The obligations of the Hong Kong government, the application of the Forced Labour Convention, the nature of the violation and the mechanism for redress will be further examined in the broader examination of an effective remedy in chapter 4.

Chapter 3 will focus on the methodology used in this research, outlining the sampling and data collection, validity and methodological framework, challenges in executing the methodology and ethical dilemmas.

Chapter 4 will examine what constitutes an effective remedy as the first of three parts of the literature review. It will examine the relationship of the obligation to prevent human rights violations with the obligation to provide an effective remedy. In examining this literature, the aim is to provide an understanding of an effective remedy, the duty to implement obligations domestically, and to articulate the necessary component measures in providing an effective remedy with special attention to vulnerable groups or individuals.

Chapter 5 the second part of the Literature review will examine the concept and identification of vulnerable groups and individuals who should be provided special attention due to their specific vulnerabilities.

Chapter 6, the third part of the literature review examines the barriers to a remedy broadly and consider the merits of ADR, a non-judicial mechanism, as an effective remedy to address the issues identified with MDWs. The research found that conciliation acted as a barrier to a remedy and is addressed as a finding in chapter 9.

Chapter 7 will outline the current conditions in Hong Kong affecting MDW. One of the issues that will also be considered is the Hong Kong government’s policies and priorities as they pertain to the MDWs, and the impact of those choices on that vulnerable population as a whole.

Chapter 8 will provide the analysis of data collected relative to the prevalence of forced labour and conditions of employment, that there is an imbalance in power between the employer and employee, the finding that many MDWs do not see themselves as victims and had ‘no choice’ but to continue in an abusive employment situation, and a comparison with other similar research.

The concluding Chapter 9 will provide the analysis of data collected that MDWs experience variety of barriers to a remedy. These barriers will be presented in four sections, social and cultural barriers, institutional barriers and structural barriers and conciliation as a barrier. Social and cultural barriers include threats of reprisals, lack of awareness on the part of MDWs. Institutional barriers include lack of legal frameworks, access to authorities, lack of representation, lack of enforcement, lack of government awareness, lack of corroborative evidence, lack of awareness at redress, lack of enforcement of judgments, government policy as reprisals, excessive delays, fees and cost associated with claiming. Structural barriers will address corruption. The final section will address the conciliation process as a barrier to a remedy engaging the literature on ADR and non-judicial/informal mechanisms to highlight the inappropriate nature of the mechanism for vulnerable individuals. Additionally I will outline the conclusions and recommendations of the research.

## Chapter 2. Legal Framework

### 2.1 Introduction

This chapter examines the legal framework of Hong Kong Special Administrative Region Government (HKSARG) on the prohibition of forced labour. A portion of this chapter is also devoted to a landmark case, *ZN v Secretary of Justice and Others*, which was decided by the Hong Kong Court of First Instance (HKCtFI) in 2015.<sup>17</sup> Though styled a civil case, the court was confronted with many of the issues of forced labour identified by my research. Broadly, the court's ruling was a firm rebuke of the Hong Kong Government's policies and lack of response, awareness and protection of victims of human trafficking for forced labour.

As a threshold matter, The People's Republic of China accepted that Hong Kong was bound by the Forced Labour Convention No.29 (1930) in 1997, after gaining jurisdiction over Hong Kong. The Forced Labour Convention lays the legal foundation for the prohibition of forced labour and identifies the criteria to identify victims. The concept of forced labour is broad in scope and emphasises that the employee's right to free choice of employment is 'inalienable'.<sup>18</sup> The underlying principle is that the employee must give free and informed consent when deciding to accept employment. Therefore, the nature of the work, location, employer, working conditions and other relevant information must be made known to the individual so that an informed and considered decision can be made in accepting or rejecting the job offer. In addition, if an employee initially accepts an offer and then decides to terminate the employment, the employee should be able to do so within the terms of any contract.

The research that I conducted made clear that many MDWs in Hong Kong have to deal with work conditions that are in violation of these basic precepts, and have to do so without appropriate redress mechanisms or a legally sufficient and adequate

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<sup>17</sup> *ZN v Secretary of Justice and Others*, HCAL15B/2015

<sup>18</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution); International Labour Conference (96 Session) 'Eradication of Forced Labour' Report III (Part 1B) (2007) p.21



response from the Hong Kong government pursuant to its obligation under the Convention.

In Hong Kong case *ZN v Secretary of Justice and Others*, the central issue for the court was to provide an interpretation of Article 4 of the Hong Kong Bill of Rights Ordinance (BOR) which prohibits slavery, servitude and forced or compulsory labour. The judicial review sought to determine whether human trafficking was prohibited under the BOR, although Hong Kong is not obligated under the “Protocol to Prevent, Suppress and Punish Trafficking in Persons”<sup>19</sup> and to outline its obligations associated with the prohibition of forced labour.

The three sections below will examine: the background of the Hong Kong case for judicial review in section 2.2, the prohibition of forced labour under the recognized international and domestic legal framework, and the definition and criteria for identifying forced labour in section 2.3 and the international and domestic legal obligations for the prohibition of forced labour in section 2.4. The obligations to which Hong Kong is bound under domestic law fall within the broader concept of an effective remedy.

## **2.2 Background – Judicial Review**

The grounds for judicial review in *ZN v Secretary of Justice and Others*<sup>20</sup> arose from the application to the HKCtFI alleging the failure of the HKSARG and the relevant authorities to protect the applicant from human trafficking for servitude or forced labour, after being brought to Hong Kong to work as an MDW between 2007 and 2010.

The applicant alleged that the HKSARG and other government authorities failed in their duties and obligations to ensure the protection against human trafficking guaranteed by Article 4 of the Hong Kong Bill of Rights Ordinance, Cap 383 (BOR), which prohibits slavery, servitude and forced or compulsory labour. The applicant alleged that he complained to officers of the Immigration Department, the Hong

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<sup>19</sup> United Nations Convention against Transnational Organized Crime: Supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, *adopted* 15 November 2000, G.A. Res. 55/25

<sup>20</sup> *ZN v Secretary of Justice and Others*, HCAL15B/2015

Kong Police and the Labour Department about the conditions under which he was required to work; however, the authorities took no action and failed to investigate his complaints as a case of human trafficking for servitude or forced labour. He further complained that these failures ‘...were systematic and occurred primarily because of the absence of any legislative framework to prevent human trafficking or to protect victims of human trafficking where they are subject to servitude or forced labour’.<sup>21</sup>

The applicant, a Pakistani male in his 30’s had previously worked for the employer and the employer’s family in Pakistan. He was first brought to Hong Kong on 1 May, 2007, accompanied by the employer’s sister. She subsequently retained his passport and continued to do so during the period of his employment. The employer’s sister was also responsible for addressing all of the legal requirements for his work in Hong Kong.

### ***Findings of fact***

Based on the evidence submitted and other information considered by the HKCtFI, the following relevant findings of fact<sup>22</sup> were established by the court:

(1) The applicant was a member of a lower socio-economic “caste” than his employer in Pakistan. The implications to this culturally accepted background were limited access to education, economic opportunities and general lack of sophistication and ignorance of the functions of government and its legal systems, particularly in Hong Kong.

(2) The applicant had been employed by the employer and his family in Pakistan. Socio-economic and cultural norms in Pakistan led to the employer asserting considerable command and control over the applicant.

(3) The employer and his family arranged for the applicant to work for them in Hong Kong. They sponsored his work permit, and arranged his transportation to Hong Kong. The applicant had not previously travelled outside of Pakistan.

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<sup>21</sup> Ibid, para 2

<sup>22</sup> ZN v Secretary of Justice and Others, HCAL15B/2015, para 160

(4) The employer promised the applicant that he would have good working conditions, and that he would receive a salary of \$4,000 per month. The two contracts considered by the court in the dispute at issue specified \$3,400 in salary, and a \$300 food allowance, and \$3,580 in salary and \$300 food allowance respectively. The court found that while these documents may have been presented to the applicant by the employer, the applicant did not understand them, and in some instances did not sign them. The applicant was not paid his wages for nearly a 4 year period.

(5) The applicant was accompanied to Hong Kong in January 2007, by a member of the employer's family who held all of the travel and identification documents of the applicant. Further these documents were in the employers custody during the duration of the applicants stay in Hong Kong.

(6) During his stay in Hong Kong, the applicant was under the total control and influence of his employer. The employer decided all aspects of the applicant's work and living conditions. The applicant had no knowledge of his rights or protections under the law, and was certainly unaware of obligations on the part of his employer created by the applicable laws or administrative regulations. The court found that the employer's dominance and control existed at all levels, psychological, physical and economic, creating a state of dependency.

(7) Though employed as a foreign domestic helper, he was required to work in the employer's trading company (which the applicant agreed to do). The applicant was required to live on the property of the business, sleeping on the carpeted floor of one of the offices. He was required to work long hours, seven days a week. He was given two meals a day, and his movements were limited to the property of the trading company, save to run any office related errands. The applicant was allowed breaks, but the court was not able to identify the frequency or the length of these breaks.

(9) The applicant was suffered both physical and emotional abuse at the hands of the employer. Although the applicant did not suffer any serious injuries, the court found the abuse pervasive.

(10) In late 2010, the applicant asked the employer to give him an advance on his unpaid wages to assist his family in Pakistan. The employer deceived the applicant

into returning to Pakistan, and then terminated his contract and associated sponsorship in Hong Kong. The end result was an inability for the applicant to claim the wages that were owed to him and a de-facto prohibition from entering Hong Kong to pursue a legal claim.

(11) Subsequently, when the applicant attempted to claim his unpaid wages, the employer and members of his family and business associates, both in Hong Kong and in Pakistan, threatened the applicant and his family.

(12) The applicant returned to Hong Kong in April 2012 to claim his unpaid wages from and to report the mistreatment that he had suffered from the employer. He presented himself to the Immigration Department upon his arrival, admitting his illegal entry, and requesting the right to make a claim on his unpaid wages and the right to file a complaint against the employer for mistreatment received over the course of his employment.

(13) Between April 2012 and September 2013, the applicant was interviewed on multiple occasions by the Immigration Department , the Labour Department and police department.

(14) Upon his return to Hong Kong, the employer filed charges of theft against the applicant. These charges went to trial and the accused was acquitted of any wrongdoing. The clear belief was that these charges were retaliatory and initiated to discourage the applicant from pursuing his case.

Relying on the ILO's indicators for identifying forced labour, jurisprudence of the ILO and its Committee of Experts , available Hong Kong domestic law and the European Court of Human Rights, specifically *Siliadin v France* , *Rantsev v Cyprus and Russia* CN & V v France and *C.N. v The United Kingdom* to define the nature and extent of Hong Kong's legal obligations under the Forced Labour Convention No.29 (1930) which has been incorporated into the Basic Law of Hong Kong (Article 4 BOR). International and regional human rights courts have considered ILO instruments and jurisprudence when interpreting and applying regional human rights treaties. These courts engage in binding adjudication available to individuals within the state party's jurisdiction, 'complement and reinforce protective effects of ILO conventions and forms the foundation on which

domestic courts rely for referencing the application of international human rights issues'. In addressing the gaps in Convention obligations and the actual application of those obligations, courts have attempted to clarify a state's obligations. The repeated caution is that the provisions of a Convention should not be the sole framework for interpreting Convention rights. However, it "...must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its provisions."

The HKCtFI incorporated the concepts of the Vienna Convention on the Law of Treaties (VCLT) in its reasoning. The VCLT sets the binding standards and principles on the interpretation of international treaties and makes clear that these standards and principles must be done in good faith and in accordance with the ordinary meaning given to the terms of the Convention, its context and aligned with its object and purpose for which the Convention was drafted. The context for the interpretation of the purpose and objective of the Convention includes the text and the preamble and annexes. Parties to conventions are bound to execute their obligations in good faith may not invoke its domestic law or lack thereof as justification for failure to perform. The prohibition of forced labour and its accompanying obligations are binding on its parties and therefore as an international convention must be interpreted and executed in accordance with the VCLT.

### **2.3 The prohibition of forced labour**

This section examines the legal framework which includes the definition and the criteria for identifying forced labour. The prohibition of forced labour dates back to the International Labour Organisation Forced Labour Convention, No.29 (1930) and Abolition of Forced Labour Convention, No.105 (1957). These Conventions apply to Hong Kong through ratification by the British Government on 3 June 1931 and on 3 June 1957 respectively.<sup>23</sup> The legal commitments were extended to Hong Kong by the government of the People's Republic of China ('China') on 1 July 1997,<sup>24</sup> and

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<sup>23</sup> ILO Ratification by Convention, <http://www.ilo.org>, accessed 22 April, 2015

<sup>24</sup> The Basic Law of Hong Kong Special Administrative Region of The People's Republic of China, Article 39; Peggy Lee, Carole Petersen, 'Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers' [2006] Centre for Comparative and Public Law Faculty of Law, The University of Hong Kong

remain in effect. Additionally The International Covenant on Civil and Political Rights (ICCPR) was extended to Hong Kong by the United Kingdom's ratification in 1976.<sup>25</sup> The Sino-British Joint Declaration in 1984<sup>26</sup> provided that the treaty would continue to apply to Hong Kong and was incorporated into Hong Kong's domestic law in 1991, through the enactment of the Bill of Rights Ordinance (BOR) (Cap. 383).<sup>27</sup> The BOR, Article 39 of the Basic Law (Hong Kong's constitution since July 1997) provides that the provisions of the ICCPR, as applied to Hong Kong, 'shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region'.<sup>28</sup> The text related to the prohibition on all forms of slavery and forced labour as outlined in Article 8 of the ICCPR (based on Article 4 of the Universal Declaration of Human Rights (UDHR)) has been directly incorporated in Article 4, section 8, of the Hong Kong BOR. The Hong Kong Court of Final Appeal has held that this has the effect of incorporating the ICCPR into the Basic Law, giving it constitutional force.<sup>29</sup>

### **2.3.1 Legal Framework**

In setting out the legal framework of human trafficking for forced labour, the HKCtFI adopted a global view of the mechanisms implemented to combat this phenomenon. It made note that the Abolition of Slavery Act was implemented in 1833 in the United Kingdom and in 1844 in Hong Kong with the first ever Slavery Ordinance. These early instruments were followed by two significant ILO Conventions, the Forced Labour Convention of (1930) and the Abolition of Forced Labour Convention of 1957. The League of Nations approved the Slavery Convention in 1926 and charged signatories to suppress all forms of slavery, a condition or status where one person assumes the right of ownership over another. In 1956 the United Nations Supplementary Convention on the Abolition of Slavery and

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<sup>25</sup> Lee and Petersen, *Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers*, p.17

<sup>26</sup> Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (signed in Beijing on 19 Dec. 1984 and entered into force on 27 May 1985 on the exchange of instruments of ratification.

<sup>27</sup> Ghai, *Hong Kong's new constitutional order: the resumption of Chinese sovereignty and the Basic Law*, p.406

<sup>28</sup> *Ibid* at 138, see also *ZN v Secretary of Justice and Others*, HCAL15B/2015, para 186

<sup>29</sup> *HKSAR v Ng Kung Sin* [2002] 2 HKC 117 (CFA).

Practices related to Slavery recognized the prohibition of debt bondage and serfdom. In 1948, the adoption of the UDHR recognized that “all human beings are born free and equal in dignity and rights” (Article 1) and that “...no person shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms” (Article 4). In 1966, the ICCPR (Article 8) and the ICESCR (Article 6 and 7) prohibited slavery and related practices and provided for the right to work and enjoy just and favourable conditions of work respectively.

The HKCtFI relied on the Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Palermo Protocol) for the definition of human trafficking. The Protocol supplements the United Nations Convention on Transnational Organised Crime and Article 3 provides that:

“(a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in sub-paragraph (a) of this article.”

Enshrined within Article 3 are three constituent elements of human trafficking.

Firstly, the **act** is the recruitment, transportation, transfer, harbouring or receipt of persons. Secondly, the **means** is the manner by which the act is achieved and includes the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. Thirdly, the **purpose** for which the act is done, which is exploitation, it includes the exploitation for the prostitution of others or other forms

of sexual exploitation, forced labour or services, slavery or similar practices, servitude or the removal of organs. In regard to the trafficking of children, there are two elements; the act of trafficking as referred to above, and for the purposes of exploitation as defined.

The protocol also imposes obligations to adopt legislative and other measures necessary to establish criminal offences in Article 5, an obligation to provide assistance to victims in Article 6 and an obligation to establish comprehensive policies, programs and other measures to combat and protect victims of human trafficking. Although the People's Republic of China and Macau is a signatory to the Palermo Protocol, a reservation has been entered by China in relation to the Hong Kong Special Administrative Region (HKSAR). Thus the Protocol does not apply to the HKSAR.<sup>30</sup>

### **2.3.1.1 Hong Kong Basic Law - Article 4 BOR**

Article 4 of the Hong Kong Bill of Rights states:

**“No slavery or servitude**

(1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

(2) No one shall be held in servitude.

(3) (a) No one shall be required to perform forced or compulsory labour.

(b) For the purpose of this paragraph the term “forced or compulsory labour” shall not include-

(i) any work or service normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) any service of a military character and, where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) any work or service which forms part of normal civil obligations.”

In Articles 8(3) of the ICCPR and 4(3) of the BOR relating to forced labour, both are

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<sup>30</sup> ZN v Secretary of Justice and Others, HCAL15B/2015, para 176



subject to derogation, but only in cases of public emergency where the life of the nation is threatened and only to the extent required by the exigencies of the situation.<sup>31</sup>

The realisation that forced or compulsory labour for public purposes would sometimes be necessary, Article 4(3) BOR provides for and follows the exceptions laid out in Article 8(3) ICCPR. The exceptions provide for work required by compulsory military service, provided it is of a purely military character; normal civic obligations; conviction in a court of law; cases of emergency; and minor communal services performed by members of a community and in the direct interest of the community.<sup>32</sup> Other than the exceptions specified, the right not to be subjected to slavery, servitude or forced labour is absolute.<sup>33</sup>

### 2.3.2 Definition and criteria

The definition of forced labour specified in the Article 2(1) Convention No.29 defines forced labour as:

*‘...all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.*<sup>34</sup>

The ILO’s definition of forced labour comprises two basic elements: the work or service is exacted under the **menace of a penalty** and it is undertaken **involuntarily**. The HKCtFI looked to *C.N. V v France*<sup>35</sup> for clarity on defining forced labour. In that case, the court relied on extracts from “The cost of coercion: global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work”, adopted by the International Labour Conference in 1999:

#### **Menace of any penalty**

*“24. The work of the ILO supervisory bodies has served to clarify both of these elements. The penalty does not need to be in the form of penal*

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<sup>31</sup> Ibid para 183

<sup>32</sup> ILO, ‘Forced labour and trafficking: a casebook of court decisions: a training manual for judges, prosecutors and legal practitioners’ [2009] Geneva, p.10

<sup>33</sup> *ZN v Secretary of Justice and Others*, HCAL15B/2015, para183

<sup>34</sup> International Labour Organisation Forced Labour Convention No.29 (1930), Geneva, 14 ILC session (28 Jun 1930), Article 2 para. 1

<sup>35</sup> *CN & V v France* App. No. 67724/09

*sanctions, but may also take the form of a loss of rights and privileges. Moreover, the menace of a penalty can take many different forms. Arguably, its most extreme form involves physical violence or restraint, or even death threats addressed to the victim or relatives. There can also be subtler forms of menace, sometimes of a psychological nature. Situations examined by the ILO have included threats to denounce victims to the police or immigration authorities when their employment status is illegal, or denunciation to village elders in the case of girls forced to prostitute themselves in distant cities. Other penalties can be of a financial nature, including economic penalties linked to debts. Employers sometimes also require workers to hand over their identity papers, and may use the threat of confiscation of these documents in order to exact forced labour.”<sup>36</sup>*

The Committee of Experts<sup>37</sup> (ILO supervisory body) has concluded that the menace of penalty which is the means of coercion, should be construed broadly and does not always have to be penal sanctions. Additionally, menace of penalty may include subtler forms of a psychological nature, or a loss of rights and privileges such as transfers, access to new employment and housing. The Committee has identified the scope of rights or privileges to include entitlement benefits based on previous work or contributions, such as social security. The concept obviously includes more extreme acts such as physical violence, restraint or death threats.<sup>38</sup>

The Human Rights Committee has acknowledged the definitions of relevant ILO instruments to be useful in elucidating the meaning of the terms forced or compulsory labour in Article 8 of the ICCPR. The Committee concluded, the term forced or compulsory labour covered a range of conduct extending from labour imposed on an individual in particularly coercive, exploitative or egregious conditions, through to lesser forms where a sanction is threatened if the labour directed is not performed.<sup>39</sup>

Examples of menace of penalty that are commonly identified and relevant in the MDW context include threats to falsely report victims to the police for committing a

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<sup>36</sup> Ibid, para 52

<sup>37</sup> ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), International Labour Conference, 90 Session, Geneva, 2002, p.98

<sup>38</sup> Ibid see also Council of Europe/European Court of Human Rights, Guide on Article 4 of the European Convention on Human Rights: Prohibition of Slavery and Forced Labour (2014), para. 25

<sup>39</sup> UN Human Rights Committee, Bernadette Faure v Australia, Communication No.1036/2001, UN Doc. CCPR/C/85/D/1036/2001 (2005) para 7.5

crime; notifying immigration authorities when the workers are in an illegal employment status; and financial penalties, including economic penalties linked to debts, the non-payment of wages, or the loss of wages accompanied by threats of dismissal if workers refuse to perform beyond the scope of their contract.<sup>40</sup> The difficulty of leaving one's employer is a characteristic of forced labour when leaving entails a penalty or other anticipated risk to the worker.<sup>41</sup> Employers may often seize identity documents or use the threat of confiscation as a means to exact forced labour. The deliberate retention of wages is recognised as a form of coercion as the worker has to stay because outstanding wages will be lost if they leave, hence there is a penalty for leaving.

The HKCtFI also looked to *C.N. v United Kingdom*<sup>42</sup> where the ECtHR defined forced or compulsory labour in accordance with what had been said in *Siliadin v France*<sup>43</sup> and based on the definition of forced labour in the ILO's Forced Labour Convention.

*“The Court itself noted that the term brought to mind the idea of “physical or mental constraint”. In Siliadin the Court found this element to be present where the applicant was an adolescent girl, unlawfully present in a foreign land and living in fear of arrest by the police. In the present case, in light of the definition adopted by the Court and the ILO, and taking into consideration the reports by the POPPY Project and the consultant psychiatrist, the applicant submitted that the police’s conclusion that the lack of payment for the applicant’s work was no more than an absence of “honour among thieves” betrayed a fundamental disregard of the ILO’s key indicators of forced labour and a troubling ignorance of the vulnerabilities of illegal immigrants.”<sup>44</sup>*

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<sup>40</sup> ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), International Labour Conference, 90 Session, Geneva, 2002, p.98

<sup>41</sup> ILO, ‘Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children’. 2012 p.14

<sup>42</sup> *C.N. v The United Kingdom* App. no.4239/08

<sup>43</sup> *Siliadin v France*, (App. no.73316/01)

<sup>44</sup> *ZN v Secretary of Justice and Others*, HCAL15B/2015, para 236

In *C.N. v The United Kingdom* the ECtHR Court placed emphasis on the use of the ILO's developed indicators<sup>45</sup> of forced labour in identifying instances of forced labour and the:

*'...overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another'.<sup>46</sup>*

The issue of coercion and its forms was addressed directly in *Unites States v Kozminski*.<sup>47</sup> Although this case is a domestic case, I find it relevant since it provides examples of more subtle forms of coercion that are described by many MDWs. The case involved the 'involuntary servitude' of two mentally handicapped men who, in their 60s, possessed the maturity and mental development of an 8-10-year-old. The Court held that coercion also encompassed any form that actually succeeds in reducing the victim to a condition of servitude resembling that of slavery.<sup>48</sup> They concluded that coercion could include psychological, economic, social coercion or weakness resulting from lack of food, sleep or medical care. In examining other similar cases, the Court noted that a variety of coercive measures were employed to include, isolation from friends, family, shelter, clothing, jobs, denial of pay, debt greater than a worker's income, disorientation by unfamiliar environment, barraging workers with orders and controlling every detail of their lives.<sup>49</sup> In this particular case, the victims were subjected to disorientation with frequent verbal abuse and complete authoritarian domination, denial of medical care, substandard food,

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<sup>45</sup> The ILO has developed a list of indicators, the most extensive list that includes forced labour and trafficking lists 77 indicators of involuntariness and coercion. The list used in this research and listed above used a list of the 11 most common indicators. In *C.N. v The United Kingdom* (App. No.4239/08) ECtHR 13 November 2012 the Court referred to a list of six indicators used by an assisting NGO and included '1. Threats or actual physical harm to the worker. 2. Restriction of movement and confinement to the work place or to a limited area. 3. Debt bondage: where the worker works to pay off a debt or loan, and is not paid for his or her services. The employer may provide food and accommodation at such inflated prices that the worker cannot escape the debt. 4. Withholding of wages or excessive wage reductions, that violate previously made agreements. 5. Retention of passports and identity documents, so that the worker cannot leave, or prove his/her identity and status. 6. Threat of denunciation to the authorities, where the worker is in an irregular immigration status'

<sup>46</sup> *C.N. v The United Kingdom* (App. No.4239/08) ECtHR 13 November 2012 para 80

<sup>47</sup> *United States v Kozminski* US (Supreme Court) 487 US 931 (1988), This case was identified in the ILO, *Forced Labour and Human Trafficking. Casebook of Court Decisions* p.5 as a useful case on the concept of coercion and the issue of an individual's perception of constraint. While a domestic case, it is relevant to the issue.

<sup>48</sup> *Ibid* para 962

<sup>49</sup> *Ibid* para 956-957

substandard living conditions, working long hours (3 a.m. to 8:30 p.m.) with no days off, exhaustion without free time to seek other work, denial of wages and isolation to reduce contact from others that might render assistance.<sup>50</sup>

### **Involuntariness**

*“25. As regards “voluntary offer”, the ILO supervisory bodies have touched on a range of aspects including: the form and subject matter of consent; the role of external constraints or indirect coercion; and the possibility of revoking freely-given consent. Here too, there can be many subtle forms of coercion. Many victims enter forced labour situations initially out of their own choice, albeit through fraud and deception, only to discover later that they are not free to withdraw their labour, owing to legal, physical or psychological coercion. Initial consent may be considered irrelevant when deception or fraud has been used to obtain it.”<sup>51</sup>*

Also:

*‘The criterion of not having offered oneself voluntarily is distinct from that of the menace of any penalty. Where consent to work or service was already given ‘under the menace of a penalty’, the two criteria overlap: there is no ‘voluntary offer’ under threat’.<sup>52</sup>*

A worker’s freedom to offer themselves voluntarily may also be influenced by external constraints or indirect coercion from an act of the authorities such as a statutory instrument, or from an employer’s practice, such as retention of identity documents.<sup>53</sup> In instances where migrant workers were induced by deceit, false promises and retention of identity documents or forced to remain at the disposal of the employer, a violation of the Forced Labour Convention occurs.<sup>54</sup> The forced labour situation is characterised by an unequal relationship between the employer

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<sup>50</sup> Ibid para 956

<sup>51</sup> *CN & V v France* App. No. 67724/09, para 52, see also ILO, ‘Global Alliance Against Forced Labour’, (2005) para 15, ILO, Forced Labour and Human Trafficking. Casebook of Court Decisions (2009), p.13

<sup>52</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), International Labour Conference (96 Session) ‘Eradication of Forced Labour’ Report III (Part 1B) (2007)

<sup>53</sup> Ibid

<sup>54</sup> ILO, ‘A Global Approach, Freedom from forced or compulsory labour/Suppression of Forced Labour’. Coverage 4

and employee.<sup>55</sup> The employee possesses no bargaining power in re-negotiating the terms and conditions of employment without facing some form of punishment.<sup>56</sup>

In instances where workers are required to work beyond their normal working hours, they should be able to refuse such work, but in reality their vulnerable position makes such a choice almost impossible since their continued employment and wages depend on conforming to the exploitative request.<sup>57</sup> However, in instances where work or service is imposed through exploitation of the worker's vulnerable position, under 'menace of penalty' such as dismissal or refusal of payment, the work ceases to be simply an issue of poor working conditions and becomes forced labour.<sup>58</sup>

In identifying victims of forced labour, the HKCtFI accepted the ILO indicators of forced labour. The indicators<sup>59</sup> include the following:

- a) Threats or actual physical harm to the worker;*
- b) Restriction of movement and confinement, to the workplace or to a limited area;*
- c) Debt bondage, where the worker works to pay off a debt or loan, and is not paid for his or her services. The employer may provide food and accommodation;*
- d) Withholding of wages or excessive wage reduction;*
- e) Retention of passport and identity documents;*
- f) Threat of denunciation to the authorities;"*

The ILO provides that a person qualifies as having been trafficked if their labour migration involves either: (1) two strong indicators of exploitation from the checklist, or (2) one strong indicator and one medium or weak indicator, or (3) three medium indicators, or (4) two medium indicators and one weak indicator. Where there are two or more indicators, the employment qualifies as forced labour.<sup>60</sup>

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<sup>55</sup> ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, (90 Session) Report III (Part 1A), International Labour Conference, Geneva, 2002, p.98.

<sup>56</sup> International Labour Conference (93 Session) 'A Global Alliance Against Forced Labour' Report I (B) 2005

<sup>57</sup> International Labour Conference (96 Session) 'Eradication of Forced Labour' Report III (Part 1B), (2007) p.72

<sup>58</sup> ILO, *Forced Labour and Human Trafficking. Casebook of Court Decisions* (2009), p.7

<sup>59</sup> *ZN v Secretary of Justice and Others*, HCAL15B/2015, para 239

<sup>60</sup> *Ibid*

## 2.4 Obligations under the Convention

The Hong Kong Bill of Rights has no definition of slavery, servitude or forced or compulsory labour, therefore, the HKCtFI relied on relevant international instruments, case law and domestic legislation to interpret the concepts of human trafficking.<sup>61</sup> In analysing the relevant instruments, the Court reasoned that although HKSAR was not a party to the Palermo Protocol and the BOR did not specifically mention human trafficking, human trafficking was covered under the BOR. The prohibition under Article 4 of the BOR of forced labour can be regarded as both the implementation of the ICCPR in Hong Kong and an aspect of the implementation of the provisions of the ILO Forced Labour Convention.<sup>62</sup>

In *Siliadin v France*, the ECtHR adopted the definition of the 1930 Forced Labour Convention and held that Article 4 of the European Convention on Human Rights (ECHR) which is similar to Article 4 of the BOR<sup>63</sup> imposed a positive obligation to protect children and vulnerable individuals in the form of effective deterrence against breaches of personal integrity.<sup>64</sup> The ECtHR also held that there was a strong positive obligation to prevent breaches related to torture, inhumane and degrading treatment and that an equivalent obligation arose under Article 4 of the ECHR.<sup>65</sup> The court specifically held that because there was no criminal offence under French law at the time related to slavery, servitude or force or compulsory labour, the current legislation did not provide the victim practical and effective protection and constituted a breach of Article 2 ECHR.

The case of *CN v France* involved two sisters brought to France from Burundi by relatives. The elder of the sisters was found to be in forced labour and the state was found to be in breach of its positive obligation of Article 4 ECHR. The court in this case followed *Siliadin* and identified the following factors associated with forced labour amounting to servitude: (a) the victim has a fear of deportation; (b) the victim has no hope of finding paid work outside the workplace; (c) the victim has no days

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<sup>61</sup>Ibid, para 221

<sup>62</sup> Ibid, para 192

<sup>63</sup> Ibid, para 181

<sup>64</sup> Ibid, para 204

<sup>65</sup> Ibid, para 205

off; (d) the victim is not permitted leisure activities; (e) the victim is vulnerable and isolated; (f) the victim has no means of living other than at the home of the employer; (g) the victim's passport has been confiscated; (h) the victim's immigration status has not been regularised; (i) the victim is not permitted to leave the workplace other than for chores and has no freedom of movement or free time.<sup>66</sup>

In *Rantsev v Russia*, the ECtHR found Cyprus in breach of Article 4 ECHR in that the failed to afford effective protection against trafficking and that the police had failed to properly investigate. The Court held that:

*“There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of art.3(a) of the Palermo Protocol and art.4(a) of the Anti-Trafficking Convention, falls within the scope of art.4 of the Convention.”<sup>67</sup>*

In the case of *C.N. v United Kingdom*, the victim was brought to the United Kingdom from Uganda on a false passport and visa by a relative. The victim was confined to premises owned by the relative and her passport was seized. She was warned not to speak to anyone or risk being arrested. Employment was arranged for the victim as a carer and security guard, but any wages earned were retained by the relative. The victim eventually escaped and complained to the police who found her claim to be not credible.

The ECtHR held that the United Kingdom was in breach of Article 4 ECHR because they failed to properly investigate the victim's claim, a procedural obligation under the Article 4 when there is a credible suspicion the the victim was in domestic

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<sup>66</sup> Ibid, para 207

<sup>67</sup> *Rantsev v Cyprus and Russia* App. No.25965/04, para 282, see also *ZN v Secretary of Justice and Others*, HCAL15B/2015, para 208



servitude. The court further held that the treatment of the victim fell within the scope of Article 4 of the ECHR but the state had not taken steps to criminalise the prohibited conduct under domestic law at the time.

The parties to the subject case in the HKCtFI were in agreement that the Strasbourg decisions at a minimum suggest that there were four obligations below, relative to human trafficking and forced labour.<sup>68</sup>

(1) To take positive measures to protect, and not merely to refrain from directly infringing, the right of individuals not to be subject to slavery, servitude and forced labour.

(2) Penalisation and effective prosecuting under criminal law of any act which is aimed at maintaining a person in such a situation. With respect to human trafficking, it also requires that a legal and administrative framework to prohibit and punish human trafficking should be put in place.

(3) There may be a duty in specific cases, depending on the factual circumstances, to take proportionate operational measures to protect individuals who are victims or potential victims of human trafficking.

(4) There may be a procedural obligation in specific cases, depending on the factual circumstances (i.e. where it is demonstrated that the authorities were aware or ought to have been aware of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being trafficked), to investigate cases of human trafficking in a way that may lead to the identification and punishment of persons responsible for human trafficking.

#### **2.4.1 Protection Under Article 4 BOR**

The HKCtFI relying on *Rantsev*<sup>69</sup> noted<sup>70</sup> that Article 4 of the BOR as well as Article 4 of the ECHR does not explicitly include a prohibition of human trafficking.

However, in *Rantsev*, the ECtHR established that by its very nature, the aim of human trafficking is the exploitation of individuals and therefore prohibited and does not necessitate the determination of whether it constituted slavery, servitude or forced or compulsory labour. The ECtHR further held that trafficking threatened the human dignity and fundamental freedoms of individuals and is incompatible with a democratic society. It reasoned that the interpretation of covenant obligations under

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<sup>68</sup> ZN v Secretary of Justice and Others, HCAL15B/2015, para 211

<sup>69</sup> *Rantsev v Cyprus and Russia* App. No.25965/04, para 277 – 279, 281 - 282

<sup>70</sup> ZN v Secretary of Justice and Others, HCAL15B/2015, para 249 - 250

the ECHR must be done in light of present day conditions and it was unnecessary to subsume trafficking into any of the categories of slavery, servitude or forced or compulsory labour.

To determine the positive obligations under the BOR, the HKCtFI<sup>71</sup> noted that both *Rantsev* and *C.N. v France* followed the reasoning in *Siliadin*. The ECtHR in *Siliadin* confirmed that Article 4 ECHR entailed a specific positive obligation to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. To comply with this obligation, it is required that a legislative and administrative framework be put in place to prohibit and punish trafficking. To effectively combat trafficking, there is a need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers. The duty to penalise and prosecute trafficking is only one aspect of the general undertaking to combat trafficking.

The extent of the positive obligations under Article 4 must be considered within this broader context. Additionally, Article 4 ECHR entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion. For an investigation to be effective, it must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.

The HKCtFI<sup>72</sup> concluded that there is a positive obligation under Article 4 of the BOR to enact measures to ensure the prohibition of forced labour, to include criminalising and penalising any offender of forced or compulsory labour or

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<sup>71</sup> Ibid, para 267 - 272

<sup>72</sup> Ibid, para 355 - 357

trafficking for that purpose. There must be appropriate measures in place to investigate such cases which constitute a criminal act as intended by the prohibition under Article 4 of the BOR. There is no criminal offence against forced or compulsory labour and the current reliance on other provisions of law falls short in addressing the prohibited conduct. The criminalisation of forced labour serves two important objectives, first it addresses the prohibited act with a specific offence provision and penalty and delineates the elements of the prohibited conduct. Secondly, it is beneficial to society as a whole as it provides notice to law enforcement and the general public of the conduct that is prohibited.

The HKCtFI further concluded that the applicant was denied his rights under Article 4 BOR, in that his case was not recognized by the relevant authorities as a victim of trafficking for forced labour and denied the appropriate investigation and care that should be afforded to victims of this crime.

Obligations under the Forced Labour Convention require that ‘... a state undertakes to suppress the use of forced or compulsory labour in all its forms’.<sup>73</sup> This undertaking implies both a positive and negative obligation, in that the state must take positive action to “abolish, forbid and counter all forms of forced labour”<sup>74</sup> not to allow any form of forced labour to be imposed by private parties and must establish legal safeguards to prevent coercion to perform work.<sup>75</sup> The state must also refrain from using forced labour as defined in the Convention for ‘its own benefit or the benefit of its various divisions (regions, public services, etc.)’.<sup>76</sup> This latter negative obligation requires that any legislation that allows forced or compulsory labour should be repealed.<sup>77</sup>

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<sup>73</sup> International Labour Conference, Eradication of Forced Labour General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) p.72,

<sup>74</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No.18: The Right to Work, 24 November 2005, E/C.12/GC/18 para 9, ZN v Secretary of Justice and Others, HCAL15B/2015, para 234

<sup>75</sup> International Labour Conference, Eradication of Forced Labour General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) p.73

<sup>76</sup> Ibid p.73

<sup>77</sup> Ibid

*‘The illegal exaction of forced or compulsory labour shall be punishable as a penal offence and ...it shall be an obligation to any [party] to ensure that penalties imposed by law are adequate and strictly enforced’.*<sup>78</sup>

The application of convention obligations is also intended to be flexible in nature. To express this flexibility and the ability to address future harms, a convention is to be treated as a living instrument that must be interpreted in accordance with modern day conditions and requires a ‘...firmness in assessing breaches of the fundamental values of democratic societies’.<sup>79</sup>

The HCtFI case highlights the ILO’s findings that there is a direct link between law enforcement and victim protection. Weak enforcement can be attributed to inadequate protection mechanisms, a lack of awareness on the part of the judiciary to identify forced labour violations in matters before them, and woefully inadequate training of law enforcement agencies and officers to recognise violations and finally, corruption is a major impediment in many instances.<sup>80</sup> As a result of these inadequacies, ‘there have been very few prosecutions for forced labour offences anywhere in the world’.<sup>81</sup> The lack of clear legislation, scarce resources for prosecutions, limited awareness both publicly and throughout state organisations and institutions, creates a cycle of violations and impunity on the part of perpetrators.<sup>82</sup>

Most recently, Article 4(1) of the Protocol to the Forced Labour Convention requires members ‘...to ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation’.<sup>83</sup> Other recognised remedies include

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<sup>78</sup> ILO, *Forced Labour Convention*, No.29 (1930), Article. 25, Ibid p.73

<sup>79</sup> *Siliadin v France*, (App. no.73316/01) ECtHR 26 July 2005 para 121

<sup>80</sup> ILO, ‘Forced Labour Convention’ No.29 (1930) Article. 25, International Labour Conference, ‘Global Alliance Against Forced Labour’ (93 Session) Report I (B) (Geneva 2005), p.59-60

<sup>81</sup> Ibid p.2

<sup>82</sup> Ibid

<sup>83</sup> International Labour Organisation (ILO), Protocol of 2014 to the *Forced Labour Convention*, 1930 *Entry into force: 09 November 2016*

access to justice and rehabilitation to all victims without regard to legal status.<sup>84</sup> Remedies should be provided for in the territory where the forced labour occurred.<sup>85</sup>

## **Conclusion**

The reasoning and decision in this case has for the first time established precedent in Hong Kong that should serve to clarify the HKSARG obligations to effectively address conditions of human trafficking for forced labour and by extension, it is not necessary that HKSARG recognise the “Palermo Protocol” since the constituent elements and purpose are the same. The reasoning also establishes that obligations under Article 4 BOR are reflective of other Conventions to which HKSARG is bound. These Conventions include the ICCPR (Article 8) based on Article 4 of the Universal Declaration of Human Rights (UDHR), the ICESCR (Article 6 and 7) that prohibits slavery and related practices and provided for the right to work and enjoy just and favourable conditions of work respectively and most importantly the Forced Labour Convention (1930).

The obligations to protect victims and in particular MDWs from human trafficking and forced labour entail that the HKSARG must:

- (1) Take positive measures by adopting legislative and administrative measures to protect, and not merely to refrain from directly infringing, the right of individuals not to be subject to slavery, servitude and forced labour.
- (2) Penalise prosecute and punish violators under criminal law of any act which is aimed at maintaining a person in such a situation.
- (3) Investigate cases as part of their a procedural obligation where the authorities were aware or ought to have been aware of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being trafficked. The investigation must be conducted in a way that may lead to the identification and punishment of persons responsible.
- (4) Take proportionate operational measures depending on the factual circumstances, to protect individuals who are victims or potential victims.

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<sup>84</sup> ILO Standards on Forced Labour - The new Protocol and Recommendation at a Glance / ILO, Fundamental Principles and Rights at Work Branch (FUNDAMENTALS) - Geneva: ILO, 2016

<sup>85</sup>Ibid

The HKCtFI proceeded along a narrow path constrained to determining HKSARG's obligations based on the definition of human trafficking for forced labour and whether human trafficking was prohibited under Article 4 BOR. However, the obligations of the HKSARG may be more extensive if a wider view of obligations under international law (ICCPR) is examined. Forced labour is considered a serious violation of international human rights law. The term 'serious violation' has no authoritative definition and is not explicitly outlined in any legal international legal framework.<sup>86</sup> It is also not very clear what factors are considered in classifying a violation as 'serious'.<sup>87</sup> Bearing the uncertainty of the definition in mind, several competent international authorities<sup>88</sup> have interpreted the notion of serious violations broadly and have concurred in saying that 'Deplorable conditions of work and life/forced labour/sexual slavery/slave labour' are serious violations of international human rights law.<sup>89</sup> The Council of Europe classified, 'the prohibition of forced labour and slavery (Article 4 of the European Convention on Human Rights) among others as serious human rights violations. 'In this respect, states have an obligation under the Convention, supported by the Court's case-law, to enact criminal law provisions to criminalise forced labour'.<sup>90</sup>

This classification of "serious violation" and the fact that forced labour is considered a crime both internationally and domestically, the obligations of HKSARG necessitate a series of actions to sufficiently address the crime. These obligations and actions are covered in more detail in Chapter 4.

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<sup>86</sup> Geneva Academy of International Humanitarian Law and Human Rights, 'What amounts to 'a serious violation of international human rights law'?: An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty' August 2014 Academy Briefing No.6 p.11

<sup>87</sup> Geneva Academy, 'What amounts to a serious violation of international human rights law'?: Briefing No.6 (2014)

<sup>88</sup> Geneva Academy, 'What amounts to 'a serious violation of international human rights law'?: Briefing No.6 (2014): analysis of international practice and jurisprudence of the African Commission and the African Court of Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Court of Human Rights, UN Charter bodies (such as the UN Security Council), the Human Rights Council's Universal Periodic Review and Special Procedures, fact-finding missions and commissions of inquiry, and UN human rights treaty bodies.

<sup>89</sup> Geneva Academy, 'What amounts to 'a serious violation of international human rights law'?: Briefing No.6 (2014)

<sup>90</sup> Council of Europe, Directorate General of Human Rights and Rule of Law, Eradicating impunity for serious human rights violations: Guidelines and reference texts, Strasbourg, 30 March 2011, p.7.

## **Chapter 3. Methodology**

### **3.1 Introduction**

This chapter outlines the methodology, instruments, challenges and ethical dilemmas in the collection of data and factors that influenced the methodology development. The data collected is not intended to be representative of the entire migrant domestic worker population in Hong Kong. Additionally, because of the selection of the NGO site to conduct the research, the prevalence of forced labour victims would be expected to be higher than those identified by randomised samples within the general population.

The examination of the research question was completed in two stages. In stage one, the sample group was assessed to determine if any of the MDWs were in a forced labour status. To determine forced labour in this first stage, I relied on the ILO's definition of forced labour based on the Forced Labour Convention No.29 (1930) and on an established, tested and validated list of indicators and qualifying criteria.

In stage two of the research, I accompanied the MDWs assessed to be in a forced labour status who chose to make labour claims to the Labour Department and observed the relevant steps of the resolution processes. In this stage, my observation of the resolution process examined whether the government officials and departments conducted any assessment or recognised MDWs to be forced labourers and selected a resolution process that was appropriate to the nature and gravity of their working and living conditions. Additionally, the examination focused on whether MDWs understood the resolution process, were capable of presenting their cases effectively, would benefit from representation, viewed the process as fair and what was the MDWs expectation of the outcome of the process.

During the research one individual was clearly identified as being a victim of human trafficking. The research is focused on the response to labour rights violations that rise to the level of forced labour and, although human trafficking and forced labour are very closely linked, the particulars of this case were recorded but was not included as the participant had not been employed in Hong Kong.

The fieldwork was conducted at the Mission for Migrant Workers (MFMW) over a seven-month period between June and December 2015. The decision to conduct the research through the NGO's facility was based on three factors: first, the fear that the ability to access participant documents and other information would be difficult at other venues, particularly the Labour Department, and may involve privacy issues; second, I had no resources to provide support to MDWs and the NGO site provided a safe environment to interview participants; and third, the topic of migrant worker abuse in Hong Kong is politically unpalatable and free and transparent access to information is difficult.

In total, 80 MDWs were interviewed, with 53 identified as being in forced labour; 17 agreed to follow up interviews and provided detailed information about their working and living conditions. However, of the 53 people assessed to be in forced labour employment status, only 12 made complaints to the Labour Department. An additional seven participants were interviewed through referrals, bringing the total number of participants to 87. The inclusion of these additional participants will be addressed below under 'sampling'.

I was granted access to potential participants beginning from 10 June to 24 August 2015. The flow of MDWs arriving for assistance was slower than expected and by 16 July only 23 participants had been interviewed, an average of 3 interviews per week. To address the lower than anticipated number of participants, I negotiated with MFMW for additional access to the MDWs and also contacted other NGOs for their assistance. In the end, MFMW extended access to include Sundays and between 19 July and 24 August, I interviewed an additional 57 participants, averaging 8 interviews on Sundays when the majority of MDWs have their weekly rest day. The number of interviews during the week remained constant. The demographic breakdown of the 80 participants interviewed included, 76 Filipino MDWs, two Indonesians and two from Madagascar. I eventually accompanied a total of 17 participants to redress forums through a combination of conciliation, Minor Claims Adjudication Board or the Labour Tribunal. In addition to the 87 participants, I conducted interviews with nine key informants and submitted written questions to five HK Government agencies.



The four sections below will examine, methods of data collection to include sampling and data sources in 7.2, the methodology framework in section 7.3, challenges during research in 7.4 and ethical dilemmas in 7.5.

## **3.2 Data collection**

This section explains how the sample frame was selected, the 4 methods of data collection and instruments used and the method of gaining consent. Data was collected from screening MDWs seeking assistance for labour rights complaints that included living and working conditions, breaches of the employment contract and concerns of final wages and entitlements after premature termination. Data was also collected from semi-structured interviews, accompaniment of MDWs to interviews and redress hearings and other key informant sources from NGOs and government organisations and departments.

### **3.2.1 Sampling of MDWs**

MDWs were selected to provide data on their living and working conditions that would allow me to assess whether they were in forced labour and to further understand what factors were considered if they decided to stay with their employers.

The sample frame was determined by referral from NGO staff who asked their clients if they would participate in the research. This referral process was acceptable for two reasons. First, from an ethical standpoint, clients arriving at the NGO for assistance were at times seeking assistance for traumatic experiences, therefore I refrained from inserting the research into a process intended to provide care and assistance to the clients. Second, while it may be viewed as undesirable to not have total control over the sample selection, I would argue that this trade-off is an example of decisions that may need to be made in this type of research dealing with access to a vulnerable population and the “Gatekeeper” NGO’s ability to effectively tend to their clients. Again, Halliday and Schmidt make the point that researchers

should embrace the realisation that ‘ambiguity and difficulty were the rule rather than the exception in empirical research’.<sup>91</sup>

Clients that agreed to participate were referred for inclusion in the research study. To narrow the sample size and identify participants that would enable the observation of the redress process, criterion sampling was chosen as the most appropriate method to gather the data needed on MDWs filing complaints with the Labour Department. This method was based on the ILO guideline that two or more indicators (involuntariness and menace of penalty with one being strong) might indicate the presence of forced labour; therefore, participants exhibiting two or more indicators that met the ILO’s criteria of forced labour were selected as potential participants for accompaniment to the redress processes. To provide an in-depth understanding of the MDW’s working and living conditions, participants were asked to participate in a second in-depth interview for use in case studies. This in-depth interview used an established ILO questionnaire<sup>92</sup> designed to capture the required information as an interview guide. Seventeen of the 53 participants when asked, agreed to participate further in the semi-structured interviews. Of the 53 participants in forced labour, only 12 decided to pursue a remedy. The overall question to be answered is whether MDWs have access to an effective remedy, and since the remedy gap exists in relation to human rights violations of forced labour, it was necessary to first establish the presence of forced labour before examining the available redress mechanisms.

Similar research that has been conducted in the past used snowball sampling where the overall sample group was identified through referral from earlier participants. It was determined that this method may not have been an appropriate means to gather the required data as there would be no way to follow claims in real time from when the violations were revealed to the NGO through resolution either by agreement with the employer or through one of the available redress processes.

To address the low numbers seeking a remedy, an additional 7 participants were added to examine the redress process in this second phase. Of the 7 additional

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<sup>91</sup> Simon Halliday and Patrick Schmidt, *Conducting law and society research: reflections on methods and practices* (Cambridge University Press 2009)

<sup>92</sup> ILO, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children* (Genève, Bureau international du Travail 2011)

participants, four were referred by MFMW and earlier participants from the initial cohort of 80 referred three participants to me.

### **3.2.2 Sampling of key informants**

Key informant interviews were conducted to gather general data on the conditions on the employment of MDWs, perceptions on the effectiveness or lack of effectiveness of existing laws and policies. Written questions were submitted to government agencies and departments to gather data on the government's position on addressing complaints of MDWs, awareness and response to concerns from NGOs and civil society organisations about the treatment of MDWs.

### **3.2.3 Data Sources**

This section addresses the methods of data collection that includes screening of MDWs, securing written consent, conducting semi-structured interviews, accompaniment, and other data collection sources.

#### **3.2.3.1 Screening of MDWs**

Once I made contact with a MDW, I explained that the reasons for the research was to determine if their working and living conditions were more than just poor employee/employer relationships or could be classified as forced labour, and whether the current Labour Department resolution processes were adequate to resolve their complaints. I then asked if they were willing to participate in the research and received verbal consent that they were. None of the MDWs were aware of what forced labour was, and usually asked me to explain. I referred to a three-page information sheet that explained the 11 indicators of forced labour and informed them that I first wanted to ask some questions and then explain what forced labour was. Most of the MDWs appeared eager to answer questions seemingly seeking education that clarified their own predicament, if complaining about their work conditions. I administered a screening form designed to capture the 11 most commonly experienced indicators of forced labour (Appendix 1) outlined in the ILO's booklet on forced labour.<sup>93</sup> The 11 indicators were treated as high-level

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<sup>93</sup> International labour Office, *ILO Indicators of Forced Labour*, Special Action Programme to Combat Forced Labour (Geneva 2012)

operational indicators with sub-categories of what I called behavioural indicators. Both operational and behavioural indicators represent the physical, psychological and economic methods of involuntariness and menace of penalty (coercion) associated with forced labour (see Chapter 2). To be classified as being in forced labour under the ILO guidelines, a participant needed to exhibit at least one behavioural indicator of involuntariness and one indicator of menace of penalty with one of the indicators assessed as being strong.<sup>94</sup>

Depending on the comfort level of the participant, they were either asked whether they experienced any of the 11 operational indicators or associated behavioural indicators, or through free dialogue the behavioural indicators were self-identifying and follow up questions were asked. At the conclusion of the screening, participants were asked whether they intended to file a claim with the Labour Department based on their complaint to the service provider and not on the screening conducted that may have identified them as being in a forced labour situation. If they were not intending to file a claim, additional information was sought to understand why that was. The screening form also collected minimal demographic data such as name, age, education, nationality and years of experience. The screening of participants took approximately 45 minutes to an hour if forced labour was assessed. If there was no assessment of forced labour, the interview lasted approximately 20 minutes.

The concept of involuntariness relates to the fact that victims may at times make the decision to enter employment situations that constitute forced labour, and sometimes through fraud or deception only to realise later that they lack the freedom to leave their employment due to legal, physical or psychological coercion.<sup>95</sup> The initial consent would be considered irrelevant when deception or fraud had been used to mask the true nature and conditions of the employment.<sup>96</sup> The freedom to leave forced labour is also often influenced by external constraints or indirect coercion from an act, statutory instrument or policy of the authorities, or from an employer or

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<sup>94</sup> The International Labour Organisation has developed indicators of forced labour that have been qualified as strong or medium indicators through consensus of experts in the field based on the severity or degree of abuse.

<sup>95</sup> International Labour Conference (93 Session) 'A Global Alliance Against Forced Labour' Report I (B) 2005, p.5-6

<sup>96</sup> Ibid

third party's practice, such as retention of identity documents.<sup>97</sup> In almost all cases, the employee is unable to negotiate the terms and conditions of employment without facing some form of punishment,<sup>98</sup> removing their ability to negotiate and leaving them with little choice but to continue in their employment as their wages depended on conforming to the exploitative request.<sup>99</sup> If a worker is not free to withdraw their consent without fear of a penalty, it may be categorised as forced labour.<sup>100</sup> Similarly, the worker may also be left with little choice but to perform work that is hard, hazardous, dangerous, illegal,<sup>101</sup> or performed in degrading living conditions with limitations on their freedom or excessive dependency imposed on them by the employer after they arrive at the destination country.<sup>102</sup> When any of the decisions to perform work that is not encompassed within their labour contract and their subsequent decision is influenced by fear of punishment, or loss of benefits whether actual or perceived, the work/labour becomes forced labour.<sup>103</sup>

The assessment of the element of menace of penalty should be construed broadly, as it might include a range of penalties from subtle forms of a psychological coercion to more extreme forms physical violence, restraint or death threats.<sup>104</sup> The ILO Committee of Experts has identified the scope of rights or privileges to include entitlement benefits based on previous work as one such right or privilege,<sup>105</sup> and threats of dismissal if workers refuse to perform work beyond the scope of their contract.<sup>106</sup> Employers may often seize identity documents or use the threat of

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<sup>97</sup> Ibid

<sup>98</sup> International Labour Conference (93 Session) 'A Global Alliance Against Forced Labour' Report I (B) (2005)

<sup>99</sup> International Labour Conference (96 Session) 'Eradication of Forced Labour' Report III (Part 1B) (2007) p.72

<sup>100</sup> ILO, Promoting Jobs, Protecting People, Q & A's on Business and Forced Labour

<sup>101</sup> International Labour Conference, (93 Session) 'A Global Alliance Against Forced Labour', Report I (B) 2005

<sup>102</sup> Lee and Petersen, 'Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers'

<sup>103</sup> Ibid

<sup>104</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), International Labour Conference (96 Session) 'Eradication of Forced Labour' Report III (Part 1B) (2007)

<sup>105</sup> Ibid, also Council of Europe/European Court of Human Rights, Guide on Article 4 of the European Convention on Human Rights: Prohibition of Slavery and Forced Labour, para. 25

<sup>106</sup> International Labour Conference, General Report of the Committee of Experts on the Application of Conventions and Recommendations (85 Session) Report III (Geneva 1998), paras. 106, 123

confiscation as a way to impose their will on the MDW.<sup>107</sup> However, a worker who may not be able to leave a job because of a lack of alternative income opportunities may not be in a situation of forced labour unless it is coupled with other identifiable elements of coercion.<sup>108</sup>

### 3.2.3.2 Semi-Structured Interview

Participants who had met the criteria of forced labour and were contemplating filing claims were asked to participate in a semi-structured interview. This used a 26-question questionnaire adapted from the ILO.<sup>109</sup> The questionnaire (Appendix 3) was adapted to the Hong Kong context and to domestic work and served two purposes: first to capture more detailed information about the participant's recruitment, working and living conditions, debt and methods of coercion associated with their employment; and second, as a guide to the interview based on structured questions but allowing for follow up and clarifying questions.

Participants who verbally agreed to participate further were provided with an information sheet to inform them about the specifics of the research with the intent of eventually securing written consent to accompany them to any redress hearings. The information sheet was read to participants or read together (Appendix 2). I also provided a three-page attachment to the information sheet describing the 11 operational indicators and behavioural indicators describing forced labour situations. Once the information sheet was completed, I asked participants if they understood the information provided and whether they had any further questions. An effort was made to ensure no additional harm<sup>110</sup> was caused to participants and they were offered the opportunity to take the information sheet with them if they could do so without drawing unwanted scrutiny from their employers. In some instances, participants did take the information with them and others declined out of concern

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<sup>107</sup> Ibid

<sup>108</sup> International Labour Conference (93 Session) 'A Global Alliance Against Forced Labour' Report I (B) (2005)

<sup>109</sup> ILO, Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children

<sup>110</sup> Karen Jacobsen and Loren B Landau, 'The dual imperative in refugee research: some methodological and ethical considerations in social science research on forced migration' (2003) 27 *Disasters* 185; Catriona Mackenzie, Christopher McDowell and Eileen Pittaway, 'Beyond 'do no harm': The challenge of constructing ethical relationships in refugee research' (2007) 20 *Journal of Refugee studies* 299

over their employer's reaction. While the literature focuses on methodologies in gathering data and the exposure of research participants, in this instance the provision of information to better educate participants could have exacerbated their already precarious employer-employee relationships.

Once the information sheet was completed, I asked participants to consent in writing, agreeing to participating in the in-depth semi-structured interview, having the interview recorded, using quotes or their responses and experiences in case studies. The written consent (Appendix 2) also provided agreement for the use of pseudonyms to protect their identity and allowing me to accompany them to any forum that might assist or adjudicate their claims. I informed all participants that whether they agreed to or declined to participate in the research, their decision would have no impact on the quality of service offered by the NGO staff. I assured participants that care would be taken in maintaining their confidentiality and no clues to their identity would appear in the research or any future publication. Any quotations would be entirely anonymous, and done under the agreed pseudonyms. I provided participants with my contact information and informed them that if they had any questions, concerns, or no longer wanted to participate after leaving the interview they should contact me within 3 months to express the desire to withdraw and they would not be included.

### **3.2.3.3 Accompaniment**

I accompanied participants to police interviews, scheduled hearings and appointments filing claims with the Labour Department, to conciliation meetings, MECAB and Labour Tribunal hearings in varying combinations. Of the 53 initial participants in forced labour, 12 were accompanied to conciliation, MECAB and the Labour Tribunal. Some Participants went to a combination of conciliation and MECAB or conciliation and the Labour Tribunal. One participant was involved in two claims against two different employers. In one case, a combination of conciliation and MECAB and the other was a combination of conciliation MECAB and the Labour Tribunal. Of the seven additional participants, five were accompanied to MECAB, the Labour Tribunal or conciliation hearings. These 5 were provided with information sheets and signed consent forms allowing accompaniment to the hearing and use of their experiences as part of any case study. These five

participants were assessed separately from the main cohort, and were mainly relied on for assessment and observation of the redress process. The remaining three additional participants were interviewed, but time constraints did not allow their accompaniment to the redress forum.

Observations of hearings focused on whether Conciliation Officers, Adjudicating Officers or Presiding Officers recognised or made any attempt to address the circumstances of the MDW's employment consistent with forced labour, and to document the conclusions of the tribunal officers, comments of the participant and employer if possible. At the end of each meeting, a debriefing was conducted to document as best as possible the participant's perception of the claims process. Of the 17 participants accompanied to redress forums, information was gathered from 8 about their perceptions of the process.

#### **3.2.3.4 Accompaniment questionnaire**

This questionnaire was developed to capture the participant's perception of the redress process. The main questions captured if the participant felt the process was fair, what outcome did they desire, did they understand the process and what was the motivation for the claim.

#### **3.2.3.5 Key Observations**

The use of the mixed methods for data collection proved useful in that it allowed a more thorough analysis and identification of forced labour indicators than in other research such as the Amnesty International and Justice Hong Kong research discussed in Chapter 8.

Other research that relied on structured surveys only are unable to capture information in court proceedings that revealed deception concerning a MDW's actual employer, discerning why cameras (which have a legitimate purpose) were in the premises and what the MDW perceived was the purpose of their presence, determining if a change in location of employment at an employer's second residence is a medium indicator of forced labour or if the prohibited location is at an office or restaurant which changes the nature of the job and makes it a strong indicator of (involuntariness) forced labour.



A clear example is in the Justice Centre Hong Kong research discussed in Chapter 8, “Hazardous work” where the MDW is forced by the employer to undertake dangerous tasks or work, the forced labour indicator is qualified as a medium indicator. However, when MDWs are asked to clean the exterior of windows on a high-rise building with no safety equipment or railing and risk the possibility of death, this should be a strong indicator of involuntariness under the dimension “work and life under duress”. These missed or overlooked indicators would suggest that the prevalence of forced labour in other research may be higher than reported in more thinly focused quantitative research.

### **3.2.3.6 Other data sources**

The selection of key informants was through a mixture of referral from existing contacts and selection of NGOs who provide services to MDWs. The interviewees agreed to be audio recorded, except for the High Court Judge. Additionally, it was agreed that the identity of key informants would remain anonymous. Government agencies and departments were also provided with questions to clarify policy regarding the administration of the MDW programme and remedies available for violations. Below is a list of NGO key informants, consular staff, government sources, the judiciary and a brief description of the information they provided or were asked to provide.

#### **Key Informants**

- Employment Agency Manager who provided general information on the recruitment process, licensing of agencies, overcharging of recruitment fees by agencies and premature terminations.
- Consulate Labour Attaché who provided information on the accreditation of recruitment agencies, overcharging of recruitment fees, migration of MDWs to Hong Kong and assistance provided to MDWs complaints.
- Four staff members (Director, Deputy Director, Deputy Manager and Social Worker) from various NGOs provided information on the types of complaints of MDWs, the effectiveness of redress of complaints by the Labour Department and government policy that affects the ability of MDWs to avoid or escape abusive employment conditions.

- Governmental employment discrimination case worker who provided information on the policy of handling discrimination resulting from breaches of the employment contract.
- United Nations Agency Representative on Migration provided information on migration of MDWs to Hong Kong, the effectiveness of existing redress mechanisms, the implications of using a redress process that does not specifically address forced labour and the lack of awareness of the government, judges, NGOs and those in the legal profession that negatively impacts the type of assistance and redress offered.

### **Government Sources**

Five government organisations and departments were asked to participate in interviews, however all but a High Court Judge declined to do in-person interviews and some agreed to respond to written questions submitted to them. Phone interviews were not conducted as the language barrier would have been too great. Written questions were sent via e-mail to the following agencies and departments:

- **Commissioner of Police** through an agent responded to the request for an interview to discuss the treatment of MDWs and contact with the police stating that the Hong Kong Police is not the responsible department to handle the general labour rights complaints of migrant workers, and that I may wish to contact the Labour Department.
- **Secretary of Justice** responded that issues relating to migrant domestic workers in Hong Kong are under the purview of Security Bureau of the Hong Kong Special Administrative Region Government and they were not in a position to comment on the subject and was therefore unable to arrange for the interview.
- **Director of Public Prosecution (DPP)** provided answers to some of the seven questions submitted. The questions sought to understand the function of the DPP as it relates to how cases of forced labour were referred to whether Hong Kong's institutions were equipped to recognise and combat forced labour; whether the experiences of some migrant domestic workers rise to the classification of forced labour; whether there was a process within the Public Prosecution Office that monitored or coordinated with other

agencies to identify cases of forced labour; whether conciliation is an effective means of redressing labour rights complaints of migrant domestic workers; and issues over numbers of prosecutions and legal instruments.

- **Commissioner of Labour** agreed to have questions submitted in writing, however after a year of monthly follow-ups, the representative who had assumed responsibility for responses had not provided answers to the submitted questions.
- **Director Immigration Department** provided a generic response that explains the two-week rule. The Immigration Department is responsible for managing the MDW scheme. The questions posed to this Department were similar to those posed to the Labour Department.

## **Judiciary**

- One High Court Judge who was cognisant of the issues concerning MDWs provided information on the lack of legislation for protection and enforcement, and what current methods were relied on to remedy some violations where MDWs are severely abused.

## **3.3 Methodology**

This section examines the methodological framework used and the development and validation of the ILO instruments used to identify forced labour. From this framework, the indicators of forced labour were developed, along with the questionnaire outlined in the guidelines *Hard to see, harder to count*, and was used as the guide for the semi-structured interview discussed earlier. This section further discusses the adaptation of the indicators to Hong Kong and to domestic work, and discusses how the indicators used were finally compiled.

### **3.3.1 Methodological framework**

The framework for this research was based on the ILO's guidelines outlined in *Hard to see, harder to count*<sup>111</sup> The guidelines were written on the basis of theoretical work through pilot studies to estimate forced child and adult labour in ten countries

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<sup>111</sup> ILO, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children*

between 2008 and 2010. Five of the surveys focused only on forced child labour, and three related to only forced adult labour. The remaining two addressed both. The guidelines provide comprehensive information and tools to undertake national surveys on forced labour of adults and children by presenting an operational definition of what constitutes forced labour and indicators with which to identify it, and to propose a minimum set of questions necessary to assess forced labour. Although the guidelines specifically address the design and implementation of quantitative surveys on forced labour and particularly relate to indicators and questionnaire design, it can also be employed equally for qualitative research using the same theoretical framework improving consistency across different but complementary approaches.

The methodology of using established indicators of forced labour and the questionnaire developed was tested and validated by the ILO between 2008 and 2010 through quantitative surveys of forced labour and human trafficking undertaken in ten participating countries.<sup>112</sup> The results of four of the pilot surveys (those with national coverage) have since been used in the context of the generation of new ILO global estimates of forced labour in 2012. The use of these primary data has contributed to the increased robustness of the resulting estimate of 20.9 million victims of forced labour globally.

The indicators of involuntariness are grouped under the three ‘dimensions’: unfree recruitment, work and life under duress, and impossibility of leaving the employer. These indicators correspond to the three phases during which coercion may be applied by employers to workers: to force them to take the job, and to force them to work or live under conditions with which they do not agree. The combination of indicators of involuntariness and coercion (penalty or menace of a penalty) can then be used to qualify a situation as one of forced labour.<sup>113</sup>

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<sup>112</sup> Testing and validation was conducted in Armenia, Bangladesh, Bolivia, Georgia, Guatemala, Côte d’Ivoire, Mali, Republic of Moldova, Nepal and Niger.

<sup>113</sup> ILO, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children*

### 3.3.2 Adaptation to Hong Kong

The indicators of forced labour and the questionnaire used in this methodology was adapted from the ILO's survey guidelines *Hard to see, harder to count* and the *Operational Indicators of Trafficking in Human Beings*<sup>114</sup> indicators of trafficking of adults for labour exploitation. The questionnaire was modified to include several questions relevant to Hong Kong and the application of indicators to domestic work.

The MDW contract<sup>115</sup> outlines three options for the start of employment: on arrival in Hong Kong, an agreed date or the date the Director approves the visa. MDWs are often told by employment agencies to arrive on specific dates but they are not picked up or taken to the employer's residence for days or sometimes weeks. The MDW will sometimes be required to work in the employment agency for no wages and then only be paid from the date the MDW arrives at the employer's home. To address this issue, the question *when did the contract begin* was added.

To better assess involuntariness and deception in employment, several questions were added, which included, *if you had to change anything about your employment, what would it be?* Participants verbalised issues or tasks that were outside the scope of their contracts or they had not volunteered to do. Once a list of issues was verbalised, follow up questions were asked, such as; *do you feel that you can negotiate the terms of your employment?* Participants at times said no and at times yes. Those indicating they could not negotiate expressed the coercive mechanisms in their employment. In many instances, participants revealed that they were afraid: of being terminated; that the employer would get angry; of assault; of higher recruitment fees if they did not finish their contract as they would have to repatriate after short work periods while still in debt; of further exorbitant or illegal recruitment fees; and of investigation by the Immigration Department for 'job hopping', resulting in jeopardising future employment. If participants answered yes to being able to negotiate the terms of employment and provided a list of coercive measures, then the following question was asked; *if you can negotiate the terms of your employment, why don't you discuss the issues that you have raised with your employer?* At times

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<sup>114</sup> ILO, Operational Indicators of Trafficking in Human Beings, March 2009

<sup>115</sup> Immigration Department of Hong Kong, Employment Contract (For A Domestic Helper recruited from abroad), Form ID 407, para 2

participants indicated that they did not want to cause trouble or upset their employers, or they might be asked to pack their things (termination), but in some instances they did not answer and they could be seen processing the discrepancy.

### **3.3.3 Indicators adapted to domestic work**

Some ILO indicators such as restriction of movement, debt bondage and excessive working hours needed to be adapted to Hong Kong conditions.

The use of surveillance cameras is considered a behavioural indicator under 'Restriction of Movement' and is intended to control the movements of employees within the workplace (industrial or commercial). When applied to domestic work, the use of surveillance cameras can have legitimate and oppressive functions. Cameras can at times be used to maintain constant visuals of the worker's movements and rest breaks, and can also be reviewed at a later time contributing to the denial of rest breaks. The use of this method of surveillance can also be used to invade the privacy of MDWs in their sleeping areas as a form of sexual harassment through voyeurism. However, this indicator was not assessed as positive until further investigation of the participant's perspective on why the cameras were there, since surveillance cameras have a legitimate application in the home. If participants provided information that surveillance cameras were used to monitor their movements or that it invaded their privacy such as in sleeping areas, this factor was assessed as a positive indicator of restriction of movement or excessive work hours in the form of denial of rest or abusive living conditions. Objective assessment criteria have to be supplemented with a thorough follow up to ensure accuracy in the assessment.

Questions intended to assess debt bondage in the form of illegal recruitment or excessive fees were dependent on where the participant was recruited. If the recruitment fee was illegal, excessive recruitment fee as a form of debt bondage was assessed as a strong indicator of involuntariness (unfree recruitment). Although this indicator is found at the recruitment stage and many of the indicators that influenced the assessment of forced labour were found during the current employment (work and life under duress), it was recorded since it is one of the limitations in decision-making regarding abusive employment conditions. The indicator of debt bondage was not used to assess instances of forced labour for two reasons: one, it was an indicator under the dimension 'unfree recruitment' and would be more time intensive

to determine recruitment circumstances; and two, it was my belief that a more direct link could be made between the employer and worker by focusing on the dimension of ‘work and life under duress’.

Hong Kong does not currently have standard work hours for MDWs. The ILO has indicated that, as a rule of thumb, the determination of whether or not overtime or excessive work hours constitutes a forced labour offence is whether employees have to work more hours than is allowed under national law under some form of threat (e.g. of dismissal) or in order to earn at least the minimum wage.<sup>116</sup> A 2012 study of work hours conducted by the Labour Department of Hong Kong<sup>117</sup> revealed that the national average work week was 48 hours, with the highest number being performed by estate management and security personnel at 69 hours. If the amount of work hours performed was above the highest for local workers, it was classified as excessive and a strong indicator of involuntariness. In respect to ‘Excessive work hours’ the denial of the contractual 24 hours of continuous rest was calculated separately from weekly working hours. MDWs are required to live with their employers and they (the employers) impose a curfew on MDWs, controlling when they can leave and have to return on their day off. Because of the residential dimension of this work, a curfew may be considered a reasonable restriction and an issue of safety.

### **3.3.4 Methodology development**

The screening form outlining the eleven ILO operational indicators of forced labour and associated behavioural indicators was used to conduct a semi-structured interview with participants to establish the presence of forced labour. The ILO booklet was produced to assist law enforcement officials, NGOs and others in identifying people who might be in forced labour and need assistance. They are based on the definition of forced labour in the Forced Labour Convention, 1930 (No. 29). The list of indicators and associated behavioural indicators were not qualified strong or medium, and thus was not able to quickly qualify a behavioural indicator.

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<sup>116</sup> International labour Office, *ILO Indicators of Forced Labour*, Special Action Programme to Combat Forced Labour, Geneva 2012

<sup>117</sup> Labour Department, ‘Report of the Policy Study On Standard Working Hours’ Hong Kong 2012. p.120-123

To simplify the identification and qualification of behavioural indicators, the list was cross-referenced with two other ILO lists of indicators to ensure consistency.

The first list that was cross-referenced was derived from the ILO's *Hard to see, harder to count* which provided a list of 77 indicators of forced labour, divided into three principal dimensions of forced labour representing the stages of employment: unfree recruitment (20 indicators), work and life under duress (33 indicators) and impossibility of leaving (24 indicators). Within each principal dimension, indicators of involuntariness and coercion (which I have called behavioural indicators) are qualified as strong or medium. In order to be assessed as being in forced labour, an individual had to exhibit at least two indicators, one indicator of involuntariness and one indicator of coercion in one of the three dimensions with at least one indicator assessed as strong.<sup>118</sup>

**Unfree/Deceptive** recruitment includes forced and deceptive recruitment. Forced recruitment is when workers are forced to work against their will during the recruitment process using forms of coercion. A family's poverty and a need for an income do not satisfy the element coercion unless the coercive methods are applied by a third party. Deceptive recruitment occurs when a person is recruited using false promises about the work to be undertaken. Where deception is used, voluntariness is voided as there is no free and informed consent; had the worker known the true conditions regarding all aspects of the job, they would not have decided to take the job.

**Work and life under duress** covers exploitation and coercive working and living conditions at the destination imposed on a worker by the use of force, penalty or menace of penalty. Work under duress includes an excessive volume of work or tasks that are beyond what can reasonably be expected within the framework of national labour law. Life under duress refers to situations where degrading living conditions, limitations on freedom or excessive dependency are imposed on a worker by the employer.

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<sup>118</sup> ILO, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children*



**Impossibility of leaving** entails a penalty or risk to the worker making it difficult to terminate the employment. The deliberate retention of wages is recognised as a form of coercion as outstanding wages will be lost if the worker leaves. A worker who finds it difficult to leave a job because of poverty or lack of alternative income is not in a situation of forced labour, unless elements of coercion or involuntariness are also present.<sup>119</sup>

### 3.3.5 Development of indicators

The 77 indicators of forced labour were derived from the indicators of trafficking for labour and sexual exploitation produced by the ILO in collaboration with the European Commission in 2009.<sup>120</sup> In this collaborative effort, the Delphi methodology<sup>121</sup> was used to build consensus among experts on the basic elements of human trafficking to harmonise data collection across the European Union.<sup>122</sup> Six dimensions were identified as part of this effort, deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitative working conditions, coercion, and abuse of vulnerability at destination resulting in a total of 67 indicators across all six dimensions.<sup>123</sup> Indicators vary in importance as to whether or not a person is in forced labour or has been trafficked.<sup>124</sup> Experts, through consensus, classified each indicator as strong, medium or weak according to the severity or degree of abuse.<sup>125</sup> The list of 67 indicators was the second list cross-referenced with the 11 indicators used.

To simplify the assessment of participants, I decided to use the shorter list of 11 indicators that dealt primarily with the dimension of work and life under duress, as I felt that I would most likely encounter MDWs in this dimension. The cross-referencing exercise proved to be useful as the 11 indicators did not fit perfectly with the other lists of indicators; for example, ‘Intimidation and Threats’ did not list a

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<sup>119</sup> International Labour Conference (93 Session) ‘A Global Alliance Against Forced Labour’ Report I (B) (2005)

<sup>120</sup> ILO, Operational indicators of trafficking in human beings (Geneva, ILO, 2009)

<sup>121</sup> For Delphi methodology, see Harold A. Linstone and Murray Turo (eds): *The Delphi method: Techniques and applications*

<sup>122</sup> ILO, Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children

<sup>123</sup> Ibid

<sup>124</sup> Ibid

<sup>125</sup> Ibid

comprehensive set of behavioural indicators. The list of 77 indicators did not list ‘threats of violence against the victim’ but it was listed in the list of 67 indicators. Thus, additional behavioural indicators were added under ‘operational indicators’ to make assessment easier.

Attention was also paid to the *United States v Kozminski*,<sup>126</sup> where a number of behavioural indicators mostly consistent with the ILO indicators were outlined. This was expected to be useful in identifying some behaviours that were not listed in any of the list of indicators but could be identified during an interview. Examples of these unlisted behaviours included, insulting and demeaning language, constant barraging of workers with orders, and constant shouting at workers. These behaviours were viewed as a means of psychological coercion and were included under the operational indicator ‘Intimidation and Threats’.

The qualifying of behavioural indicators was also distinct from the operational indicator under which they fall and each are qualified differently from other indicators within the same set. For example, under the operational indicator ‘Intimidation and Threats’, threat of dismissal is qualified as a medium behavioural indicator of coercion while deprivation of food is a strong indicator. So, under each operational indicator, there are behavioural indicators that range in severity of abuse from medium to strong. Some indicators such as retention of identity documents or isolation are easily qualified as strong as there isn’t many others associated behavioural indicators.

This instrument was used as a guide in documenting the working and living conditions, any incurred debt that was excessive or illegal, any forms of deception, reasons for remaining in the abusive employment, and methods of coercion used to ensure performance. During this in-depth interview, audio recordings were conducted. In retrospect, I would not have used the screening form, but relied primarily on the in-depth questionnaire modified to reflect the indicators more readily and qualified as strong and medium, making available more rich information on which conclusions could be drawn. The screening could be useful if further

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<sup>126</sup> *United States v Kozminski* US (Supreme Court) 487 US 931 (1988)

simplified to assist front line NGOs, law enforcement, customs or immigration officials to quickly identify victims of forced labour. Additionally, the complexity involved in identifying victims of forced labour requires training of all people and organisations tasked with preventing, investigating, punishing and providing remedies to victims. A lack of widespread training may limit capacity to specialised groups that may not be as effective if front line law enforcement and NGOs are more likely to encounter victims.

### **3.4 Challenges encountered during the research**

Challenges were encountered in four main areas: in the execution of the outlined methodology; in applying some of the ILO indicators; in identifying forced labour; and ethical dilemmas and researcher bias. This section will examine the normal challenges associated with research, the adjustments that were necessary to collect the required data and the unintended or unexpected dilemmas that arose.

#### **3.4.1 Challenges in methodology**

Changes in methodology had to be made in relation to accessing participants' case files to review responses from employers or the Labour Department. The original intent and part of the data collection was to have access to the participants' case files that was secured as part of the written consent. I was sensitive to the staff at the NGO and conditions in the office and I felt that reviewing case files was not desirable and so no case files were accessed as planned. All documents reviewed came directly from the participants. The intent to establish a daily count of migrant domestic workers seeking assistance through the office log book and to identify those who were filing labour claims as a percentage of those who were not, did not materialise. There were very few MDWs seeking assistance during the week, and most of the 80 interviews were completed on Sundays when many of the MDWs in Hong Kong had their day off. Because of the high volume of MDWs needing assistance on Sundays, a private area to conduct interviews was not available. Considering the location and size of the office and the need for immediate access, there was not much of an alternative to conducting the interviews under the limitations present. It was quickly discovered that the screening took about 45 minutes to an hour, the same amount of time as the questionnaire as a full understanding of the conditions of employment was necessary to attach the presence

of forced labour and both covered the same information. The questionnaire did provide a detailed understanding of coercive methods used, and a detailed description of the living and working conditions of employment was revealed. With regard to one of the questions adapted to Hong Kong on when the employment started, it was discovered that this issue conflicts with a 2014 court ruling that sets the start date of employment from the day the MDW starts working for the employer. This discovery voided any attachment of involuntariness at the recruitment stage regarding involuntary work with no pay.

It was also difficult to maintain contact with participants after the interview because of the two-week rule mandating that MDWs repatriate within two weeks of termination of their contract. Many participants were occupied with looking for new work or attending interviews within this tight timeframe and therefore inaccessible. Communication was also problematic since some MDWs made use of employer-provided mobile phones, and others seeking to minimise expenses did not 'top-up' their mobiles, causing texts and messages to be delayed. I was also unable to successfully schedule appointments with participants as they were focused on securing their future employment. I had to remain flexible and would meet participants at coffee shops on their route to employment interviews.

Accompanying participants was more time intensive than anticipated, and not all participants were accompanied to their hearings. To execute this part of the research, it was necessary to keep track of scheduled dates for submitting claim forms and conciliation meeting, MECAB and Labour Tribunal dates and times. While filling out claim forms at the Labour Department, MDWs appeared visibly intimidated by Department staff. My assessment was that the MDWs were frequently treated as though they were a nuisance, and Labour Department Staff were not very helpful. In some instances Staff attempted to assist in providing limited information regarding paperwork but it was clear that there might have been some prohibition about involvement or providing assistance in filing and submission of paperwork. To be able to file a claim, the NGO staff would assist in calculating the amount of any outstanding wages, vacation, severance, travel allowance, airfare, rest days worked and at times any underpayment of wages. MDWs, armed with the itemized calculation of outstanding entitlements would be taken to the Labour Department

where the claim form would be filled out using the calculated amounts. The claim form proved challenging at times as it was written in English and some MDWs had trouble understanding it. Additionally, there was a section on the claim form where MDWs were required to provide a brief description on their working conditions, reason for termination and justification for the claimed amount. This initial filing would be reviewed by Labour Department Staff for completeness and at times Staff directed MDWs to remove claim items if they felt it was not justified. This initial claim form would remain as the basis of the claim through Conciliation, MECAB or Labour Tribunal. If a claim was filed directly with MECAB or the Labour Tribunal, the process was the same except that a more detailed statement of the working conditions and justification of the claim was provided as a separate and attached document.

Hearing dates were sometimes postponed or cancelled as a result of the absence of the employer, or continued to provide the opportunity to gather additional information or witnesses and time for decision makers to consider evidence before rendering a decision. Prior to the commencement of any meeting or hearing, MDWs were required to arrive early and notify the Labour Department Staff that they were present. Failure to notify the Staff of their presence would result in the dismissal of their claim if they failed to appear. Usually MDWs were extremely anxious as the waiting areas for meetings or hearings provided no ability to be separated from their sometimes belligerent employers. At times the anxiety was a result of just being in the same proximity of the employer.

Hearings took an extremely long time, typically lasting four hours or more. The length of time spent on translations contributed significantly to the lengthy process. The MDWs may have an interpreter that translated from their native tongue of “Tagalog” to English. The employer may have an interpreter to translate from English to “Cantonese”. The adjudicator would use English as the common language. A MDW unfamiliar with the process might find it extremely difficult to understand everything that is being translated since at any one time, the Adjudicator may be speaking in English and at the same time the Tagalog and Cantonese interpreters would be speaking to their clients.

Interviews after hearings were at times not considered prudent, as participants were emotionally distraught during and after many hearings. The taking of notes during hearings was at times discouraged by those adjudicating the process, and audio recordings of the hearings was prohibited in all forums. No employers were interviewed as part of this research.

### **3.4.2 Challenges in applying indicators of forced labour**

Experience revealed that the ILO indicators did not fit neatly when applied to domestic work and highlights the fact that the indicators and the ILO guidelines are a ‘...starting point, and subject to refinement in the light of further experience in their application in different national contexts’.<sup>127</sup> The three indicators discussed below highlight some of the difficulty in applying indicators and the necessity of adapting indicators not only to the local context but the type of work being performed.

#### **3.4.2.1 Hazardous work without adequate protection**

This indicator is qualified as medium indicator of exploitation by the ILO. In Hong Kong, there have been several documented incidents of MDW deaths in high-rise apartments. In 2012, nine MDWs in Singapore fell to their deaths while cleaning windows.<sup>128</sup> In 2014, a MDW from Indonesia fell from the 27<sup>th</sup> floor of a building in Hong Kong while cleaning windows.<sup>129</sup> During this research participants P3 and P4 both worked for the same employer and described having to clean the exterior of the windows on the 4 floor of their building. They were asked to climb onto a narrow ledge, with no railing to hold on to, to clean the windows. This was not a singular event, but a part of their required and expected work. Considering the dangerous nature of this ‘routine’ activity, it was assessed as a strong indicator of exploitation.

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<sup>127</sup> ILO, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children* p.9

<sup>128</sup> The Independent, ‘Singapore Tightens Rules On Window Cleaning After Nine Maids Fall To Their Death’, June 4 2012 (no author’s name provided)

<sup>129</sup> Clifford Lo, ‘Maid Falls to Her Death From 27 Floor Flat While Cleaning Windows’, *South China Morning Post*, January 24 2014

### **3.4.2.2 Deprivation of food**

This indicator was qualified as strong for coercion (menace of penalty) under ‘Intimidation and Threats’. Some participants who described receiving very small portions of food also described receiving a very limited budget to do the household grocery shopping. Under these circumstances it was difficult to discern the intent of the employer. It was unclear whether the limited food budget was due to limited financial resources or a purposeful act on the part of the employer directed at the MDW. Some of the documented complaints included being asked to eat leftovers after the family had had their meals or being given food that was stale or spoiled. The assessment of these indicators could not take into account the intent of the employer, although it was very obvious from an objective consideration of the facts.

### **3.4.2.3 Deception**

Deception indicators were categorised as strong if deception was applied at the recruitment stage and related to the nature of the work. A qualification of medium was assigned if there was deception in working conditions, in the content or legality of the employment contracts, housing or living conditions, or legal documentation such as work visas, job location, employer or wages. The ILO’s lists of indicators did not identify any indicators for deception when considering ‘work and life under duress’<sup>130</sup> or deception at destination. The assessment of deception under the dimension ‘work and life under duress’ was a bit unclear. When MDWs were illegally deployed to commercial places such as retail stores and restaurants, the employer’s action or practice was not assessed as deception as to location or conditions, but it was considered as deception in the nature of the job and qualified as a strong indicator of involuntariness. An example of deception under the dimension ‘work and life under duress’ is explained by one participant below.

P33<sup>131</sup> had been working for her employer for one year before she was told that she had to sign a document that would change her employment address. She was considered to be in forced labour because she was working 17 hours per day

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<sup>130</sup> ILO, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children*

<sup>131</sup> Participant number 33, in chronological order of interview.

(excessive work hours, strong involuntariness), the employer had seized her passport (retention of documents, strong coercion), and she was allotted 10 hours rest per week. P33 had paid the equivalent amount of approximately \$14,000 to a Hong Kong recruitment agency but she paid the fee in the Philippines of 80,000 pesos. P33 was taken to the Immigration Department where she was told to sign what she was told was a change of address form. In fact, the employer transferred P33 to his mother's employ (deception, work and life under duress). P33 worked for three months with the original employer's mother. During the three months, she was frequently beaten with clothes hangers, assaulted with blows to her head, and her ear forcefully twisted (physical assault, strong coercion). P33 said that she did not report the assaults to the police at first because she simply wanted to finish her contract. After 3 months, the employer abruptly terminated her and, feeling aggrieved, P33 called the police and made a full statement of the abuses. P33 reported that the police told her 'it is OK because the employer had paid me'. The call to the police upset the employment agency staff that was notified by the employer. The agency refused to assist P33 in finding temporary shelter until she could repatriate.

### **3.4.3 Ethical dilemmas**

With respect to this category of challenges, three ethical issues arose that had to be dealt with. In the first instance, a participant secretly recorded a conciliation meeting that I was not allowed to attend. In the two other instances, I felt compelled to intervene in the claims process as I felt that I would make a significant difference to the outcome. These dilemmas will be discussed in further detail below, but according to MacKenzie et al.<sup>132</sup> dilemmas are not unexpected and intervention may be ethically required. They argue that where a human being is in need and the researcher can offer assistance, failing to do so for the sake of objectivity is unethical.<sup>133</sup> Jacobsen and Landau<sup>134</sup> contend that the intervention into the lives of research participants can influence their behaviour and responses, compromising the research findings. My intervention in the two latter instances did not, in my opinion,

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<sup>132</sup> Mackenzie, McDowell and Pittaway, 'Beyond 'do no harm': The challenge of constructing ethical relationships in refugee research', p.316

<sup>133</sup> Ibid

<sup>134</sup> Jacobsen and Landau, 'The dual imperative in refugee research: some methodological and ethical considerations in social science research on forced migration', p.192



affect the findings since the focus of the research was to examine if the redress process was appropriate and whether government personnel recognise the presence of forced labour in the working conditions of the participant. I found that, not only did my intervention have a positive effect, it also provided some evidence that representation, not necessarily in the form of legal counsel but also people knowledgeable about the rights of MDWs, could be helpful. I have had a great deal of experience assisting MDWs in the past and was familiar with the Labour Ordinance in Hong Kong and some of the challenges faced by MDWs in asserting their rights.

In the first participant's conciliation meeting, the employer failed to appear and I was not allowed to accompany the participant into the meeting with the Conciliation Officer. At the end of the meeting the participant revealed that she had recorded the meeting on her mobile phone without the knowledge of the Conciliation Officer. While the recording was unsolicited, I ultimately decided that the recording might provide useful insight into a closed-door meeting between the Conciliation Officer and participant. After this issue arose, each participant was asked not to record any aspect of hearings that they participated in. Care was taken thereafter to ensure that this type of surreptitious recording did not happen again. This recording was useful in documenting the coercive efforts by the Conciliation Officer to get the participant to withdraw her claim. The employer had falsely accused the participant of theft and assault, and the Conciliation Officer convinced the participant that if she pursued her claim, the employer would pursue the cases of assault and theft against her. I have attended numerous conciliation meetings in the past and this type of behaviour on the part of the Conciliation Officer had never been exhibited. This suggests that if an advocate accompanies MDWs to the applicable meetings and hearings, the field becomes a bit more level.

The second ethical dilemma was more direct and concerned my ability to maintain a neutral observer's posture during conciliation. In this second claim, the participant was asked to explain her claim against the employer and was visibly intimidated after a lengthy explanation from the Conciliation Officer that the meeting was 'a framework for settlement of the dispute'. While much of the items of the claim were contractual obligations, one point of contention was airfare to the participant's 'place

of origin'. The employer had provided an air ticket for the participant to travel to the Philippines and was willing to pay all final entitlements, but she refused to accept the ticket and the time of use had expired. When asked to explain why she (the participant) did not use the ticket and had allowed it to expire, she became emotionally incapacitated and could only explain that she had the right to remain in Hong Kong for up to 14 days after termination. The Conciliation Officer left the room returning approximately ten minutes later with a copy of the immigration policy explaining that there was no right to remain in Hong Kong, although staying for 14 days was allowed. At this point, the participant turned to me and asked, 'sir what will I do?'

I then explained to the Conciliation Officer that the issue of the 14-day stay was not the relevant issue. The issue at hand was that although the employer was willing to pay all final entitlements, he was unwilling to provide the appropriate air ticket. The contract obligates the employer to provide airfare to the employee's place of origin, and since the air-ticket was only to Manila and the participant would have to secure an additional flight from Manila to her home, the ticket provided was insufficient. The Officer explained the obligation to the employer who eventually agreed to provide the appropriate airfare.

The third instance concerned a participant that had filed a claim with the Labour Tribunal against her employer. The participant submitted her statements<sup>135</sup> to the Tribunal, and was distraught once she received a copy of the employer's response. The employer provided a copy of a termination letter that he claimed was given to the participant at the time of termination. He further claimed that this letter was being discussed with the participant when she became angry and left the residence and later accused him of assault. The letter was essentially claiming that the participant was being summarily dismissed for disobedience and poor performance after being warned on several earlier occasions. This account of events supplied by the employer, if believed, could deny any final entitlements to the participant. After I was provided a copy of the employer's response and a copy of the 'termination

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<sup>135</sup> Once the participant files the claim and statements, the employer is provided a copy of the claim and is required to respond to it.

letter’, the participant expressed concern that she would not be believed over the employer and posed the question, ‘what am I going to do?’

I recognised the despair in the participant’s voice and body language and offered my assessment. Recalling the circumstances of the participant’s case, I pointed out that the ‘termination letter’ supplied to the Labour Tribunal was addressed to her (the participant) at the NGO’s address. If the letter was provided on the day of termination, there should be no mention of the NGO’s address since that address was not provided to the employer until two weeks after the date on which the contract came to an end. This would suggest that the letter was written some time on or after the NGO’s address was provided to the employer and could not have been written on the date of termination. I further informed the participant that this discrepancy should be highlighted in any response to the Tribunal.

These dilemmas reinforce the need for representation; not necessarily a lawyer, but someone familiar with the law and process and capable of overcoming the imbalance in power both between the employer and MDW and the third-party Conciliation Officer or decision maker and the MDW.

#### **3.4.4 Researcher bias and perspective**

In all three instances above, beyond the request for assistance, I must recognise my own bias based on my life experiences and as an advocate for MDWs. Having worked with the MDW population in Hong Kong for some time prior to this research, I was keenly aware that for each claim in the Labour Department, there was a family in the Philippines or Indonesia that was relying on every single dollar of the claim. This lesson came in 2012 when I had the opportunity to visit a recently returned MDW in their home country. As I was entertained in her home with her husband and daughter, she reflected on her time in Hong Kong. Pointing to the unfinished repairs to her home and the spots of daylight in the roof, she explained that her experience had left her feeling cheated. Having been underpaid for four years and being owed in excess of \$100,000, at settlement only \$48,000 was recovered. This experience and life lesson gave me a clear understanding of what was at stake for those pursuing a claim. The possibility of negotiating for and losing money that had already been earned was viewed as an unjust outcome. Even when

MDWs said that ‘it’s ok’, I interpreted it to mean that they were tired of the process and saw it as not worthwhile.

Additionally, my prior work in law enforcement and many years as a detective conducting interviews and interrogations created two issues. First, there was a sense of frustration with the lack of recognition and enforcement of forced labour prohibitions which reinforced my views of the unpredictable outcomes faced by MDWs. Secondly, during interviews I at times viewed accounts of deception in recruitment with scepticism. In one instance, after being told by a MDW that he had been hired as a gardener at the employer’s residence, but then found himself living in squalid conditions in a remote location and had bought his own boots and gloves, I questioned if he was really a victim of forced labour. This questioning made the need to get a law enforcement perspective on the treatment of MDWs even more significant although at the time it was apparent that I would not be able to achieve that goal. However, my perception is that the problems encountered by MDWs are viewed as self-created and they are willing participants in their predicament. I did not view my participant in this way and did classify him as being in forced labour since he no longer wanted to be engaged in work he was doing (involuntariness), and it was illegal based on the conditions of his employment contract as he was isolated as a result of the instructions from the employer not to engage with others at the work site and threatened with deductions of wages (coercion) and he was unpaid for the work he had provided and would lose it if he returned home (menace of penalty).

Toma<sup>136</sup> acknowledges that it is impossible for researchers to be truly objective, although many believe that objectivity should be the standard. He suggests that researchers should ‘accept involvement and bias as inevitable and work toward finding meaning through closer ties with subjects’. A research relationship cannot be built on detached observations by researchers intentionally uninvolved. The researcher and the subject, object are interactively linked, with the values of the researcher inevitably influencing the research.<sup>137</sup> According to Toma, researchers

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<sup>136</sup> J Douglas Toma, ‘How getting close to your subjects makes qualitative data better’ (2000) 39 *Theory into practice* 177

<sup>137</sup> Egon G Guba and Yvonna S Lincoln, ‘Competing paradigms in qualitative research’ (1994) 2 *Handbook of qualitative research* 105 p.110

work in two worlds. In one aspect, they can be objective in their relationships with participants and the subject being studied and in the other, their personal values influence their investigation<sup>138</sup> based on their own values and perspective. While the presence of the researcher potentially influences the behaviour and responses of participants and occurs in all field research especially related to marginalised, poor and powerless groups, the presence may lead to problems in methodology and even cross over into ethical issues.<sup>139</sup>

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<sup>138</sup> Toma, 'How getting close to your subjects makes qualitative data better' p.178

<sup>139</sup> Jacobsen and Landau, 'The dual imperative in refugee research: some methodological and ethical considerations in social science research on forced migration', p.192

## Chapter 4. Duty to Implement an Effective Remedy

### 4.1 Introduction

This chapter examines an individual's right to an effective remedy and builds on the issues identified and developed in Chapter 2, including the identification of forced labour as a crime. This chapter will focus on defining the obligation in implementing measures necessary for ensuring an effective remedy to address violations of human rights.

The term 'effective remedy' refers to 'the range of measures that may be taken in response to an actual or threatened violation of human rights'.<sup>140</sup> International law recognises individual human rights and requires all states to take affirmative steps to ensure that all individuals within their jurisdiction have the ability to enjoy those basic freedoms accepted by the international community.<sup>141</sup> Reading together Articles 2(1), (2) and (3) of the ICCPR, jurisprudence and relevant literature on the provision of effective remedies in the event of breach, we can identify eight specific measures that are critical in providing an effective remedy.<sup>142</sup> Human rights bodies have held that states are in breach of their obligations if they do not exercise due diligence in preventing violations, or fail to punish violators as required by the Convention.<sup>143</sup> The lack of due diligence in adopting the required legislative and other measures to ensure human rights gives rise to a variety of abuses exacted on individuals and creates barriers to seeking remedies for violations of guaranteed rights.

Over time, many principles have been developed and refined through jurisprudence and international human rights bodies.<sup>144</sup> In articulating the principles and legal standards of an effective remedy in Article 2 and in particular Article 2(3) of the

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<sup>140</sup> Dinah Shelton, *Remedies in international human rights law* (second edn, Oxford University Press, USA 2005), p.8

<sup>141</sup> C Droege, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners Guide* (Geneva, International Commission of Jurists) (2006), p.23

<sup>142</sup> *Ibid* p.25

<sup>143</sup> Human Rights Committee, 'General Comment No.31(80) Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21 Rev.1/Add.13 (2004) para 8, *Velasquez-Rodriguez v Honduras*, Case (ser C) No.4 (1988) (Inter-Am Ct HR 29 July 1988). para 172

<sup>144</sup> Droege, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners Guide* (Geneva, International Commission of Jurists, 2006) p.19

ICCPR, I have been guided by the jurisprudence of the United Nations human rights treaty bodies, the decisions reached by the Inter-American Court, the European Court of Human Rights and the African Commission on Human and Peoples' Rights, and by General Assembly Resolution 60/147 of 16 December 2005 which has been adopted by the Commission on Human Rights,<sup>145</sup> the Human Rights Committee, and the Committee on Economic Social and Cultural rights. I have also relied on several secondary sources<sup>146</sup> from writers who have examined the obligations that states incur as parties to international conventions to take affirmative steps to address crimes such as forced labour.

This chapter will also serve as the link between the issues of the prohibition of forced labour addressed in Chapter 2 and the duty to provide effective remedies through the complement of the eight measures identified to negate or mitigate barriers to remedies that will be detailed in Chapter 6.

In the three sections below, I will examine the duties that arise as part of the obligation to implement human rights and examine the domestic implementation of covenant obligations (Section 4.2). I will also articulate the eight component measures of an effective remedy (section 4.3). Throughout each section, I will examine the comments and direction of supervisory human rights bodies for guidance on how the right to a remedy should be interpreted and applied, and the jurisprudence of international and regional human rights courts and other treaties. While addressing the eight components I will rely on jurisprudence that addresses the specific component which in some instances will not relate to crimes, but will give meaning to the component being addressed. Lastly I will introduce the theory that there should be special attention provided to vulnerable groups and individuals as part of a remedy (section 4.4).

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<sup>145</sup> Mashood A. Baderin and others, *International human rights law: six decades after the UDHR and beyond* (Ashgate Pub. 2010); United Nations General Assembly, Resolution Adopted By The General Assembly, 60/147, Basic Principles And Guidelines on The Right To A Remedy and Reparation For Victims of Gross Violations Of International Human Rights Law and Serious Violations of International Humanitarian Law.

<sup>146</sup> Nowak, *UN Covenant on civil and political rights: CCPR Commentary*; Droege, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners Guide*; Shelton, *Remedies in international human rights law*; Daniel Moeckli and others, *International human rights law* (Oxford University Press 2013); Baderin and others, *International human rights law: six decades after the UDHR and beyond* (Ashgate Pub. 2010)

Lastly, the terms state, party and government are used interchangeably at times when referring to Hong Kong. Given its unique political history, Hong Kong is technically not a state and is officially identified as the Hong Kong Special Administrative Region and a part of the People's Republic of China. However, by virtue of the fact that the United Kingdom extended several relevant international conventions to Hong Kong prior to handing it over to Chinese sovereignty in 1997, Hong Kong is bound to many international conventions that impose specific binding obligations.

## **4.2 Duty to implement human rights**

Article 2 of the ICCPR imposes obligations to respect and ensure the implementation of human rights, the protection of individuals and the right to remedies if the state fails to protect those rights through commission of any acts attributable to the state or by omission in failing to exercise due diligence to protect harm from individuals. Article 2(1) outlines the obligations of the parties to the Convention in respecting and ensuring guaranteed rights has immediate effect for all state parties.<sup>147</sup> Paragraph 2 '...provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected'.<sup>148</sup> Article 2(3) requires that, in addition to effective protection of Covenant rights, states must ensure that individuals also have access to effective remedies to enforce those rights<sup>149</sup> and provide reparation to individuals whose Covenant rights have been violated.<sup>150</sup> The three sections below will examine the obligation to respect and ensure human rights, the obligation to protect individuals and fulfil those obligations by taking positive steps and to provide remedies when protection fails.

### **4.2.1 International obligations**

The obligation to respect and ensure the implementation of human rights emanates from treaties to which a state has bound itself. Those treaty obligations also require a member state to pass the appropriate legislation in conformity with the relevant

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<sup>147</sup> UN Human Rights Committee (CCPR) General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para 5

<sup>148</sup> Ibid p.3

<sup>149</sup> Ibid para 15

<sup>150</sup> Ibid para 16



treaty or convention, creating the necessary legal framework to enforce those laws.<sup>151</sup> In executing these treaty obligations, the adoption of a victim-oriented perspective is critical in protecting victims and effectively prosecuting those who violate those laws.<sup>152</sup> Generally, the crimes which are subject of international treaties and conventions, such as forced labour, are not subject to statutes of limitations.<sup>153</sup>

**Article 2(1)** states in pertinent part that:

*‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.*

The obligation of a state to respect and ensure the rights of all individuals on its territory has been characterised as both ‘negative’ and ‘positive’ in nature.<sup>154</sup> With respect to what are termed negative obligations, a state must refrain from interfering with or curtailing the enjoyment of the type of rights outlined in the Covenant.<sup>155</sup> States must also ensure that no element of the state violates those rights; this includes the legislative and executive bodies and those agents of the state such as civil servants, law enforcement bodies such as the police, and the military.<sup>156</sup> Positive obligations refer to the responsibility to give effect domestically to civil and political rights and economic, social and cultural rights.<sup>157</sup> Parties to the Covenant are also required to recognise that the rights guaranteed are intended to protect individuals and

*‘...will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its*

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<sup>151</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147

<sup>152</sup> Ibid

<sup>153</sup> Ibid

<sup>154</sup> Human Rights Committee, ‘General Comment No.31 Nature of the General Legal Obligation on States Parties to the Covenant

<sup>155</sup> Ibid

<sup>156</sup> Moeckli and others, *International human rights law*, p.130

<sup>157</sup> Nowak, *UN Covenant on civil and political rights: CCPR Commentary*, p.37 - 41

*agents, but also against acts committed by private people or entities’.*<sup>158</sup>

Article 2(1) also provides clear language prohibiting discrimination against individuals within the state’s jurisdiction, whether nationals or non-nationals.<sup>159</sup> The protection is ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>160</sup> This obligation applies equally without discrimination between citizens and aliens.<sup>161</sup>

The Human Rights Committee has noted that the ICCPR does not define the term ‘discrimination’, nor does it indicate what constitutes discrimination.<sup>162</sup> However, it concluded that the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provided suitable guidance and at the same time demonstrating the compatible nature of Conventions and determined that:

*‘...discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all people, on an equal footing, of all rights and freedoms’.*<sup>163</sup>

In discussing the non-discrimination provisions of the ICESCR, the Committee advised that:

*‘Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which*

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<sup>158</sup> UN Human Rights Committee (CCPR) General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para. 8

<sup>159</sup> Ibid

<sup>160</sup> International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), UN GAOR, 21 Sess., UN Doc. A/6316 (1966), 999 UNT.S. 171 (*entered into force* 23 Mar. 1976)., Article 2(1)

<sup>161</sup> UN Human Rights Committee (CCPR) General Comment No.15: The Position of Aliens Under the Covenant (2017), HRI/GEN/1/Rev.9 (Vol. I) para. 2

<sup>162</sup> UN Human Rights Committee (CCPR) General Comment No.18: Non-discrimination’ (1989) 1 UN Doc CCPR/C/21/Rev 626, para. 6-7

<sup>163</sup> Ibid

*facilitate the full protection of economic, social and cultural rights*'.<sup>164</sup>

The Committee has found 'that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organisation, often involving unchallenged or indirect discrimination'.<sup>165</sup> Discrimination can be exacted through '...legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups'.<sup>166</sup>

#### **4.2.2 Domestic Implementation**

Article 2(2) states:

*'Where not already provided for by existing legislative or other measures, each state Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant'*.

Parties to the Convention are required to take positive steps to protect individuals through the adoption of judicial, administrative and legislative measures appropriate to reflect Covenant obligations.<sup>167</sup> The state may be held liable for its shortcomings in protecting individuals, for example if the state adopts a law that made violations possible or fails to take action that would have prevented the violation from occurring.<sup>168</sup>

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<sup>164</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No.9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24 p.5

<sup>165</sup> UN Economic and Social Council, Committee on Economic Social and Cultural Rights, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) Forty-second session, General comment No.20, E/C.12/GC/20 (2009) E/C.12/GC/20 p.5

<sup>166</sup> Ibid

<sup>167</sup> Nowak, UN Covenant on civil and political rights:CCPR Commentary, p.39

<sup>168</sup> Moeckli and others, *International human rights law*, p.131, *X and Y v Netherlands*, 8 E.H.R.R. 235 (1985)

The Human Rights Committee has made it clear that the responsibility for giving domestic effect to Covenant obligations is through adoption of judicial, administrative and legislative and educative measures<sup>169</sup> as the:

*'...Covenant cannot be viewed as a substitute for domestic criminal or civil law'.<sup>170</sup> Educative measures are a critical component in raising awareness about Convention obligations and rights among public officials, state agents and population at large'.<sup>171</sup>*

The failure to ensure Covenant rights as required by Article 2 may give rise to violations by parties to the Covenant for:

*'...permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private people or entities'.<sup>172</sup>*

A party may not invoke the provisions of domestic law or lack thereof as justification for failure to perform a treaty,<sup>173</sup> nor can there be an argument that a violation was carried out by a non-executive branch of government as a means of evading responsibility.<sup>174</sup> This understanding is made clear in Article 27 of the Vienna Convention on the Law of Treaties. Lastly, where there are incompatibilities between domestic laws and Covenant obligations, the domestic law or practice must be changed to meet the standards of the Convention.<sup>175</sup>

#### **4.2.3 The right to a remedy**

Article 2(3) states:

*3. Each State Party to the present Covenant undertakes:*

*(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy,*

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<sup>169</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para 7

<sup>170</sup> Ibid para 8

<sup>171</sup> Ibid para 7

<sup>172</sup> Ibid para 8

<sup>173</sup> Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p.331

<sup>174</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para 4

<sup>175</sup> Ibid, para 13

*notwithstanding that the violation has been committed by persons acting in an official capacity;*

*(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*

*(c) To ensure that the competent authorities shall enforce such remedies when granted.*

The duty to provide an effective remedy has been outlined in several human rights instruments<sup>176</sup> and places the obligation squarely on the state to ensure accessible and effective remedies.<sup>177</sup>

States have the discretion to determine how they discharge their Covenant obligations domestically,<sup>178</sup> and the ICESCR Committee has provided clarification on this issue. The Committee's adoption of General Comment No.9 provided crucial clarification and came as a result of the remarks of the Canadian Head of Delegation at the review at the Committee's 19 session (November 1998).<sup>179</sup> The contention was over the issue of 'justiciability' of Covenant rights. The Canadian delegation believed that it was up to the state (Canada) to decide whether to make rights under the ICESCR justiciable and argued that legal remedies were optional. Committee members disagreed with the Delegate's statement, and drafted General Comment No.9 to clarify the issue. The Committee laid down two basic principles of compliance based on the overriding duty to provide effective remedies in domestic law.<sup>180</sup> The first is that the means chosen must be adequate to give effect to the rights

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<sup>176</sup> In particular Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 39 of the Convention on the Rights of the Child, and the ILO Protocol to the Forced Labour Convention No.29

<sup>177</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para 15

<sup>178</sup> Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary

<sup>179</sup> Ibid

<sup>180</sup> Ibid p.11 - 12

in the Covenant.<sup>181</sup> In many cases, this includes judicial enforcement, particularly when it comes to protecting the most vulnerable.<sup>182</sup> The Committee cautioned that:

*‘The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society’.*<sup>183</sup>

Secondly, ‘protection for social and economic rights should be comparable to, and integrated with, the protection provided for civil and political rights’.<sup>184</sup>

*‘...protection for social and economic rights should be comparable to, and integrated with, the protection provided for civil and political rights. Where the means used to give effect to the ICESCR ‘differ significantly’ from those used in relation to other human rights treaties, ‘there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights’.*<sup>185</sup>

The Committee (ICESCR) was careful to leave room for variation from state to state as to how rights are protected within domestic legal systems, giving states the flexibility to choose the precise method by which Covenant rights are given effect in national law.<sup>186</sup> However, the Committee was firm in articulating that this flexibility in implementing the covenant into domestic law did not permit states to simply decide not to provide any effective remedies at all for violations of Covenant rights.<sup>187</sup>

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<sup>181</sup> Ibid

<sup>182</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Substantive issues arising in the implementation of the international Covenant on Economic, Social and Cultural Rights draft General Comment No.9: The Domestic Application of the Covenant, 3 December, E/C.12/1998/24 1998 para 10

<sup>183</sup> Ibid p.4

<sup>184</sup> United Nations Committee on Economic, Social and Cultural Rights, The right to Effective Remedies, Review of Canada’s Fourth and Fifth Periodic Reports Under the ICESCR, p.13

<sup>185</sup> Ibid p.13

<sup>186</sup> Ibid p.12

<sup>187</sup> Ibid

Courts and tribunals must interpret and apply domestic law in a manner that is consistent with a state's international human rights obligations. This basic principle of the rule of law is not 'optional' or a matter for the discretion of parties.<sup>188</sup> Whatever constitutional provisions are adopted, these must be applied consistently with international human rights law.<sup>189</sup>

*'Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the state to comply with the Covenant, international law requires the choice of the latter'.<sup>190</sup>*

The Inter-American Court clearly stated that to give effect to human rights obligations, a party to the Convention needs '...to ensure the principles of human rights throughout its entire 'legal, political and institutional system'.<sup>191</sup> All the structures, through which public power is exercised, must be capable of providing judicial measures ensuring the free and full enjoyment of human rights.<sup>192</sup> The mere existence of a legal system designed to make it possible to comply with this obligation is insufficient, the government is also required to conduct itself so as to effectively ensure the free and full exercise of human rights.<sup>193</sup> An important aspect of this is the obligation to take proactive steps to prevent violations from occurring, investigate and prosecute effectively when they do not and punish those found guilty of committing criminal acts and to provide effective remedies to restore the right violated and provide compensation for damages resulting from the violation.<sup>194</sup>

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<sup>188</sup> Ibid

<sup>189</sup> Ibid

<sup>190</sup> Ibid p.5

<sup>191</sup> *Chumbivilcas v Peru*, Case 10.559, Report No.1/96, (Inter-Am.Ct.H.R. 1 March 1996), OEA/Ser.L/V/II.91 Doc. 7 at 136 (1996). Para V 3

<sup>192</sup> *Velasquez Rodriguez v Honduras* (Ser. C) No.4 (1988) (Inter-AmCt.H.R.). para 166 - 167

<sup>193</sup> Ibid

<sup>194</sup> Ibid para 166 – 167, see also, Droegge, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners Guide* (Geneva, International Commission of Jurists) p.24, citing Inter-American Commission on Human Rights Case 10.559, Chumbivilcas (Peru), Report 1/96, 1 March 1996, para V 3; *X and Y v the Netherlands*, Judgment of 26 March 1985, Series A 91, para 27; *M.C. v Bulgaria*, Judgment of 4 December 2003, para 153

The Court further made clear in its advisory opinion<sup>195</sup> that the lack of an effective remedy to vindicate rights under the Convention is itself a violation by the obligated party.<sup>196</sup> Merely incorporating the obligation into the Constitution or law or that it be formally recognised is insufficient ‘... rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress’.<sup>197</sup>

If the existing conditions in a country or particular case do not provide a real possibility of rights vindication, an effective remedy is not achieved.<sup>198</sup> The limitations in realising an effective remedy could be attributable to ineffective practices, when judicial power lacks independence to render impartial decisions or enforce its judgments, where there is unnecessary delay in rendering decisions or when victims are denied a judicial remedy.<sup>199</sup>

In *X and Y v the Netherlands*, a gap in criminal law provision and government policy failed to protect and provide access to a remedy to a minor from a criminal act.<sup>200</sup> Identifying a gap in protection, the Court made it clear that effective deterrence of criminal acts was indispensable and could only be achieved by criminal law provisions and is the means by which similar matters would be regulated.<sup>201</sup> Similarly, in *Opuz v Turkey*, the court identified a gap in the law that

*‘...prevented the prosecuting authorities from pursuing the criminal investigations because the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more’.*<sup>202</sup>

The Court further considered this ‘sickness or unfitness’ requirement under the existing legal framework constituted a breach of the state’s positive obligation.<sup>203</sup> Additionally, the withdrawal of complaints of harm was irrelevant, as the state should have pursued prosecution of the violator as a matter of ‘public interest

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<sup>195</sup> *Judicial Guarantees in States of Emergencies*, Advisory Opinion OC-9/87, Inter-American Court of Human Rights Series A No.9, (6 October 1987)

<sup>196</sup> *Ibid* para 24

<sup>197</sup> *Ibid* para 24

<sup>198</sup> *Ibid* p.6

<sup>199</sup> *Ibid*

<sup>200</sup> *X and Y v Netherlands* (App. no. 8978/80) ECtHR, 26 March 1985 para 25

<sup>201</sup> *Ibid*

<sup>202</sup> *Opuz v Turkey* (App. no. 33401/02) ECtHR, 9 June 2009 para 145

<sup>203</sup> *Ibid*



regardless of the victims' withdrawal of complaints'.<sup>204</sup> The Government had argued that it did not pursue investigation out of respect for the private life of the victims. The Court concluded:

*'...that, in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal act'.*<sup>205</sup>

The African Charter<sup>206</sup> does not specifically provide for the right to an effective remedy.<sup>207</sup> However, in *Jawara v The Gambia*, the African Commission set out the three elements of a remedy: availability, effectiveness and sufficiency.<sup>208</sup>

*'A remedy is considered available if the petitioner can pursue it without impediment; effective if it offers a prospect of success; and sufficient if it is capable of redressing the complaint'.*<sup>209</sup>

These three aspects of a remedy although distinct and separate, should be considered, as constitutive of a remedy that is 'effective' for human rights violations.<sup>210</sup>

### **4.3 Components of effective remedies**

UN General Assembly Resolution 60/147<sup>211</sup> outlines basic principles related to effective remedies consistent with those outlined in the ICCPR<sup>212</sup> and the ICESCR.<sup>213</sup> While these principles are not binding on states, they outline the extent and scope of the right to a remedy, measures to be taken in securing that remedy, and standards for measuring effectiveness. Using these guidelines, effective remedies can be separated into two categories,<sup>214</sup> both of which are essential in securing effective

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<sup>204</sup> Ibid para 145

<sup>205</sup> Ibid para 144

<sup>206</sup> Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982)

<sup>207</sup> Godfrey M Musila, 'The Right to an Effective Remedy under the African Charter on Human and People's Rights' (2006) 6 *Afr Hum Rts LJ* 442, p.447

<sup>208</sup> *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), para 32, *see also* Ibid p.446

<sup>209</sup> Ibid para 32

<sup>210</sup> Ibid

<sup>211</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147

<sup>212</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant

<sup>213</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No.9: The domestic application of the Covenant

<sup>214</sup> Shelton, Remedies in international human rights law, p.7

protection of all human rights. The first is procedural in nature and deals with the right to bring human rights violations before the competent authorities.<sup>215</sup> Second, there is a substantive redress category that focuses on the relief to which the victim is entitled after a successful claim.<sup>216</sup> The aim of the substantive component is to ‘restore as far as possible the state of the victim prior to the violation occurring’<sup>217</sup> ‘Irrespective of who may ultimately be the bearer of responsibility for the violation’,<sup>218</sup> the victim should have equal and effective access to justice.<sup>219</sup>

A victim of a crime is defined as person(s) who have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions which are in violation of domestic criminal laws and also includes those crimes that are internationally recognised norms relating to human rights that are not recognized nationally.<sup>220</sup>

The existing literature<sup>221</sup> identifies a number of complimentary component measures that adequately fulfil the state’s obligations in providing an effective remedy. These measures are to be delivered through the application of domestic laws that reflect Covenant obligations. An effective remedy may be a singular component measure in the range of options or multiple measures to effectively restore the victim to the state prior to the violation occurring.<sup>222</sup> The list of component measures below is not intended to be representative of all measures, nor is it limited to those outlined; rather it represents basic components that would be expected as remedies to gross

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<sup>215</sup> Ibid

<sup>216</sup> Ibid

<sup>217</sup> *Factory at Chorzow* (Germ. v Pol.), 1928 P.C.I.J. (ser. A) No.17 (Sept. 13), para 73

<sup>218</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147 P.3

<sup>219</sup> Ibid p.3

<sup>220</sup> UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34 p.2 - 4

<sup>221</sup> Anne T Gallagher, ‘The right to an effective remedy for victims of trafficking in persons: A survey of international law and policy’ (2010); UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147, UN General Assembly, ‘Declaration of basic principles of justice for victims of crime and abuse of power’ (1985) UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34; International Commission of Jurists, ‘The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners’ Guide’, Geneva 2006, Baderin and others, *International human rights law: six decades after the UDHR and beyond*, ch.25

<sup>222</sup> *Silver v United Kingdom* (App. No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75) ECtHR, 24 October 1983 para 113 C

violations of international human rights law and serious violations of international humanitarian law that constitute crimes.<sup>223</sup>

The components of a remedy<sup>224</sup> include access to competent authorities; an obligation on the state to thoroughly and effectively investigate; an obligation to prosecute, where the investigation yields evidence of a crime; a right of the victim to access to relevant information; a victim's right to reparation; an obligation on the part of the state to stop ongoing violations; and the ability on the part of the victim to enforce any judgments rendered by the adjudicating body.

#### **4.3.1 Procedural components of a remedy**

This measure of redress is intended to ensure victims of violations are afforded access to judicial, administrative and legislative bodies. Several conditions emerge as important factors in ensuring meaningful access.<sup>225</sup> Judicial mechanisms are critical, especially when they protect the most vulnerable<sup>226</sup> or when the behaviour complained of constitutes a crime.<sup>227</sup> In the section below, several important elements of judicial and administrative proceedings will be highlighted. These elements include the appropriateness of judicial remedies for serious violations and crimes. Access to competent authorities is more than a physical appearance in court; representation in proceedings are important especially for disadvantaged participants and procedures must be based on the law.

##### **4.3.1.1 Access to competent authorities**

There is a general agreement concerning access to judicial and administrative measures, however there is very little discourse on the importance of legal

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<sup>223</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147

<sup>224</sup> Ibid see also, Assembly, 'Declaration of basic principles of justice for victims of crime and abuse of power'; International Commission of Jurists, 'The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide', Geneva 2006, Baderin and others, International human rights law: six decades after the UDHR and beyond, ch.25

<sup>225</sup> United Nations Committee on Economic, Social and Cultural Rights, Review of Canada's Fourth and Fifth Periodic Reports Under the ICESCR, (May 5 & 8, 2006), Submission of the Charter Committee on Poverty Issues

<sup>226</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Substantive issues arising in the implementation of the international Covenant on Economic, Social and Cultural Rights draft General Comment No.9: The Domestic Application of the Covenant, 3 December 1998 p4 para 10, E/C.12/1998/24

<sup>227</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147

representation, or the meaning of access to the competent authorities. This latter issue was addressed in the European Court of Human Rights (ECtHR) decision in *Airey v Ireland* involving a victim of domestic violence who was unable to afford the cost of legal representation necessary to pursue separation proceedings before the High Court.<sup>228</sup> Although Airey claimed that she was not provided an effective remedy under domestic law as guaranteed by Article 13 of the ECHR, the Court did not rule on the issue as it was found that she was denied effective access and thus a decision on an effective remedy was not necessary.<sup>229</sup> The Court did note that by denial of access to the high court, she was denied a domestic remedy.<sup>230</sup>

In the complaint to the Commission, Mrs. Airey raised several issues, including ‘...that, because of the prohibitive cost of proceedings, she could not obtain a judicial separation’<sup>231</sup> which violated:

- Article 6 para. 1 (art. 6-1) of the Convention, by reason of the fact that her right of access to a court was effectively denied;
- Article 8 (art. 8), by reason of the failure of the state to ensure that there is an accessible legal procedure to determine rights and obligations that have been created by legislation regulating family matters;
- Article 13 (art. 13), in that she was deprived of an effective remedy before a national authority for the violations complained of;
- Article 14 in conjunction with Article 6 para. 1 (art. 14+6-1), in that judicial separation is more easily available to those who can afford to pay than to those without financial resources.

The Court found that Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation contrary

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<sup>228</sup> *Airey v Ireland* (App no.6289/73) judgment EctHR 9 October 1979

<sup>229</sup> Ibid para 35, ‘since Articles 13 and 6 para. 1 (art. 13, art. 6-1) overlap in this particular case, the Court does not deem it necessary to determine whether there has been a failure to observe the requirements of the former Article (art. 13): these requirements are less strict than, and are here entirely absorbed by, those of the latter Article (art. 6-1)’ The decision in the Airey case was 4-3 among the judges.

<sup>230</sup> Ibid

<sup>231</sup> *Airey v Ireland* App no.6289/73 para 13

to Article 6 para. 1 (art. 6-1)<sup>232</sup> which ‘secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal’.<sup>233</sup>

The Irish government contended that there was nothing to gain from a judicial separation and that Airey could have entered into a separation deed with her husband or could have applied for a barring order or for maintenance under the 1976 Act.

The Court held that the law required remedies to the violation that had been alleged, and rejected the government’s claim that the applicant had nothing to gain from a judicial separation. It further concluded that judicial separation is a remedy provided for by law and should be available to anyone who satisfies the conditions prescribed. It is for the individual to select which legal remedy to pursue.

The government<sup>234</sup> also contended that Airey did enjoy access to the High Court since she was free to go before that Court without the assistance of a lawyer. The Court held that the law is ‘...intended to guarantee, not rights that are theoretical or illusory, but rights that are practical and effective’.<sup>235</sup> This is particularly so with the right of access to the courts and the right to a fair trial. The Court explained that the applicant would be at a disadvantage if a lawyer represented her husband and she was not represented. In considering the complexity of the case, the Court concluded that the possibility of appearing in person before the High Court without representation, notwithstanding any assistance that the judge may provide, does not provide an effective right of access and, hence, that it also does not constitute a domestic remedy.

The government maintained<sup>236</sup> that there was no positive obstacle emanating from the state and there was no deliberate attempt by the state to impede access; the alleged lack of access stemmed not from any act on the part of the authorities, but solely from Mrs. Airey’s personal circumstances, a matter for which the state cannot be held responsible. The Court did not agree with this conclusion. In the first place,

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<sup>232</sup> European Convention On Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>233</sup> *Airey v Ireland* App no.6289/73 para 22

<sup>234</sup> *Ibid* para 24

<sup>235</sup> *Ibid* para 24

<sup>236</sup> *Ibid* para 25

hindrance to access can be an impediment resulting from the state's inaction. It is the duty of the state on some occasions to take positive action and not simply remain passive. The law is designed to safeguard the individual in a real and practical way and, in some cases, even a lack of legal representation may meet the requirements of effective access but it is dependent on the particular circumstances of the case and complexity of the procedure.

The Court offered some direction on this issue, suggesting that in order to ensure effective access, the state may be required to provide legal aid or to simplify procedures so that litigants may easily navigate the system; however, the state was free to determine the means by which access is assured.

The Court noted that Convention obligations 'are intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.<sup>237</sup> In essence, Airey should also have had access to legal counsel in order to meaningfully and effectively present and resolve her complaint and, if needed, be provided legal resources (legal aid) as a duty of the state.

#### **4.3.1.2 Priority of judicial remedies**

To fulfil the obligations of the state that everyone has the right to effective redress measures by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law,<sup>238</sup> a number of specific actions have been outlined setting the standard of effective access. Access to the convening body, whether judicial, administrative or other, must be prompt, effective<sup>239</sup> and independent with the power to determine whether a violation has been committed and to offer a mechanism of redress appropriate to the nature and gravity of the violation.<sup>240</sup>

In respect to judicial measures, there appears to be consistent agreement that judicial measures of redress be used for gross violations of human rights and serious violations of international humanitarian law obligated under Article 2(3) of the

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<sup>237</sup> Ibid App. no. 6289/73, judgment of 9 October 1979 para 24

<sup>238</sup> Universal Declaration of Human Rights, Article 8

<sup>239</sup> Ibid

<sup>240</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147

ICCPR, as disciplinary or administrative sanctions are insufficient for these violations.<sup>241</sup> In *Caracazo v Venezuela*, the Inter American Court concluded that ‘any person who considers himself or herself to be a victim of human rights violations has the right to resort to the system of justice to attain compliance with the duty of the State, for his or her benefit and that of society as a whole’.<sup>242</sup> There is:

*‘...an obligation to provide effective judicial remedies to victims of human rights violations..., remedies that must be substantiated in accordance with the rules of due process of law ..., all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognised by the Convention to all people subject to their jurisdictions’.*<sup>243</sup>

The significance of access to the court was also outlined in *Rantsev v Cyprus and Russia* where the court elaborated on the purpose of judicial proceedings stating:

*‘...that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties’.*<sup>244</sup>

and

*‘Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States’.*<sup>245</sup>

The African Commission on Human and Peoples’ Rights is consistent with the Inter American Court and Article 2(3) of the ICCPR in that a judicial measure of redress is reiterated in the Principles and Guidelines on the Rights to a Fair Trial and Legal

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<sup>241</sup> Human Rights Committee in *Nydia Erika Bautista v Colombia*, views of 13 November 1993, CCPR/C/55/D/563/1993, para 8.2; *Jose Vicente, Amado Villafane Chaparro et al v Colombia*, views of 29 July 1997, CCPR/C/60/D/612/1995, para 8.2

<sup>242</sup> *Caracazo v Venezuela (Reparation Costs)*, Judgment of 29 August 2002 para 115

<sup>243</sup> *Judicial Guarantees in States of Emergencies*, Advisory Opinion OC-9/87, Inter-American Court of Human Rights Series A No.9 (6 October 1987) para 24

<sup>244</sup> *Rantsev v Cyprus and Russia* App. no. 25965/04 para.197

<sup>245</sup> *Ibid* para 197

Assistance in Africa.<sup>246</sup> The Committee on CEDAW has opined that, for redress measures to be effective, they should include penal sanctions, civil methods of redress, and preventive and protective measures.<sup>247</sup> The committee notes that judicial measures are effective only if the judicial power is independent, and can render impartial decisions, carry out its judgments, ensure justice without unnecessary delay, and the victim is assured access to a judicial redress measure.<sup>248</sup>

The Committee on ICESCR has determined that ‘the right to an effective redress need not be interpreted as always requiring a judicial measure’.<sup>249</sup> Where administrative redress measures are used as the primary mechanism for providing a remedy, they must be legally binding and available for judicial review to ensure that the decision rendered is consistent with Covenant obligations and due process and the rule of law.<sup>250</sup> In many cases an Administrative measure will be adequate but ‘such administrative measures should be accessible, affordable, timely and effective’.<sup>251</sup> However, when a Covenant right cannot be made fully effective without some role for the judiciary, judicial measures are necessary.<sup>252</sup>

The European Court has adopted the position that ‘the application of Article 13 (effective remedy) under European Convention on Human Rights in a given case will depend on the manner in which the Contracting state concerned has chosen to discharge its obligation under Article 1’.<sup>253</sup> A single redress measure may not entirely satisfy the requirements, but the aggregate of component measures provided for under domestic law may do so.<sup>254</sup> States are also obligated to take measures to

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<sup>246</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147

<sup>247</sup> Ibid

<sup>248</sup> *Judicial Guarantees in States of Emergencies*, Advisory Opinion OC-9/87, Inter-American Court of Human Rights Series A No.9, (6 October 1987) para 24

<sup>249</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Substantive issues arising in the implementation of the international Covenant on Economic, Social and Cultural Rights draft General Comment No.9: The Domestic Application of the Covenant, para 9

<sup>250</sup> International Commission of Jurists, ‘The ICJ Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems’, [2012] Geneva Switzerland p.3 para 6

<sup>251</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Substantive issues arising in the implementation of the international Covenant on Economic, Social and Cultural Rights draft General Comment No.9: The Domestic Application of the Covenant, para 9

<sup>252</sup> Ibid para 9

<sup>253</sup> *Silver v United Kingdom*, Judgment of 25 March 1983, para 113

<sup>254</sup> Ibid para 113



minimise the inconvenience to victims and should ensure their safety before, during and after judicial, administrative or other proceedings.<sup>255</sup>

#### **4.3.1.3 Obligation to effectively investigate**

The Committee on the ICCPR noted that administrative mechanisms are necessary to fulfil the obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.<sup>256</sup> This establishes that the obligation has two criteria; that there must be an investigation and that it must be effective. States must therefore ensure that the necessary supporting administrative offices are instituted to give effect to their obligations under the Convention.<sup>257</sup> The right to an effective remedy cannot be realised if the state does not take the steps to seriously investigate human right violations.<sup>258</sup> Not all human rights instruments have explicit obligation to investigate violations, but human right bodies have unanimously held that the right to a prompt, effective, impartial and independent investigation for all violations of covenant rights is critical to the right of a remedy.<sup>259</sup>

The obligation to investigate is necessarily dependent on the enactment of a legislative framework. In *C.N. v United Kingdom*,<sup>260</sup> the victim had reported to the police that she had been subjected to conditions that violated Article 4 of the European Convention on Human Rights (ECHR) (Slavery and Forced Labour). At the time of the alleged violation between 2002 and 2006, the United Kingdom had no specific statutes relating to servitude, forced or compulsory labour. The police relied on the Asylum and Immigration Act of 2004 in conducting their investigation but did not find her allegations to be credible, finding no evidence to substantiate her claim that she was trafficked into the United Kingdom. In filing with the Court, the victim claimed that the investigation was deficient because of the lack of legislation criminalising domestic servitude had hampered the ability of the investigating body

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<sup>255</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147 P.6

<sup>256</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para. 15

<sup>257</sup> Ibid

<sup>258</sup> Ibid

<sup>259</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UNDoc. CCPR/C/21/Rev, 1/Ass.13, 2004, para. 15

<sup>260</sup> *C.N. v The United Kingdom* App. no.4239/08

to make a true determination. In its ruling, the Court concluded that there was a failure to adequately investigate, hampered by the lack of adequate legislation to provide practical and effective protection. The UK was obligated under the Forced Labour Convention No.29 to penalise forced labour and adequately enforce penalties. It was further found that the authorities should have been aware of the presence of these types of violations, given that similar types of cases had previously been brought to the attention of the authorities. Additionally, the Court found that the obligation to investigate is not reliant on a complaint of the victim; where there is a credible suspicion of a violation or the matter comes to the attention of the authorities, they are obligated to investigate and to take operational measures to remove the victim from the harm as a matter of urgency.

An additional aspect of the obligation to investigate is maintaining central focus on the victim and integrating them into the process. Victims have the right to take an active part in the investigation, and the right to know all facts surrounding the violation is crucial to ensuring effective redress.<sup>261</sup> This obligation is derived from the state's duty to protect all individuals within its jurisdiction from acts committed by private people who prevent the enjoyment of human rights.<sup>262</sup>

#### **4.3.1.4 Obligation to prosecute**

State parties must ensure that those responsible for Covenant rights violations are prosecuted before an unbiased authority with jurisdiction. A failure to bring to justice perpetrators of violations could in of itself be a breach of the Covenant.<sup>263</sup> These obligations are heightened when the violations are recognised as criminal under national or international law.<sup>264</sup> The obligation to prosecute and to punish is intrinsically related to the right of justice and a duty of the state to address impunity that promotes recidivism.<sup>265</sup>

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<sup>261</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para. 15

<sup>262</sup> Ibid

<sup>263</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant

<sup>264</sup> Ibid

<sup>265</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147

The Human Rights Committee has considered criminal sanctions the primary obligation of States in respect to gross human right violations and serious human rights violations.<sup>266</sup> In *Bleier v Uruguay*, the HRC urged the Uruguayan government to pursue the prosecution of individuals responsible for human rights violations.<sup>267</sup> Similarly, the European Court of Human Rights has also found that certain acts that interfere with the enjoyment of individual rights will require punishment by criminal law.<sup>268</sup> The Court held the duty to punish is embedded in the wider obligation of protection, as states must take appropriate measures to protect those within their jurisdiction.<sup>269</sup>

The obligation to prosecute provides the opportunity for the courts through their judgments ‘not only to decide those cases brought before it but, ...to elucidate, safeguard and develop the rules’<sup>270</sup> of the convention which contributes to the observance of state obligations.

#### **4.3.1.5 Access to relevant information**

States are obligated to develop and effectively disseminate relevant information to educate the general public, government personnel and victims of human rights violations of their rights.<sup>271</sup> Information should also include available services for the rehabilitation of victims and should include all legal, medical, psychological, social and administrative resources to assist victims.<sup>272</sup>

#### **4.3.2 Substantive Components of a Remedy**

Substantive redress measures are intended to restore the victim to their condition prior to the harm and include reparations, cessation of the violations and the enforcement of judicial and administrative judgments.

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<sup>266</sup> Un Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant

<sup>267</sup> *Eduardo Bleier v Uruguay*, Communication No R7/30, UN Doc Supp No 40 (A/37/40) at 130 (1982), para 15

<sup>268</sup> Droegge, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners Guide* (Geneva, International Commission of Jurists) p.158

<sup>269</sup> Ibid

<sup>270</sup> *Rantsev v Cyprus and Russia*, App. no.25965/04 para 197

<sup>271</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147 p.8-9

<sup>272</sup> Ibid

#### 4.3.2.1 Right to reparation

The right to reparation has long been recognised as part of positive international law.<sup>273</sup> The underlying principle was clearly articulated by the Permanent Court of International Justice in ‘*Factory at Chorzow*’.<sup>274</sup> The Court observed that ‘... it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation’,<sup>275</sup> ‘...reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself’.<sup>276</sup>

The objective of this principle of reparation ‘...is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.<sup>277</sup> Although this case involved disputes between states, the principle has since been extended to include individuals who have suffered harms.<sup>278</sup>

The Human Rights Committee, in General Comment 31, reinforced this obligation stating that, without reparation, the obligation to provide effective redress that is central to the efficacy of Article 2(3) of the ICCPR is not discharged.<sup>279</sup> States are obliged to provide adequate, effective and prompt reparations proportional to the gravity of the violation and harm suffered.<sup>280</sup> The Basic Guidelines<sup>281</sup> have outlined appropriate forms of reparations included below to encompass:

*Restitution*,<sup>282</sup> whenever possible, should restore the victim to their original position. It can include restoration of liberty, identity, citizenship, employment and return of

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<sup>273</sup> *Factory at Chorzow (Germ. v Pol.)*, 1928 P.C.I.J. (ser. A) No.17 (Sept. 13), para 73

<sup>274</sup> Ibid

<sup>275</sup> Ibid para 73

<sup>276</sup> Ibid para 23

<sup>277</sup> Ibid para 125

<sup>278</sup> Baderin and others, *International human rights law: six decades after the UDHR and beyond* (Ashgate Pub. 2010) p.400

<sup>279</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant

<sup>280</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147 para 13–14; Commission on Human Rights, Revised final report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political), 2 October 1997, E/CN.4/Sub.2/1997/20/Rev1. Annex II, p.7-8

<sup>281</sup> Ibid

<sup>282</sup> Ibid

property. States should review their laws, policies and practices to make restitution an available option in criminal cases and other criminal sanctions.

*Rehabilitation*<sup>283</sup> includes medical and psychological care and legal and social services.

*Compensation*<sup>284</sup> should be provided for any assessable damage resulting from a violation. Violations can include:

- a) Physical or mental harm.
- b) Lost opportunities, including employment, education and social benefits.
- c) Material damage and loss of earnings, including loss of earning potential.
- d) Moral damage to include humiliation, defamation, attacks on reputation and self-esteem.
- e) Costs of legal advice, expert assistance, medicine and medical services, psychological and social services.

Other forms of reparation can include measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices. In relation to non-state actors, ‘in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should make reparation to the victim or compensate the state if the state has already made reparation to the victim’.<sup>285</sup> To ensure that victims are properly compensated, states should establish, strengthen or expand national funds for this purpose.<sup>286</sup>

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<sup>283</sup> Ibid

<sup>284</sup> Ibid

<sup>285</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147 para 15; Commission on Human Rights, Revised final report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political), 2 October 1997, E/CN.4/Sub.2/1997/20/Rev1. Annex III, p.22

<sup>286</sup> UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34

#### 4.3.2.2 Cessation of an ongoing violation

Cessation of violations is an essential element of the right to an effective remedy. The Committee<sup>287</sup> has held that ‘In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant’.<sup>288</sup> Accordingly, measures, beyond a victim-specific remedy may be necessary to avoid recurrence of the type of violations in question.<sup>289</sup> Such measures may require changes in the state party’s laws or practices’.<sup>290</sup> ‘Under international law, it has been disputed if guarantees of non-repetition are a reparation measure or another consequence of state responsibility’.<sup>291</sup> However, under international human rights law, non-repetition is critical in bringing relief to victims.<sup>292</sup>

*‘Guarantees of non-repetition, together with rehabilitation measures, are the most far-reaching forms of reparation that can be awarded to redress a human rights violation, with measures such as institutional reform, vetting, training of police personnel, and development programmes’.*<sup>293</sup>

This may also include practices and policies intended to protect certain categories of at risk people.<sup>294</sup>

#### 4.3.2.3 Enforcement of judgments

Enforcement of redress measures is the responsibility of the police and executive authorities and can only be deemed effective when it is implemented.<sup>295</sup> The African Commission on Human and Peoples’ Rights has asserted that ‘...an effective remedy is a crucial component of a right, as it provides victims with the procedure by which

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<sup>287</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant

<sup>288</sup> Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UNDoc. CCPR/C/21/Rev.1/Ass.13, 2004, para. 17

<sup>289</sup> Ibid

<sup>290</sup> Ibid

<sup>291</sup> Clara Sandoval, ‘The Concepts of ‘Injured Party’ and ‘Victim’ of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations’ in C. Ferstman, A. Stephens, and M. Goetz (eds.), *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making* (The Netherlands, Brill, 2009), pp. 243-282.

<sup>292</sup> Ibid

<sup>293</sup> Ibid

<sup>294</sup> Ibid

<sup>295</sup> Nowak, UN Covenant on civil and political rights:CCPR Commentary, p.73

they can assert their rights and seek reparation for the violation'.<sup>296</sup> While defining how the success of the Commission should be measured, it was determined that effectiveness should be measured by the practical outcome of cases to include how violations are addressed, '...what States should do to provide justice to the victims, what measures should be taken to prevent recurrence, and most importantly, the extent to which States comply with the rulings'.<sup>297</sup>

*'A remedy can only be deemed effective when it is implemented, if need be, by the exercise of force'.<sup>298</sup>*

In essence, without the ability to enforce judgments of courts and the decisions of administrative bodies, commissions and tribunals effective redress may not be achieved.

#### **4.4 Special attention to the vulnerable**

The central aims of an effective remedy are to ensure that individuals have access to mechanisms to vindicate their rights<sup>299</sup> and are provided reparation when Covenant rights have been violated.<sup>300</sup> In many cases, this includes judicial enforcement, particularly when it comes to protecting the most vulnerable;<sup>301</sup> whatever mechanisms are employed, they must be sufficient to give effect to the rights in the Covenant.<sup>302</sup>

To ensure the protection of vulnerable and disadvantaged groups, the United Nations human rights system has adopted a variety of instruments to specifically address groups that have been designated as vulnerable.<sup>303</sup> These include, the International

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<sup>296</sup> The African Commission on Human and Peoples' Rights, *Reaching for Justice: The Right to Reparation in the African Human Rights System*, October 2013) p.8

<sup>297</sup> *Ibid* p.5

<sup>298</sup> Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, p.73

<sup>299</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, para 15

<sup>300</sup> *Ibid* para 16

<sup>301</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Substantive issues arising in the implementation of the international Covenant on Economic, Social and Cultural Rights draft General Comment No.9: The Domestic Application of the Covenant para 10

<sup>302</sup> Nowak, UN Covenant on civil and political rights:CCPR Commentary, p.11 - 12

<sup>303</sup> Audrey R Chapman and Benjamin Carbonetti, 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 Human Rights Quarterly 682, p.684

Convention on the Rights of People with Disabilities,<sup>304</sup> the International Covenant on the Elimination of All Forms of Racial Discrimination,<sup>305</sup> the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>306</sup> the Convention on the Rights of the Child,<sup>307</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>308</sup> Article 27 of the International Covenant on Civil and Political Rights<sup>309</sup> also provides for the rights of minorities.<sup>310</sup> Additionally, the United Nations Human Rights Council and, previously, the Human Rights Commission, established a series of thematic mandates to address issues of vulnerability.<sup>311</sup> These mandates

*‘...include the appointment of special rapporteurs and independent experts on the topics of the sale of children, child prostitution, and child pornography; violence against women; contemporary forms of slavery, torture and other cruel, inhuman, and degrading punishment; trafficking in people; contemporary forms of racism and racial discrimination; human rights and extreme poverty; minority issues; and the human rights of migrants’.*<sup>312</sup>

The recognition of the special attention necessary to ensure the protection of vulnerable and disadvantaged groups has been an ongoing concern of the UN Committee on Economic, Social and Cultural Rights (CESCR).<sup>313</sup> The Icelandic

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<sup>304</sup> Convention on the Rights of Persons with Disabilities, *adopted* 13 Dec. 2006, G.A. Res. 61/106, UN GAOR, 61 Sess., Agenda Item 67(b), UN Doc. A/RES/61/106 (2006) (*entered into force* 3 May 2008).

<sup>305</sup> International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, G.A. Res. 2106 (XX), UN GAOR, 20 Sess., UN Doc. A/6014 (1966), 660 UNT.S. 195 (*entered into force* 4 Jan. 1969), *reprinted in* 5 I.L.M. 352.

<sup>306</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, UN GAOR, 34 Sess., UN Doc. A/34/46 (1980), 1249 UNT.S. 13 (*entered into force* 3 Sept. 1981).

<sup>307</sup> Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, UN GAOR, 44 Sess., UN Doc. A/44/49 (1989), 1577 UNT.S. 3 (*entered into force* 2 Sept. 1990)

<sup>308</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted* 18 Dec. 1990, G.A. Res. 45/158, UN GAOR, 45 Sess., UN Doc. A/RES/45/158 (1990) (*entered into force* 1 July 2003)

<sup>309</sup> International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), UN GAOR, 21 Sess., UN Doc. A/6316 (1966), 999 UNT.S. 171 (*entered into force* 23 Mar. 1976).

<sup>310</sup> Chapman and Carbonetti, ‘Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights’, p.684

<sup>311</sup> *Ibid* p.685

<sup>312</sup> *Ibid* p.685

<sup>313</sup> Chapman and Carbonetti, ‘Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights’



Human Rights Centre has identified 13 groups that are considered vulnerable<sup>314</sup> and may experience structural discrimination, social exclusion, stigmatisation, and deprivation of protections and entitlements on an ongoing basis and may be subject to human rights violations by the state, by others in the society, or from institutions, structural barriers, social dynamics and economic forces.<sup>315</sup> For these reasons, vulnerable groups require special protection for the equal and effective access to remedies.<sup>316</sup> Despite the continuous references to vulnerable, disadvantaged and marginalised individuals and groups, the CESCR has not provided a definition or criteria for identifying these groups.<sup>317</sup>

## **Conclusion**

The right to an effective remedy highlights the obligations discerned by HCFI (Chapter2). The above examination provides a broader framework for determining the HKSARG obligations to prevent human rights violations experienced by MDWs in Hong Kong. It also highlights the lack of due diligence exercised by the HKSARG in protecting and preventing the imposition of forced labour by private individuals and the lack of effective remedies available to victims of forced labour seeking vindication of rights.

The lack of an effective remedy available to human trafficking for forced labour under Article 4 of the Hong Kong BOR highlights several points raised above. First, merely incorporating the obligation into the Constitution or law or that it be formally recognised as is Article 4 BOR, is insufficient ‘... rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress’.<sup>318</sup> The lack of due diligence in adopting the required legislative and other measures to ensure human rights gives rise to a variety of abuses exacted on individuals and creates barriers to seeking remedies for violations of guaranteed

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<sup>314</sup> Ibid p.683, *see also* Icelandic Human Rights Centre, *The Human Rights Protection of Vulnerable Groups* (2009), 1) women and girls; 2) children; 3) refugees; 4) internally displaced persons; 5) stateless persons; 6) national minorities; 7) indigenous peoples 8) migrant workers; 9) disabled persons; 10) elderly persons; 11) HIV positive persons and AIDS victims; 12) Roma/Gypsies/Sinti; and 13) lesbian, gay and transgender people

<sup>315</sup> Ibid p.684

<sup>316</sup> Icelandic Human Rights Centre, *The Human Rights Protection of Vulnerable Groups* (2009)

<sup>317</sup> Chapman and Carbonetti, ‘Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights’, p.723

<sup>318</sup> Ibid para 24

rights. It is clear that effective deterrence of criminal acts could only be achieved by criminal law provisions and it is by this means by which similar matters would be regulated.<sup>319</sup> The lack of awareness of government organizations demonstrated that the HKSARG failed in their obligations, ‘...to ensure the principles of human rights throughout its entire ‘legal, political and institutional system’.<sup>320</sup> All the structures, through which public power is exercised, must be capable of providing judicial measures ensuring the free and full enjoyment of human rights.<sup>321</sup>

Additionally, the ICESCR Committee’s adoption of General Comment No.9 recommended that the means chosen to address violations of rights must be adequate to give effect to the rights in the Covenant.<sup>322</sup> In many cases, this includes judicial enforcement, particularly when it comes to protecting the most vulnerable.<sup>323</sup> Therefore any legislation intended to prevent, protect, investigate, punish as a remedy to forced labour must take account of the special vulnerability of MDWs.

The following chapter will examine the concept of vulnerability relying on the reports of the CESCR, case law of the ECtHR, the committee on CEDAW and the link to barriers in accessing remedies in Chapter 6.

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<sup>319</sup> Ibid

<sup>320</sup> *Chumbivilcas v Peru*, Case 10.559, Report No.1/96, (Inter-Am.Ct.H.R. 1 March 1996), OEA/Ser.L/V/II.91 Doc. 7 at 136 (1996). Para V 3

<sup>321</sup> *Velasquez Rodriguez v Honduras* (Ser. C) No.4 (1988) (Inter-AmCt.H.R.). para 166 - 167

<sup>322</sup> Ibid

<sup>323</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Substantive issues arising in the implementation of the international Covenant on Economic, Social and Cultural Rights draft General Comment No.9: The Domestic Application of the Covenant, 3 December, E/C.12/1998/24 1998 para 10

## **Chapter 5. Vulnerable Groups**

### **5.1 Introduction**

This chapter examines the links between the obligation to provide an effective remedy discussed in Chapter 4, the concept of vulnerability of disadvantaged or marginalised groups and the necessity to pay special attention to the underlying elements that make a particular individual or groups vulnerable and the response of government institutions in addressing the needs of vulnerable individuals and groups.

I will examine the concept of vulnerability and what makes migrant workers in particular a vulnerable group. To address the concept and identification of vulnerable groups, I will rely on the reports of the CESCR, emerging case law of the ECtHR which is at the forefront in setting the parameters of what constitutes vulnerable groups, the committee on CEDAW and the Council of Europe Parliamentary Assembly that specifically addresses migrant domestic workers. I will also rely on Martha Fineman's theory of vulnerability which I believe links directly to the goals of human rights instruments, and in particular state responsibility in ensuring equity and non-discrimination.

There are some overlapping elements between migrant workers and other designated vulnerable groups, however migrant workers appear to experience a wider array of overlapping vulnerability elements that may follow them into mechanisms for redress of rights violations. The barriers to accessing remedies will be discussed in Chapter 6.

In the section below, I will examine the concept of vulnerability and the emerging jurisprudence on the identification of vulnerable groups, and the protections that should be afforded to such groups under heading equalising vulnerability.

## 5.2 Concept of vulnerability

Although the concept of vulnerability is not new, there is no consensus on its definition.<sup>324</sup> Recent scholarly writings and case law have contributed to the articulation of parameters in the identification of these special groups. The jurisprudence of the ECtHR is at the forefront of shaping the understanding of this concept, and prolific writers such as Martha Fineman have provided a theoretical framework on the discourse that provides a dual lens on viewing vulnerability.

### 5.2.1 Recognition of vulnerability

Vulnerable and disadvantaged groups have frequently been victims of violations of civil and political rights which extends to economic, social, and cultural rights'.<sup>325</sup> The Committee on Economic, Social and Cultural Rights has repeatedly stressed<sup>326</sup> that the ICESCR is the appropriate vehicle for the protection of the most vulnerable and disadvantaged in society.<sup>327</sup>

These concerns are rooted in the realisation that in most societies, specific groups or individuals may be systematically denied a variety of their rights.<sup>328</sup> These groups are likely to be disproportionately affected by discrimination, social exclusion, and stigmatisation. In many cases, these violations are carried out by a state actor, and consummated via state institutions.

The CESCR has outlined a set of reporting guidelines to better evaluate the effectiveness of the implementation of Covenant rights. The guidelines, adopted in 2008, require reporting on 'disadvantaged and marginalised individuals and groups'.<sup>329</sup> In the reporting to the CESCR, migrant workers have been specifically

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<sup>324</sup> Icelandic Human Rights Centre, *The Human Rights Protection of Vulnerable Groups* (2009)

<sup>325</sup> Chapman and Carbonetti, 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights'

<sup>326</sup> Icelandic Human Rights Centre, *The Human Rights Protection of Vulnerable Groups* (2009)

<sup>327</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Substantive issues arising in the implementation of the international Covenant on Economic, Social and Cultural Rights draft General Comment No.9: The Domestic Application of the Covenant*

<sup>328</sup> Chapman and Carbonetti, 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights', p.683

<sup>329</sup> Guidelines on treaty-specific documents to be submitted by states parties under articles 1 and 17 of the International Covenant on Economic, Social and Cultural Rights, adopted 18 Nov. 2008, UN ESCOR, Comm. on Econ., Soc. & Cult. Rts., 41 Sess., 49 mtg., UN Doc. E/C.12/2008/2 (2008) [hereinafter 2008 Guidelines]

referred to in the context of the disadvantaged and marginalised when seeking information on measures to protect and ensure the rights to education and adequate food.<sup>330</sup> In this context, the terms disadvantaged and marginalised are used in the same manner as the term vulnerable, which was used in the 1991 guidelines.<sup>331</sup> The CESCR has also recognised that the ability of impoverished individuals and groups to gain access to, take part in and contribute to cultural life on equal terms is seriously restricted.<sup>332</sup> Poverty plays a significant role in the lack of awareness of individual rights and contributes to a sense of powerlessness as a consequence of their situation, therefore efforts must be taken to adopt measures to ensure adequate protection and the full exercise of the rights of people living in poverty as a matter of urgency.<sup>333</sup> The CESCR has defined poverty broadly as the lack of basic capabilities to live-in dignity and encompasses broader features such as hunger, poor education, discrimination, vulnerability and social exclusion.<sup>334</sup>

*'In the light of the International Bill of Rights, poverty may be defined as a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'.*<sup>335</sup>

In some instances, poverty arises when people have no access to resources because of who they are, what they believe or where they live. The Committee recognised that, as a means of eliminating discrimination, poverty must also be addressed. Discrimination may cause poverty, just as poverty may cause discrimination. Particular attention must be afforded vulnerable groups, as inequality may be entrenched in institutions and deeply rooted in social values that shape relationships within households and communities.

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<sup>330</sup> Ibid; see also Chapman and Carbonetti, 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights', p.688 - 689

<sup>331</sup> Ibid p.689

<sup>332</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN Doc. E/C.12/GC/21 (2009), para 38 - 43

<sup>333</sup> Ibid

<sup>334</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' 10 May 2001, E/C.12/2001/10, p.2

<sup>335</sup> Ibid p.2-3

To address the vulnerable and unequal position of people with disabilities, the CESCR in Comment No.5 stated that it was an obligation on parties to the Covenant to remove structural disadvantages and give appropriate preferential treatment to people with disabilities to enable them to achieve the objectives of full participation and equality within society.<sup>336</sup> This obligation would require additional resources be made available to ensure the guarantee of rights to people with disabilities and may require specifically tailored measures to fulfil the obligation. This principle would in all probability be applied to other vulnerable individuals and groups.<sup>337</sup> General comment No.20 on discrimination similarly stipulates that measures must be taken to attenuate or suppress conditions that perpetuate discrimination and, in some cases, there is an obligation to adopt special measures to achieve such a purpose.<sup>338</sup>

The ILO has stated that migrant workers both individually and as a group are vulnerable to human rights abuses due to inequalities determined by gender, race, ethnicity, national origin and social status.<sup>339</sup> According to the ILO, migrant domestic work is one of the least protected under national laws and lacks effective monitoring under labour laws. For migrant domestic workers who live and work in the household of the employer, the situation is critical, particularly for those in irregular or undocumented migration status. They can face language and cultural barriers in accessing information on their rights and the socio-cultural characteristics of their host country. They may be isolated from other employees and service providers, have limited access to communications, including phones or the internet, limiting communication with their families, and are restricted in their freedom of movement. They may also suffer from non-payment or withholding of wages, extremely long working hours, contract substitutions, passport retentions, violations

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<sup>336</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.5: Persons with Disabilities*, 9 December 1994, E/1995/22, para 9

<sup>337</sup> Chapman and Carbonetti, 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights', p.697

<sup>338</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No.20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, paras 8, 9

<sup>339</sup> UN ILO, 'Protecting Migrant Domestic Workers: The International Legal Framework at a Glance' 2016, see also Council of Europe Parliamentary Assembly, '*The Employment Rights of Domestic Workers, especially Women, in Europe*', *Committee on Social Affairs, Health and Sustainable Development, Draft Resolution adopted 24 April 2017*

of human dignity and fundamental freedoms, degrading treatment and violence, forced labour and trafficking for labour exploitation in the worst cases.

The Committee on the Elimination of Discrimination Against Women (CEDAW) addressed the vulnerability of migrant workers directly, indicating that their vulnerability is both cause and consequence of their experiences of sex and gender.<sup>340</sup> Female migrant workers are women who migrate independently, who migrate to join their spouses or members of their families who are also workers and undocumented, and may fall into the above categories.<sup>341</sup>

In assessing policy needs to combat discrimination of women migrant workers, policy makers should adopt a perspective based on gender inequality, traditional female roles, a gender labour market, widespread gender-based violence, the worldwide feminisation of poverty, and labour migration.<sup>342</sup> Violations occur in countries of origin, transit and destination. Female migrant workers may experience intersecting forms of discrimination, suffering not only gender-based discrimination, but also that based on racism, ethnicity, cultural particularities, nationality, language, religion or other status.<sup>343</sup>

Access to justice may also be limited due to the unresponsiveness of officials and at times through collusion between officials and perpetrators.<sup>344</sup> Workers may lose their work permits once reports of abuse or discrimination are reported to the authorities and they cannot remain in the country for trial. In addition to these formal barriers, practical barriers may frustrate access to remedies; there may be language barriers, lack of awareness of rights, a lack of mobility due to confinement at the employer's residence, lack of access to communication, isolation and lack of access to social groups.<sup>345</sup> Additionally, workers may suffer violence and abuse for long periods before the situation is exposed.

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<sup>340</sup> CEDAW Committee, *General Recommendation No.26 on Women Migrant Workers* (CEDAW/C/2009/WP. 1/R, 5 December 2008)

<sup>341</sup> Ibid p.3

<sup>342</sup> Ibid p.4

<sup>343</sup> Ibid p.6

<sup>344</sup> Ibid p.7

<sup>345</sup> Ibid p.8

### 5.2.2 Identification of vulnerability

Peroni and Timmer trace the way in which the ECtHR has characterised the concept of vulnerable groups and its implications on human rights case law.<sup>346</sup> The identification as a ‘vulnerable group’ allows courts to provide special attention to address inequalities in an effective and practical way.<sup>347</sup> As it relates to the identification of vulnerable groups, the court has examined the social, historical and institutional forces that create and perpetuates the vulnerability; whether specific actions have affected a particular group or a specific segment of society; and whether historical prejudice and stigmatisation have contributed to the harm.<sup>348</sup> Where evidence of historical prejudice and stigmatisation exists, Peroni and Timmer characterise this as ‘misrecognition’, where some individuals or groups actors are branded as inferior and excluded from a full membership in the wider society.<sup>349</sup>

According to Fraser<sup>350</sup>, one becomes a full member of society only by recognising and being recognised by another member of society. Recognition by others is essential to the development and sense of belonging as a member of society. The denial of ‘...recognition or to be “misrecognised” is to suffer both a distortion of one’s relation to one’s self and an injury to one’s identity’.<sup>351</sup> Belonging to a group that is devalued by the dominant culture, suffering repeated encounters with the stigmatising gaze of the culturally dominant, disesteemed groups internalise negative self-images which prevent them from developing a healthy cultural identity. Another identifiable harm recognised by the court is ‘maldistribution’ which constitutes an impediment to equal participation in social life and a form of social subordination and injustice in which some actors lack the necessary resources to interact with others as peers.<sup>352</sup>

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<sup>346</sup> Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11 *International Journal of Constitutional Law* 1056

<sup>347</sup> *Ibid* p.1057

<sup>348</sup> *Ibid* p.1065 - 1066

<sup>349</sup> *Ibid* p.1065

<sup>350</sup> Nancy Fraser, ‘Rethinking recognition’ (2000) 3 *New left review* 107, p.109

<sup>351</sup> *Ibid*

<sup>352</sup> *Ibid* p.16



In determining the protection to be afforded to vulnerable groups, the ECtHR's case law is identifying and developing the necessary criteria for classification of vulnerable individuals or groups. Peroni and Timmer state that the concept of vulnerable groups was introduced in 2001 in the case of *Chapman v the United Kingdom*<sup>353</sup> involving the lifestyle of the Roma community. They contend that the articulation of elements constituting vulnerability in this case has shaped the court's construction of the term, in that, 'belonging to a group whose vulnerability is constructed by broader, societal, political and institutional circumstances', which creates power imbalances and an institutional framework that fails to account for the specific needs of a minority class.<sup>354</sup>

The vulnerability of groups has also been defined by historical prejudices directed toward the group resulting in social exclusion (misrecognition).<sup>355</sup> In *D.H. and Others v the Czech Republic*<sup>356</sup> *Oršuš and others v Croatia*<sup>357</sup> and *Horváth and Kiss v Hungary*<sup>358</sup> the Court relied on historical prejudices in school segregation against these groups (Roma) citing the group's 'turbulent history and constant uprooting'.<sup>359</sup> The court also relied on a recommendation by the Parliamentary Assembly of the Council of Europe that, as a group, the Roma were continually being:

*'...subjected to discrimination, marginalisation and segregation ...in every field of public and personal life, including access to public places, education, employment, health services... [and that this type of discrimination] ...usually affects the weakest social groups'.*<sup>360</sup>

In addition to prejudice and stigmatisation, another variable in determining vulnerability is social disadvantage and material deprivation (maldistribution).<sup>361</sup> In

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<sup>353</sup> *Chapman v the United Kingdom* (App. no. 27238/95) ECtHR 18 January 2001

<sup>354</sup> Peroni and Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law', p.1063

<sup>355</sup> Ibid 1066

<sup>356</sup> *D.H. and Others v the Czech Republic* (App. no. 57325/00) ECtHR 13 November 2007

<sup>357</sup> *Oršuš and others v Croatia* (App. no. 15766/03) ECtHR 16 March 2010

<sup>358</sup> *Horváth and Kiss v Hungary* (App. no. 11146/11) ECtHR 29 January 2013

<sup>359</sup> Peroni and Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law'

<sup>360</sup> *D.H. and Others v the Czech Republic* App. no. 57325/00, par. 58

<sup>361</sup> Peroni and Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law', p.1067

*Yardanova v Bulgaria*<sup>362</sup> which involved the forced eviction of a decades-old Roma settlement from state land, the Court noted the government's argument that had they considered the Roma community's unique status and taken steps to provide housing, it could be viewed as discrimination against the majority population.<sup>363</sup> The misalignment of the argument did not escape the court that reminded the state that;

*'...the applicants are part of an underprivileged community whose problems are specific and must be addressed accordingly... The argument fails to recognise the applicants' situation as an outcast community and one of the socially disadvantaged groups'.<sup>364</sup>*

*'Such social groups, regardless of the ethnic origin of their members, may need assistance in order to be able effectively to enjoy the same rights as the majority population. As the Court has stated in the context of Article 14 of the Convention, that provision not only does not prohibit a member state from treating groups differently in order to correct 'factual inequalities' between them but, moreover, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach...'<sup>365</sup>*

In *M.S.S. v Belgium*,<sup>366</sup> an asylum seeker was returned by Belgium to Greece and held in conditions so bad that the Court concluded that it constituted inhumane and degrading treatment in violation of the ECHR.<sup>367</sup> In identifying the asylum seeker as vulnerable, the court stated in part:

*'In the present case, the Court must take into account that the applicant, being an asylum- seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'.<sup>368</sup>*

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<sup>362</sup> *Yardanova v Bulgaria* App. no. 25446/06

<sup>363</sup> Ibid par.128

<sup>364</sup> Ibid par. 129

<sup>365</sup> Ibid

<sup>366</sup> *M.S.S. v Belgium* (App. no. 30696/09) ECtHR 21 January 2011

<sup>367</sup> Ibid para 234

<sup>368</sup> Ibid para 232

This statement suggests that the court not only identified the victim as vulnerable based on his status as an asylum seeker, but also considered his past individual experience.<sup>369</sup>

The victim was wholly dependent on the state for support and therefore:

*‘...State responsibility could arise for “inhuman and degrading treatment” where an applicant, in circumstances... [finds] ...herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity’.*<sup>370</sup>

This dependency reasoning is consistent with other cases concerning prisoners and detainees.<sup>371</sup> The Court further took notice of the specific conditions existing<sup>372</sup> at the detention facility in their decision essentially establishing the exacerbation of vulnerability through government policy and conduct.<sup>373</sup>

### **5.2.3 Equalising vulnerability**

Fineman proposes an understanding of vulnerability that diverges from the traditional understanding of harm to individuals and groups where equality is narrowly defined as ‘sameness of treatment’, an anti-discrimination agenda that is remedied in the courts.<sup>374</sup> The current understanding of vulnerability is built on the narrow confines of the discrimination model concerning the autonomous and independent subject and an inattentive state that disregards underlying social inequalities.<sup>375</sup> The anti-discrimination perspective built on sameness coupled with the autonomous subject creates two issues: first the autonomous subject is viewed as one with individual choice and responsible for their own successes and failures; second, the state in respecting this autonomy adopts a passivity that ignores the

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<sup>369</sup> Peroni and Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’, p.1069

<sup>370</sup> *M.S.S. v Belgium* App. no. 30696/09

<sup>371</sup> Peroni and Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’, p.1069

<sup>372</sup> *M.S.S. v Belgium* App. no. 30696/09, par.230

<sup>373</sup> Peroni and Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’, p.1069

<sup>374</sup> Martha Albertson Fineman, ‘The vulnerable subject: Anchoring equality in the human condition’ (2008) 20 *Yale JL & Feminism* 1, p.2

<sup>375</sup> *Ibid* p.2

underling inequalities of circumstances and presumes an equivalence of position, and possibilities.<sup>376</sup>

The traditional anti-discrimination and equality approach is based on sex, race and ethnicity.<sup>377</sup> It is divisive and spawns a backlash on the part of those who perceive they are not within groups favoured by this approach to equal protection and claims of reverse discrimination<sup>378</sup> as the protections do not cover everyone.<sup>379</sup> For true equality to exist, Fineman proposes that the argument should be reframed in terms of advantages and privileges conferred on segments of the population through the respective state's policies and its institutions.<sup>380</sup>

Vulnerability is often associated with victimhood, deprivation and dependency intended to protect populations such as those infected with HIV-AIDS, people living in poverty or confined in prisons or other state institutions, children and the elderly.<sup>381</sup>

Fineman postulates that vulnerability is a naturally occurring human condition that afflicts all in society, is inevitable and, if viewed universally, has the potential to provide a more robust framework for equal protection. We are vulnerable as a result of our mere existence, faced constantly with the possibility of harm ranging from the mild to severe either by accident or intentionally. Vulnerability is beyond our control, we can mitigate it but we cannot escape it.

Taking into consideration the constant possibility of harm, '...vulnerability mandates that politics, ethics, and law be fashioned around a complete, comprehensive vision of the human experience if they are to meet the needs of real-life subjects...'<sup>382</sup> To ensure that the issue of concern is addressed, the focus by the state should be on ensuring that its policies and institutions are structured in such a manner to ensure no

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<sup>376</sup> Martha Albertson Fineman, 'The vulnerable subject and the responsive state' (2010) 60 *Emory LJ* 251, p.2

<sup>377</sup> Fineman, 'The vulnerable subject: Anchoring equality in the human condition', p.3

<sup>378</sup> Fineman, 'The vulnerable subject and the responsive state', p.5

<sup>379</sup> Fineman, 'The vulnerable subject: Anchoring equality in the human condition', p.4

<sup>380</sup> *Ibid* p.1

<sup>381</sup> *Ibid* p.8

<sup>382</sup> *Ibid*

group is gaining impermissible advantages at the expense of other groups.<sup>383</sup> This shift in perspective not only brings scrutiny to individual actions, but also to institutions ensuring that assets are not being provided unequally, even if unintentionally.

Peroni and Timmer suggest that there is a tension between Fineman's theory and the legal literature on vulnerability. The court uses vulnerability to define particular groups in need of protection but Fineman's approach is universal vulnerability.<sup>384</sup> To make sense of the paradox, they rely on a ECtHR judge who, when asked about the court's reasoning, replied '[a]ll applicants are vulnerable, but some are more vulnerable than others'.<sup>385</sup>

This paradox that Peroni and Timmer debated can be seen in *Yardanova v Bulgaria*<sup>386</sup> and Fineman's concern over reverse discrimination. The court recognised that the government's argument that housing assistance to the Roma could be viewed as discrimination against the majority population was without merit. The government was not only required to provide measures tailored to bring relief to the Roma, but was also responsible for attempting to correct existing inequalities and recognising their status as a socially disadvantaged group. However, there may never have been a paradox in Fineman's theory and the Court's reasoning. Human rights courts have consistently done two things through their judgments; bring relief to victims and hold states accountable for their actions. The accountability of states for harms resulting from commission or omission in state responsibility often requires changes in law, policy or resources to ensure full compliance with state obligation.

While Peroni and Timmer finally embrace, and rightly so, the concept of universal vulnerability, Fineman's theory may not have been to define vulnerability, but rather to re-define the argument on equality. The back-footed approach in identifying and justifying vulnerable groups creates gaps in which reverse discrimination claims can occur. If the concept of universal vulnerability is accepted, then everyone is equally

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<sup>383</sup> Ibid p.18

<sup>384</sup> Peroni and Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law', p.1060

<sup>385</sup> Ibid

<sup>386</sup> *Yardanova v Bulgaria* App. no.25446/06

vulnerable and the argument of equality shifts to why some are benefiting disproportionately from a skewed manner in which institutions create, reinforce and sustain privileges and disadvantages.

Fineman<sup>387</sup> argues that this new regime to refocus on institutional and structural advantages and disadvantages would require changes in political culture. The responsibility in structuring this imperative would fall on the legislature and executive branches for primary manifestation and ultimate monitoring by the courts to ensure fulfilment of responsibility in assessing individual equality claims. State institutions collectively are important in lessening, ameliorating and compensating for vulnerability. Together, they provide assets which can be viewed as advantages, coping mechanisms, or resources that allows us to withstand misfortunes, disaster and violence.

According to her, these assets include physical assets that provide financial means, property and other material goods, and human assets focused on individual capabilities developed to allow us to make the best of a given situation, for example health and educational institutions and employment systems.<sup>388</sup> These assets allow the development of the human being to participate in the market facilitating the accumulation of material resources that enhance the ability to withstand vulnerabilities. Lastly, social assets are networks of relationships that provide support and include family and other cultural groups and associations.<sup>389</sup> Social assets are also accumulated through political parties and trade unions as a means of strengthening resilience. Institutions that are responsible for conferring assets are brought into legal existence through regulation and the mechanisms of the state. Since the state is responsible for conferring these assets through their institutions, there should be greater vigilance in ensuring equitable distribution and they should be held accountable for individual and institutional vulnerability.

Within the asset conferring institutions, Fineman believes that individuals are placed and treated differently with some enjoying more privileges than others who are

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<sup>387</sup> Fineman, 'The vulnerable subject: Anchoring equality in the human condition'

<sup>388</sup> Ibid p.14

<sup>389</sup> Ibid p.15

relegated to disadvantaged positions. Privileges and disadvantages overlap and accumulate across asset conferring systems devastating some while benefiting others. She makes the point that, in some instances, assets conferred in one system may mitigate disadvantages in other systems; for example, education may mitigate poverty, particularly when linked to strong social networks. Vulnerability does not occur because of the intersection of multiple identifiers such as race, class or sexual orientation, but rather as a result of the intersecting of systems of power and privileges that creates webs of advantages and disadvantages.<sup>390</sup> The resources provided by institutions are the assets that create the capacity to the full enjoyment of rights despite naturally occurring vulnerabilities.<sup>391</sup> It is therefore critical that these institutions operate in a non-discriminatory manner that does not favour or disadvantage individuals or groups. The institutions should be structured in such a manner that they that are capable of responding equally and, if they do not, they must justify the inequality or act appropriately to remedy the disadvantages.<sup>392</sup>

## **Conclusion**

Government institutions possess considerable leverage in ensuring the protection of vulnerable individuals and groups and ensuring equity and equality in treatment. MDWs like other groups in most societies may be systematically denied a variety of their rights<sup>393</sup> and disproportionately affected by discrimination, social exclusion, and stigmatisation. The supervisory body of ICESCR has recognised that those disadvantaged by poverty lack the ability to gain access to, take part in and contribute to cultural life on equal terms with others in society.<sup>394</sup> Poverty contributes to a lack of awareness of individual rights and contributes to a sense of powerlessness as a consequence of their situation, therefore efforts must be taken to adopt measures to ensure adequate protection and the full exercise of the rights of

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<sup>390</sup> Ibid p.16

<sup>391</sup> Ibid p.18

<sup>392</sup> Ibid p.19

<sup>393</sup> Chapman and Carbonetti, 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights', p.683

<sup>394</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN Doc. E/C.12/GC/21 (2009), para 38 - 43

people living in poverty as a matter of urgency.<sup>395</sup> It is an obligation on parties to the Covenant to remove structural disadvantages and give appropriate preferential treatment to vulnerable groups and individuals to enable them to achieve the objectives of full participation and equality within society.<sup>396</sup>

MDWs are viewed as inferior and excluded from full membership in society.<sup>397</sup> This view can be recognized in the *ZN v Secretary of Justice and Others* where the implications of the applicant's membership as an inferior caste member was noted along with the imbalance in power between the applicant and the employer, the low economic status and unfamiliarity with the system and structures in Hong Kong, the psychological and economic constraints exerted by the employer, the state of dependency, restriction of movement and isolation that limited the ability to a normal life<sup>398</sup> and full enjoyment of rights.

Considering the vulnerable position of MDWs, a comprehensive vision of the MDW's experience must be taken into account to protect and ensure they are not being taken advantaged of by those more powerful members of society or adversely affected by government policy in accumulating the necessary assets to lift themselves and their families out of poverty. To ensure that MDWs are receiving their fair share of the assets owed to them and are not being disadvantaged while the employers benefit off of the disadvantage, the government institutions must ensure that the apparatus that regulates the MDW scheme and tasked with ensuring the prevention, protection, and remedy of labour rights violations are responding appropriately to remedy any disadvantage.

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<sup>395</sup> Ibid

<sup>396</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.5: Persons with Disabilities*, 9 December 1994, E/1995/22, para 9

<sup>397</sup> Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 *International Journal of Constitutional Law* p.1065

<sup>398</sup> *ZN v Secretary for Justice and Others*, HCAL15B/2015, para 160



## Chapter 6. Barriers to Remedies

### 6.1 Introduction

This Chapter examines the link between vulnerable groups and individuals, and barriers<sup>399</sup> to remedies, which include the use of formal and informal mechanisms such as conciliation. Barriers to remedies generally and disproportionately affect the vulnerable who are most at risk of abuse, are the least able to protect themselves against harm and are more likely to be ignored by policy makers.<sup>400</sup>

Barriers to remedies may manifest in ways such as unaffordable costs associated with legal representation, administrative and other costs or fees for filing claims, or be directly linked to the lack of financial resources.<sup>401</sup> Studies that focus on unrepresented litigants have found that, in some courts, the majority of litigants who were without legal representation and identified themselves as racial or ethnic minorities were women and poor.<sup>402</sup> This factor has a ripple effect that reaches into every aspect of the formal and informal justice processes.

Galanter<sup>403</sup> proposes that barriers to accessing remedies are related to the fact that an injured party may not perceive the injury as attributable to a decision of another individual, they may be ignorant about their rights or suffer intimidation, and cost barriers may prevent a party from making a claim, pursuing a dispute or obtaining legal help. Similarly, Murphy<sup>404</sup> identifies cost, lack of access to legal aid, lack of representation, delay, complexity of proceedings and paperwork, lack of awareness

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<sup>399</sup> Identified barriers have been adopted from the United Nations Development Programme 'Access to Justice', Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice' (2012); J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)*.

<sup>400</sup> Michael R Anderson, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' (2003)

<sup>401</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice' (2012)

<sup>402</sup> Elisabeth L MacDowell, 'Reimagining Access to Justice in the Poor People's Courts' (2014) 22 *Geo J on Poverty L & Pol'y* 473, p.495; see also Deborah L Rhode, *Access to justice* (Oxford University Press 2004), p.3 - 'Groups that are the most politically vulnerable are now the most legally vulnerable ... include prisoners, undocumented aliens, women seeking abortions and desegregation plaintiffs'

<sup>403</sup> Marc Galanter, 'Access to justice in a world of expanding social capability' (2010) 37 *Fordham Urb LJ* 115, p.118

<sup>404</sup> Jane C Murphy, 'Access to Legal Remedies: The Crisis in Family Law' (2009)

of rights and process for low- and moderate-income litigants as barriers to accessing remedies. Rhode<sup>405</sup> also identifies legal representation, system inefficiency, cost of representation and malpractice as impediments to access to justice. She reiterates that the poor experience more legal difficulties and their cases take on a special urgency since individuals living on the economic margins are less likely to ‘lump it’ when they are impeded from accessing remedies.<sup>406</sup>

There are many overlapping elements in a variety of available literature on barriers to remedies, however, they do not seem to capture the varied and overlapping elements associated with the vulnerability of migrant workers. The wide array of overlapping elements of barriers to remedies described below has been found to adequately reflect the migrant workers condition. The list of barriers has been compiled from several studies, reports and literature related to access to justice for vulnerable, poor or disadvantaged groups.<sup>407</sup>

There is wide agreement that the disadvantaged are less likely to have the education, skills, and self-confidence to handle legal problems effectively without assistance.<sup>408</sup> According to Carmona, the lack of access to information and the lack of recognition or awareness of guaranteed rights impedes access to remedies for the most marginalised in society and other barriers occur due to institutional and structural deficiencies in the design and operation of justice and resolution mechanisms; these include lack of legal frameworks, inadequate capacity and awareness of police, courts and prosecutors, corruption, lack of enforcement of judicial rulings and others.<sup>409</sup> Access to justice requires a substantially greater effort in money and time for disadvantaged groups and the lack of quality education, reduced access to information and limited political influence translates into lower levels of knowledge

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<sup>405</sup> Rhode, Access to justice

<sup>406</sup> Deborah Rhode, ‘Access to justice: Connecting principles to practice’ (2003) 17 *Geo J Legal Ethics* 369, p.377

<sup>407</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, ‘General Recommendation on women’s access to justice’ (23 July 2015) UN Doc CEDAW/C/GC/33; Anderson, ‘Access to justice and legal process: making legal institutions responsive to poor people in LDCs’; Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’, Julinda Beqiraj and Lawrence McNamara, *International Access to Justice: Barriers and Solutions*, 2014)

<sup>408</sup> Rhode, ‘Access to justice: Connecting principles to practice’, p.377

<sup>409</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’

of rights and the legal system.<sup>410</sup> In summary, access to remedies requires a comprehensive and holistic approach that must incorporate broader structural, social, cultural and institutional factors to ensure equity so that one segment of society is not benefiting from privileges at the disadvantage of others.<sup>411</sup>

Many jurisdictions have made use of informal alternative mechanisms for resolving disputes and have either mandated it as a first step to resolution or as an optional mechanism available for those willing to use it. These alternative mechanisms were developed as an alternative to the formal court system and include mediation, conciliation, arbitration and collaborative resolutions of disputes.<sup>412</sup> The central question on the use of informal and formal mechanisms regarding vulnerable groups is, which mechanism offers the best procedural and substantive protections?

In the following Sections, I will examine three categories of barriers to remedies; social and cultural, institutional and structural. I will also bear in mind the discourse on alternative mechanisms of dispute resolution as the preferred method of resolving labour rights violations is conciliation, an informal resolution process where there is a lack of procedural and substantive protections for vulnerable individuals and groups. The structural framework for this section was adapted from Beqiraj and McNamara's *Access to Justice* study.<sup>413</sup>

## **6.2 Social and cultural barriers**

Beqiraj and McNamara believe that social and cultural barriers are reflected from wider society and characteristic of the particular jurisdiction, including economic factors, income, inequality gaps, ethnicity, nationality, religion, literacy and education. Poverty, illiteracy and discrimination are widely identified as obstacles to a remedy and overlap, and when go unaddressed result in the disempowerment and lack of awareness of rights and an actual or perceived subordination to the more powerful in the community. These factors cannot be ignored as they have an adverse

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<sup>410</sup> Ibid p.6

<sup>411</sup> Fineman, 'The vulnerable subject: Anchoring equality in the human condition', p.13

<sup>412</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation on women's access to justice' (23 July 2015) UN Doc CEDAW/C/GC/33, p.21

<sup>413</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

effect on vulnerable and disadvantaged groups. Social and cultural barriers are linked to poverty and create socioeconomic subordination, a lack of willingness to seek a remedy out of fear of reprisals from the more privileged in society, a lack of awareness of rights, discrimination and a lack of understanding in proceedings as a result of language barriers.

### **6.2.1 Poverty and socioeconomic subordination**

‘Poverty is both a cause and consequence of inadequate levels of access to justice’.<sup>414</sup> According to Beqiraj and McNamara, reduced human and financial resources by the government results in an inefficient and ineffective civil justice system. These failures have a disproportionate impact on the disadvantaged who lack the resources to overcome these systemic failures and navigate the state institutions. Carmona argues that the impact of poverty is magnified by multi-dimensional structural and societal impediments extend beyond low income, and include other elements such as literacy, access to information, limited political influence, stigmatisation, discrimination, powerlessness, economic dependence on others and their subordination to other groups, people and organisations.<sup>415</sup> Additionally, when access to remedies is denied, the disadvantaged are unable to secure their economic and social rights, unable to avoid exploitation and are forced to accept unjust settlements.

### **6.2.2 Fear of reprisal (penalties)**

Carmona believes that vulnerable individuals or groups may choose not to seek a remedy because they fear reprisal or sanctions from more powerful actors inside and outside the civil justice system or their community, and that that fear prevents vulnerable groups from asserting their right to seek a remedy.<sup>416</sup> People who have been in forced labour or trafficked or have an illegal migration status may be led to believe they will be imprisoned or arrested, building on fears of mistreatment by the

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<sup>414</sup> Ibid

<sup>415</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’

<sup>416</sup> Anderson, ‘Access to justice and legal process: making legal institutions responsive to poor people in LDCs’, p.4

authorities or elites in their home countries or abroad.<sup>417</sup> Victims often endure long periods of abuse and exploitation without complaint.<sup>418</sup> People who have experienced the most severe forms of abuse are more likely to seek remedies because at that stage they may identify as a victim, motivated to seek a remedy or empowered through support providers.<sup>419</sup> Vulnerable individuals living in constant fear and insecurity are more prone to making short term economic decisions, have an aversion to risk, and lack trust in the institutions that may assist them.<sup>420</sup>

### 6.2.3 Lack of awareness of rights

The lack of awareness and understanding of legal rights and the ways that these rights can be secured in judicial and administrative forums impedes full enjoyment of the rights and pursuit of a remedy.<sup>421</sup> Victims raised in poverty may not have acquired the necessary tools and basic knowledge to assert their rights and be unaware of the obligations of governments toward them.<sup>422</sup> They may also lack sufficient literacy and education that is the foundation of empowerment and increases the individual's capacity to understand and exert their legal rights.<sup>423</sup> The lack of these two factors reduces accumulation of economic resources and the capacity to understand and enforce rights that translates in to a denial of legal remedies.<sup>424</sup>

To mitigate this deficiency and ensure the protection and realisation of rights for the most vulnerable, states must ensure access to information for the public generally

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<sup>417</sup> Hannah Andrevski, Jacqueline Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study' (2013) *Trends and Issues in Crime and Criminal Justice* 1

<sup>418</sup> Satterthwaite, 'Crossing borders, claiming rights: using human rights law to empower women migrant workers' p.47

<sup>419</sup> Andrevski, Larsen and Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study'

<sup>420</sup> Anderson, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs' p.4

<sup>421</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>422</sup> Ibid

<sup>423</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

<sup>424</sup> Ibid

through easily accessible and effective means,<sup>425</sup> taking into consideration these two factors and particularly language barriers of those needing the information. The public must also be made aware of laws and have access to material relating to judgments, trial transcripts and adjudication procedures.<sup>426</sup> Vulnerable groups cannot effectively seek remedies for harms when they do not know their rights and entitlements under the law.<sup>427</sup> Information concerning remedies must be made available and intelligible to them and serve their practical purposes.<sup>428</sup> Without effective access to legal information and advocacy to minimise the imbalance that the lack of awareness creates, vulnerable groups risk effectively being deprived of remedies for harms.<sup>429</sup>

The accessibility to information alone is insufficient and the state has the duty to address costs, waiting periods, and interaction with government officials which can act as disincentives for the most disadvantaged in society.<sup>430</sup> States rarely consider the financial, technological, linguistic and geographical challenges experienced by the poor.<sup>431</sup> The government may fail to inform the public about their rights and entitlements or they lack capacity to comply with their obligations.<sup>432</sup>

#### **6.2.4 Discrimination**

Discrimination is an obstacle that affects all aspects of accessing a remedy.<sup>433</sup> It can be legislated against, but its elimination requires more substantial efforts to empower the disadvantaged through awareness and acknowledgement of their rights. In times of economic uncertainty, discrimination becomes a political and social issue, and

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<sup>425</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'; see also UNGA, 'Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', para. X

<sup>426</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>427</sup> United Nations Development Programme, 'Access to Justice: A practice note' (2004)

<sup>428</sup> Ibid

<sup>429</sup> Marjorie Mayo and others, *Access to Justice for Disadvantaged communities* (Policy Press 2015), Intro p3.

<sup>430</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>431</sup> Ibid

<sup>432</sup> United Nations Development Programme, 'Access to Justice: A practice note' (2004), p.10

<sup>433</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

thus measures need to be taken to address inequality and exclusion through a legal framework as a long-term strategy and part of government policy<sup>434</sup> to ensure equal and consistent treatment. Discrimination affects some segments of society more drastically due to their unique characteristics, such as ethnic and racial minorities and migrants who face barriers to claiming and enforcing their rights. Barriers to remedies may be as a result of race, gender or ethnicity, but discriminatory policies that place already disadvantaged groups at a further disadvantage reinforce or exacerbate their disadvantaged status and treatment.<sup>435</sup>

### **6.2.5 Language**

Many people find it difficult to understand judicial processes, terminology, sequences of events and the manner of presenting information to an adjudicator. The complexities and intimidation are exacerbated when the proceedings are conducted in a language not familiar to litigants, especially in a multilingual and multi-ethnic society.<sup>436</sup> Many of the services available to low-income individuals prove to be unusable due to a lack of proficiency in language skills, even when computer services are available. This barrier is exacerbated by rules that prohibit clerks from assisting out of fear that it may be viewed as giving legal advice to unrepresented litigants.<sup>437</sup>

Social relationships are also affected as it is often confined to those who share the same language contributing to isolation.<sup>438</sup> Linguistic barriers also prevent vulnerable groups from contacting the authorities out of fear of being treated differently.<sup>439</sup> Even when interpreters are used, these services may not be sufficient to counter communication problems with officials and depends on the degree to which interpreters act professionally and are unbiased.<sup>440</sup> Interpreters are not routinely available in crisis encounters, thus if an interested party calls the police,

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<sup>434</sup> Ibid

<sup>435</sup> Magdalena Sepúlveda Carmona and Kate Donald, 'Access to justice for persons living in poverty: a human rights approach' (2013) Ministry for Foreign Affairs, Finland 8, p.30

<sup>436</sup> Sepúlveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>437</sup> Rhode, Access to justice

<sup>438</sup> Edna Erez and Carolyn Copps Hartly, 'Battered immigrant women and the legal system: A therapeutic jurisprudence perspective' (2002) 4 *W Criminology Rev* 155, p.157

<sup>439</sup> Ibid p.158

<sup>440</sup> Ibid p.159

unless the officers are versed in the complainant's language or have interpreters available, the officers are likely to gather necessary information from the party that is best able to communicate in the familiar language and may control the outcome of the incident.<sup>441</sup> In these situations, decisions and services rendered by the police are frequently based on incomplete information and can also undermine the justice system's processes. Litigants in such situations can often be persuaded to accept inappropriate or second-best legal remedies or solutions, persuaded to waive their rights or sign documents that are not in their best interests.<sup>442</sup>

### **6.3 Institutional barriers**

Institutional barriers are linked to governmental policy and resources dedicated to the structure and operation of the country's justice and dispute resolution systems.<sup>443</sup> These barriers exist as a result of inadequate or non-existent legal frameworks, inadequate administrative structures lacking resources or effective management, limited judicial capacity, inadequate training of the judiciary and other officials resulting in poorly reasoned, inconsistent and biased decisions.<sup>444</sup> Other factors concern the inadequate geographical distribution of resolution forums affecting physical access. The lack of diligence in recognising rights-holders and recording complaints that affects vulnerable groups leads to impunity for perpetrators of violations in contrast to victims who are disregarded or mistreated.<sup>445</sup>

#### **6.3.1 Legal framework – recognition of rights**

The most basic right in seeking a remedy is the recognition of the individual as the bearer of rights. Legal norms can determine people's choices.<sup>446</sup> For many disadvantaged groups, existing legal frameworks – formal, traditional and informal – are inadequate for providing justice.<sup>447</sup> For legal frameworks to be effective, they must be in conformity with human rights principles.<sup>448</sup> The rule of law not only

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<sup>441</sup> Ibid

<sup>442</sup> Ibid

<sup>443</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

<sup>444</sup> Ibid

<sup>445</sup> Ibid

<sup>446</sup> United Nations Development Programme, 'Access to Justice: A practice note' (2004)

<sup>447</sup> Ibid

<sup>448</sup> Ibid



ensures life and personal security, it also provides a stable framework of rights and obligations to be effectively realised.<sup>449</sup>

The requirement that states adopt legislative, judicial, administrative, educative and other appropriate measures to fulfil the state's positive obligations<sup>450</sup> is the mitigating factor for barriers to remedies. An effective legal framework is essential and must appropriately criminalise offenses, provide clear definitions, give avenues for protection and support appropriate and proportionate penalties.<sup>451</sup> These legal frameworks must also include regulatory systems and monitoring schemes to prevent or stop violations.<sup>452</sup> In crafting legislation, legislators may not take into account the issues that negatively affect vulnerable groups and may enact laws that reflect and reinforce the interests of the powerful in society.<sup>453</sup> These laws are often biased against the poor and do not recognise or prioritise their rights or abuses they suffer which results in a disproportionate impact on them (impermissible advantages).<sup>454</sup>

A redress system based on prejudices is incapable of protecting vulnerable groups and serves only to undermine guaranteed rights and autonomy and to control and segregate them by class.<sup>455</sup> The lack of laws or lack of enforcement of laws aimed at protecting economic, social and cultural rights and discrimination on socioeconomic status is not recognised in many countries, and significantly impedes the pursuit of a remedy.<sup>456</sup> The equal protection and access for all seeking equitable outcomes cannot be achieved if underlying structural inequalities arising from gender, race, ethnicity and social class divisions are not addressed.<sup>457</sup> When countries do not implement

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<sup>449</sup> Anderson, 'Access to justice and legal process: making legal institutions responsive to poor people in LDCs', p.2

<sup>450</sup> Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc), para 7

<sup>451</sup> Andrevski, Larsen and Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study'

<sup>452</sup> Satterthwaite, 'Crossing borders, claiming rights: using human rights law to empower women migrant workers' p.12

<sup>453</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice' p8

<sup>454</sup> Ibid

<sup>455</sup> Ibid p9

<sup>456</sup> Ibid

<sup>457</sup> Anne Phillips, Multiculturalism, universalism and the claims of democracy (United Nations Research Institute for Social Development 2002), p2-3, see also, Marjorie Mayo and others, 'Accessing social justice in disadvantaged communities: dilemmas for Law Centres in the context of public service modernisation' (2012) p.4

legislation that defines and criminalises offenses recognised under international law and other types of exploitative conditions, it impedes the investigation and prosecution of violations and contributes to a system of impunity.<sup>458</sup> A lack of strong legal frameworks perpetuates other social and cultural, institutional and structural barriers.

### **6.3.2 Accessibility**

Physical accessibility of courts, police stations and government organisations is usually challenging for the poor as they live-in rural areas with few government services.<sup>459</sup> Available literature supports this viewpoint, however there is a definite gap in the literature, particularly when it relates to migrant workers in domestic work. Migrants who ‘live-in’ with their employers may have restrictions placed on them that restrict their movement<sup>460</sup> and access to assistance from the authorities. This restriction results in the same effect as if they were physically isolated.

### **6.3.3 Judicial and adjudicatory independence and review**

Judicial independence is critical for a well-functioning justice system that is free from outside influence and where judges are capable of discharging their duties in a fair and impartial manner.<sup>461</sup> The accountability of decision makers – in particular, the judiciary – encompasses two principles, answerability and enforcement.<sup>462</sup> First, answerability requires public officials to provide information about their activities and give valid reasons for their actions.<sup>463</sup> Secondly, enforcement is the ability to sanction wrongdoers and to issue authoritative decisions clarifying which actions are legal or illegal.<sup>464</sup> There are rarely mechanisms available to review social policies or

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<sup>458</sup> Andrevski, Larsen and Lyneham, ‘Barriers to trafficked persons’ involvement in criminal justice proceedings: an Indonesian case study’

<sup>459</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’

<sup>460</sup> UN ILO, ‘Protecting Migrant Domestic Workers: The International Legal Framework at a Glance’ 2016, see also Council of Europe Parliamentary Assembly, ‘*The Employment Rights of Domestic Workers, especially Women, in Europe*’, *Committee on Social Affairs, Health and Sustainable Development, Draft Resolution adopted 24 April 2017*

<sup>461</sup> Andrevski, Larsen and Lyneham, ‘Barriers to trafficked persons’ involvement in criminal justice proceedings: an Indonesian case study’

<sup>462</sup> Anderson, ‘Access to justice and legal process: making legal institutions responsive to poor people in LDCs’, p.6

<sup>463</sup> Ibid

<sup>464</sup> Ibid

administrative decisions that affect the enjoyment of rights, especially for the disadvantaged.<sup>465</sup> The lack of remedies especially for social, economic and cultural rights domestically, is perceived as a charitable gesture instead of a justiciable right guaranteed by international human rights instruments.<sup>466</sup> To ensure that decisions are in conformity with the constitution, higher court judges are empowered through legislation to check that decisions are based on the law.<sup>467</sup>

#### **6.3.4 Legal assistance and representation – effective claiming**

Access to legal advice and representation is a fundamental principle of access to a remedy, ensuring equality and due process.<sup>468</sup> Where individuals do not have adequate resources, a lack of legal assistance may severely hamper the effective assertion of their rights, and therefore legal assistance should be provided in criminal and civil processes for effective judicial protection.<sup>469</sup> A lack of civil legal assistance is a significant barrier to a remedy when the vulnerable are unable to assert their rights in a variety of proceedings concerning abusive working conditions or discrimination in the workplace.<sup>470</sup> These disputes have a significant effect on marginalised individuals, and so assistance is particularly useful in civil claims where the processes are complex and paperwork is difficult.<sup>471</sup> Legal awareness can help disadvantaged groups understand that they have justiciable rights.<sup>472</sup> However, in pursuing these rights, legal awareness needs the intervention of both government and civil society in implementing schemes to ensure effective representation.<sup>473</sup> In instances where legal aid is provided to vulnerable individuals, the quality of care is undermined by inadequate allocation of human and financial resources.<sup>474</sup>

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<sup>465</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’

<sup>466</sup> Ibid

<sup>467</sup> Anderson, ‘Access to justice and legal process: making legal institutions responsive to poor people in LDCs’, p.7

<sup>468</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’

<sup>469</sup> Ibid

<sup>470</sup> Ibid

<sup>471</sup> Ibid

<sup>472</sup> United Nations Development Programme, ‘Access to Justice: A practice note’ (2004)

<sup>473</sup> Ibid

<sup>474</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’, p.15

### **6.3.5 Lack capacity and awareness of government**

Insufficient financial, human resources and functional structure in the police, courts and prosecution services exacerbated by the lack of training in all areas of government, limits access to a remedy for many victims.<sup>475</sup> These deficiencies including the delays in resolution, ineffective investigation and evidence collection, lack of enforcement and abuse of official positions undermine the justice process and translates into denial of rights.<sup>476</sup> Lack of capacity and resources also creates an overburdened justice system and encourages the rejection of complaints, especially for the disadvantaged ‘...owing to bias and discrimination’.<sup>477</sup> Faced with power imbalances and discrimination rooted in cultural norms and social structures, disadvantaged groups are ill-served by the lack of training afforded to those tasked with resolving their particular conditions.<sup>478</sup>

### **6.3.6 Fees, cost and claiming**

Those in poverty experience costs which they cannot afford associated with claiming their rights, constituting a major barrier for vulnerable individuals.<sup>479</sup> Fees and costs are required for travel, filing claims, photocopies and legal documentation. The possibility of losing a claim where the unsuccessful party is often required to pay the legal costs of the prevailing party is unaffordable for vulnerable individuals, and acts as a disincentive in pursuing claims.<sup>480</sup> To mitigate this impediment, economic barriers should be removed by ensuring legal aid is available and reducing the cost for issuing and filing documents and court costs for low-income people and waived for those living in poverty.

Effective operation of the justice chain is dependent on effective processes and administrative systems to register claims.<sup>481</sup> Barriers to claiming can arise when there are too few staff, processes are unreliable, or staff and the judiciary lack the

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<sup>475</sup> Ibid

<sup>476</sup> Ibid

<sup>477</sup> Ibid

<sup>478</sup> Ibid par. 44

<sup>479</sup> Ibid

<sup>480</sup> Ibid p.13

<sup>481</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

appropriate training.<sup>482</sup> Inability to access the justice system can arise at the earliest stages of the remedy process with a failure through corruption to accurately register the complaint or action being claimed or minimise the harm caused.<sup>483</sup> Difficulties in commencing legal action are particularly challenging for disadvantaged groups especially when there are language barriers or claimants belong to a group that is subjected to discrimination.<sup>484</sup>

### **6.3.7 Lack of corroborative evidence**

Lack of corroborative evidence significantly hampers the pursuit of a remedy. Migrant workers who live-in are frequently the only ones able to recount the abuses and circumstances of their employment or termination, ‘...yet, their testimony is often not enough to meet the burden of proof or credibility for prosecution or benefit of doubt’.<sup>485</sup> MDWs may initially have difficulties recounting instances of abuse and may not seem credible to authorities. However, in instances where individuals have experienced trauma, it is common for them to provide inconsistent statements when they are first identified as victims and interviewed by authorities.<sup>486</sup>

### **6.3.8 Enforcement**

Enforcement is key in minimising the insecurity of the disadvantaged and is a precondition for accountability and the mitigation of impunity.<sup>487</sup> Many of the problems in formal and informal justice mechanisms are related to ineffective enforcement mechanisms both in enforcement of existing laws and enforcement of adjudicatory awards.<sup>488</sup> Through lack of enforcement and oversight of government processes and ill-conceived policies, it is difficult for disadvantaged groups to bring claims as the government creates a ‘zero risk’ victim, perpetuating impunity where

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<sup>482</sup> Ibid

<sup>483</sup> Ibid

<sup>484</sup> Ibid

<sup>485</sup> Andrevski, Larsen and Lyneham, ‘Barriers to trafficked persons’ involvement in criminal justice proceedings: an Indonesian case study’, p.6

<sup>486</sup> Ibid

<sup>487</sup> United Nations Development Programme, ‘Access to Justice: A practice note’ (2004)

<sup>488</sup> Ibid

perpetrators can coerce and exert exploitative acts without punishment.<sup>489</sup> The government should ensure the prompt enforcement of remedies.<sup>490</sup>

## **6.4 Structural barriers**

Some barriers are a result of broader social and cultural structures and some are specific to justice systems, but some occur at the intersections of these structures.<sup>491</sup> These barriers may not be attributable on one specific and identifiable factor but are cumulative; they have a significant impact on the ability to seek remedies. These barriers relate to stigmatisation, corruption, formalism, delays, legal standing and distrust of authorities.

### **6.4.1 Stigma, and lack of understanding of the needs of the poor**

In some instances, victims may be reluctant to identify themselves as such due to feelings of shame or rejection by family or community members.<sup>492</sup> Some may identify with their abusers and not acknowledge they have been mistreated.<sup>493</sup> Victims may also feel responsible if they entered into an employment situation that turns abusive and may also be reluctant to identify themselves as a victim.<sup>494</sup>

Law enforcement, courts and government personnel reflect the prejudices of wider society and are not adequately informed and trained to conduct the government's business without imposing these discriminatory attitudes toward people of lesser social and economic status.<sup>495</sup> Justice sector staff's daily lives and background are drastically different from those of MDWs who migrate to escape poverty and who are there to serve them.<sup>496</sup> Without proper training and sensitisation, these officials do not understand and value the choices, behaviours and problems of vulnerable

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<sup>489</sup> Platform for International Cooperation on Undocumented Migrants, 'Undocumented Migrant Women's Lack of Access to Justice in Europe' 54 Session of the Committee on the Elimination of Discrimination Against Women, (Geneva 2013)

<sup>490</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation on women's access to justice' (23 July 2015) UN Doc CEDAW/C/GC/33

<sup>491</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

<sup>492</sup> United Nations Development Programme, 'Access to Justice: A practice note' (2004)

<sup>493</sup> Andrevski, Larsen and Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study'

<sup>494</sup> Ibid

<sup>495</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>496</sup> Ibid

individuals and may be influenced by the negative stigma and stereotyping associated with a perceived low social status.<sup>497</sup> The police are often the most common interface for those seeking a remedy, but their actions and procedures frequently treat complaints as trivial and vulnerable individuals are not treated as individuals with rights whose access to remedies should be protected, respected facilitated.<sup>498</sup>

#### **6.4.2 Corruption**

Weak institutional practices or prevalent corruption due to a lack of appropriate oversight contributes to corrupt practices that deny remedies to victims.<sup>499</sup> In many countries where judicial and law enforcement functions are overburdened, corruption is a significant problem where illicit payments or social standing can affect decisions made by authorities.<sup>500</sup> In those instances, vulnerable groups and individuals who lack resources find that their claims are rejected.<sup>501</sup> Disadvantaged groups in society are less likely to avail themselves of the justice system if they perceive it to be corrupt or unfair.<sup>502</sup> Corruption undermines the credibility of the entire justice system, reinforcing discrimination and further disadvantaging the poor and other marginalised groups who have claims for harms committed by the state or private parties.<sup>503</sup> Corruption is often more prevalent at the lower levels of government.<sup>504</sup> Administrative staff may engage in corrupt activities for economic benefits or other quid pro quo reasons before a claim even reaches an adjudicatory forum.<sup>505</sup>

#### **6.4.3 Formal processes**

According to Carmona, poor and disadvantaged people who are unable to secure legal representation either as a result of financial limitations or as a result of

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<sup>497</sup> Ibid

<sup>498</sup> Ibid

<sup>499</sup> Andrevski, Larsen and Lynham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study'

<sup>500</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>501</sup> Ibid

<sup>502</sup> Ibid

<sup>503</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

<sup>504</sup> Ibid

<sup>505</sup> Ibid

governmental policy are forced to navigate the civil justice system alone.<sup>506</sup> These claimants at times find a range of barriers related to complexity of applicable rules, filing deadlines, confusing paperwork and legal terminology, all of which can limit access to a remedy or produce unjust outcomes. The hearing process, played out through traditional roles and strict procedures often intimidates those unfamiliar with the justice process. This general lack of awareness of the rules of conduct and procedure places marginalised individuals in an unequal and disadvantaged position before proceeding even begins. Claims that require evidentiary proof can prove challenging for marginalised individuals. Gathering evidence, preparing forms and developing strategy for claims, the correct language and the narrow focus on the claim at issue can frustrate many claimants without legal assistance.

#### **6.3.4 Excessive delays**

A lack of resources and qualified staff adds to unnecessary delays in adjudicating claims and enforcing judgments.<sup>507</sup> These delays disproportionately affect disadvantaged groups and are in essence a denial of justice as the process becomes unaffordable, costs greatly outweighing any potential benefit in most cases. In many instances, the claims of these disadvantaged groups are underprioritised due to biased and preferential treatment of the wealthy or ‘lack of sensitivity or understanding of the impact of the delay on weakest claimants’.<sup>508</sup> Vulnerable individuals need their claims to be heard promptly.<sup>509</sup> When the vulnerable reach the court, they are in ‘dire straits’ because they lack resources to sustain lengthy dispute processes and their basic components of livelihood are in jeopardy.<sup>510</sup>

#### **6.3.5 Legal standing**

Narrow rules on legal standing prevent civil society from being able to take a direct role in assisting the vulnerable who are unable to represent themselves.<sup>511</sup> The

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<sup>506</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’

<sup>507</sup> Ibid

<sup>508</sup> Ibid

<sup>509</sup> Anderson, ‘Access to justice and legal process: making legal institutions responsive to poor people in LDCs’, p.20

<sup>510</sup> Ibid

<sup>511</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’



embracing of civil society in this regard may drastically improve access and outcomes of marginalised claimants by reducing financial cost and personal distress<sup>512</sup> and mitigate the imbalance caused by lack of awareness, time, representation, and social status.

### **6.3.6 Distrust of authorities**

Victims may have distrust of authorities based on their past experiences, and these experiences may be vastly different based on their country of origin.<sup>513</sup> Their respective socioeconomic status may also contribute to this distrust. In addition to the fact that contact with authorities may be unsettling, the uncertainty brought about by actual or perceived bias substantially contributes to the distrust and possible reticence to cooperate.<sup>514</sup> Vulnerable or disadvantaged groups may hesitate to approach the authorities because of concern over the impact on their immigration status or uncertainty about how they might be treated in the justice system.<sup>515</sup> The unfamiliarity with the justice system in their current country of residence may be compared to their experiences, both good and bad, in their home country.<sup>516</sup> Similarly, the authorities may bring their own cultural, social and discriminatory perceptions of migrants, and while interacting with those groups. They may, through the lens of their own biases coupled with a lack of appropriate training, fail to recognise the needs, concerns and fears of vulnerable groups.<sup>517</sup> Vulnerable individuals, due in most part to their own economic instability, become averse to relying on legal processes, fearing further exploitation, corruption or unjust outcomes.<sup>518</sup>

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<sup>512</sup> Ibid

<sup>513</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014), p.30

<sup>514</sup> Andrevski, Larsen and Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study'

<sup>515</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014), p.30

<sup>516</sup> Ibid

<sup>517</sup> Ibid

<sup>518</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

## Conclusion

To ensure access to remedies, the consensus<sup>519</sup> is that both formal and informal mechanisms be used. However, access to judicial and other remedies should not be restricted, and if cases involve any form of violence, cases should not be referred to an alternative dispute resolution procedure.<sup>520</sup> Cases involving violence should be referred to an adjudicatory process, preferably a judicial one. ‘Adjudication is the most appropriate process of identifying the most appropriate remedy or compensation’.<sup>521</sup> It has been argued that the tendency in addressing harms is to rely on formal justice mechanisms, but access to justice must consider formal and informal mechanisms.<sup>522</sup> Both mechanisms should rely on the same basic principles in the settlement of disputes and should be impartial and include interpretation and application of the law, transparency and independence.<sup>523</sup> Justice processes should be open to the public to facilitate public scrutiny that contributes to fairness and should also provide enforcement of decisions.<sup>524</sup> ADR mechanisms can provide remedies to disadvantaged individuals that would have been beyond their reach by creating the conditions for dialogue<sup>525</sup> but it should be regulated or backed by formal justice mechanisms such as the courts or tribunals and should function independently from the executive branch of government.<sup>526</sup>

The use of informal mechanisms has been suggested in numerous access to justice documents, but the use of informal mechanisms for vulnerable groups appears to be inconsistent with the access to justice needs of vulnerable individuals and groups. The notion of referring vulnerable individuals experiencing the multiple and

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<sup>519</sup> United Nations Development Programme, ‘Access to Justice: A practice note’ (2004); J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014); also several commentators discussed later on Alternative Dispute Resolution (ADR) agree that ADR should be available as a dispute resolution mechanism.

<sup>520</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, ‘General Recommendation on women’s access to justice’ (23 July 2015) UN Doc CEDAW/C/GC/33, p.22

<sup>521</sup> United Nations Development Programme, ‘Access to Justice: A practice note’ (2004)

<sup>522</sup> Ibid

<sup>523</sup> Ibid

<sup>524</sup> Ibid

<sup>525</sup> United Nations Development Programme, ‘Access to Justice: A practice note’ (2004)

<sup>526</sup> Ibid

overlapping barriers listed above into a process that provides limited procedural protections would seem to exacerbate an already vulnerable condition.

Taking into account the overlapping barriers, vulnerable MDWs should not be steered toward conciliation as a first step in the resolution of claims. An adjudicatory process that relies on the application of the law should be the first step and if a MDW decides that they are unable to bear the cost of time, they should be allowed to consider conciliation. The Tribunal/Court should be able to resolve claims that do not involve crimes in a more timely and just manner based on contractually obligated entitlements.

Most of the Social and cultural, Institutional and Structural barriers can be mitigated through legislation, however, barriers such as discrimination, the effect of stigmatization and understanding of the needs and vulnerabilities of MDWs require a greater investment in time and resources through training and awareness raising. Training and awareness is an obligation ‘...to ensure the principles of human rights throughout its entire ‘legal, political and institutional system’.<sup>527</sup> A shift in the perception of MDWs is required along with a genuine commitment from the government to effectively protect MDWs from violations of forced labour.

Addressing the vulnerability of MDWs mandates that politics, ethics, and law be fashioned around a complete, comprehensive vision of the MDW experience if they are to meet the real-life needs MDWs.<sup>528</sup> To ensure that the issue of concern is addressed, the focus by the government should be on ensuring that its polices and institutions are structured in such a manner to ensure no group is gaining impermissible advantages at the expense of other groups.<sup>529</sup> This shift in perspective not only brings scrutiny to individual actions, but also to institutions ensuring that assets are not being provided unequally, even if unintentionally.

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<sup>527</sup> *Chumbivilcas v Peru*, Case 10.559, Report No.1/96, (Inter-Am.Ct.H.R. 1 March 1996), OEA/Ser.L/V/II.91 Doc. 7 at 136 (1996). Para V 3

<sup>528</sup> Ibid

<sup>529</sup> Ibid p.18

The focus on Social and Cultural, Institutional and Structural advantages and disadvantages would require changes in political culture. To reiterate Fineman's<sup>530</sup> point, the responsibility in structuring this imperative would fall on the legislature and executive branches for primary manifestation and ultimate monitoring by the courts to ensure fulfilment of responsibility in assessing individual equality claims. State institutions collectively are important in lessening, ameliorating and compensating for vulnerability. Together, they provide assets which can be viewed as advantages, coping mechanisms, or resources that would allow MDWs to withstand misfortunes, disaster and violence.

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<sup>530</sup> Fineman, 'The vulnerable subject: Anchoring equality in the human condition'

## Chapter 7. Conditions in Hong Kong

### 7.1 Introduction

Hong Kong has been an attractive place for the employment of foreign domestic workers for over 150 years. From the time of the seizure of the island by the British in 1841 to today, migrant domestic workers have been relied on to provide child care, elderly care and household work (cooking, cleaning, laundry), first to wealthy occupiers and currently as a means of freeing local households to take advantage of the opportunities of two income households and a cheap source of labour for expatriate and other wealthy employers. The complaints of domestic workers are as old as Hong Kong itself, and although there are some laws to ensure the protection of workers, complaints of ill treatment continue.

In recent years there has been a focus on the treatment of some of the 340,000 domestic workers in Hong Kong, mainly from the Philippines and Indonesia. These workers enter into two-year contracts with the aid of employment agencies to secure domestic work. Recent research conducted by non-governmental organisations<sup>531</sup> has suggested that some of the abuses suffered by domestic workers can be classified as forced labour and human trafficking, and several cases of the ill treatment of MDWs in Hong Kong have been reported in the local and international media.<sup>532</sup> While the crimes of forced labour and human trafficking are closely related, I will focus primarily on forced labour.

Section 7.2 I will examine the current use of non-judicial mechanisms used in redress of MDW complaints; and Section 7.3 will examine common violators that contribute to the exploitation of MDWs to include the effect of government policy.

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<sup>531</sup> Jade Anderson, Victoria Wisniewski Otero, 'Coming Clean' Justice Centre Hong Kong 2016; Amnesty International 'Exploited for Profit, Failed by Governments, Indonesian Migrant Domestic Workers Trafficked to Hong Kong' (2013)

<sup>532</sup> Angharad Hampshire, 'Help for the helpers: New Hong Kong employment agency aims to stamp out 'modern-day slavery' *South China Morning Post* (9 Aug 2014) <http://www.scmp.com/magazines/post-magazine/article/1568215/maid-pay>; Lo C, 'Maid Falls To Her Death From 27Th Floor Flat While Cleaning Windows' *South China Morning Post* (24 January 2014); <http://www.scmp.com/news/hong-kong/article/1411804/domestic-helper-28-plunges-death-high-rise-flat>

### *Labour migration and administration*

To overcome job shortages in both the Philippines and Indonesia, both governments resorted to the exportation of labour in the mid-1970s and early 1980s respectively. In both countries, recruiting agencies for labour export have been privatised, making it a significant factor of their national development strategy contributing billions of dollars yearly in remittances from overseas workers. Several other countries send migrant workers to Hong Kong but they make up a small percentage of the total migrant domestic worker population compared with the Philippines and Indonesia.

The total population of Hong Kong in 2015 was 7,305,700 with a MDW population of 340,380, making up approximately 4.65% of the total population an overwhelming majority of them are women. (see Table 1 for trend and country of origin).<sup>533</sup>

**Table 1 - Hong Kong Domestic Worker Population 2015 & 2016**

Country	2004	2005	2009	2010	2011	2012	2013	2014	2015
<b>Philippines</b>	119,711	118,032	129,875	137,313	144,553	155,969	164,628	172,779	181,861
<b>Indonesia</b>	90,045	96,904	130,448	140,941	148,153	149,236	149,034	149,837	150,239
<b>India</b>	1,294	1,368	1,814	2,058	2,306	2,520	2,702	2,959	3,275
<b>Thailand</b>	4,922	4,511	3,858	3,695	3,323	2,990	2,710	2,650	2,560
<b>Sri Lanka</b>	885	876	883	890	909	1,040	1,118	1,171	1,148
<b>Bangladesh</b>	42	421	62	65	67	70	275	594	650
<b>Nepal</b>	1,398	1,349	677	542	452	389	342	310	299
<b>Myanmar</b>	27	29	23	27	37	41	45	177	147
<b>Pakistan</b>	43	38	67	70	77	62	68	70	77
<b>Malaysia</b>	29	31	31	31	33	29	24	24	22
<b>Singapore</b>	3	2	3	3	3	3	2	1	2
<b>Others</b>	31	46	37	46	48	46	40	78	100
<b>Total</b>	218,430	223,204	267,778	285,681	299,961	312,395	320,988	330,650	340,380

The Immigration Department of Hong Kong Special Administrative Region (HKSAR) administers the domestic worker programme. All workers are required to have a signed contract<sup>534</sup> with an employer prior to arrival in Hong Kong. The MDW

<sup>533</sup> Census and Statistics Department of Hong Kong, Annual Digest of Statistics 2016 ed. released in October 2016 p.43

<sup>534</sup> Form ID 407

employment contract is governed by the Employment Ordinance and Employees Compensation Ordinance.<sup>535</sup>

Only with the approval of contracts and the granting of a work visa, are domestic workers allowed to travel to Hong Kong. Only the Philippine and Indonesian consulates require an employment agency to submit domestic worker contracts for approval by their consulates. Domestic workers of other nationalities are not subjected to this requirement and thus are more likely to avoid the recruitment fees illegally charged by some employment agencies.

To be eligible to hire a MDW, employers must have a household income of not less than \$15,000 per month or comparable assets, and agree to pay the MDW not less than the minimum allowable wage (MAW).<sup>536</sup> Additional criteria listed for eligibility for hiring MDWs include that the MDW is only permitted to perform duties per schedule of accommodation in the contract, is not permitted to take up any other employment and is to be provided with suitable accommodation.

No definition of suitable accommodation is provided; however, examples of unsuitable accommodation are, 'the MDW (Helper) having to sleep on made-do beds in the corridor with little or no privacy or sharing a room with an adult or teenager of the opposite sex'.<sup>537</sup>

At the end of each two-year contract the employer and MDW must apply for a new working visa and under normal circumstances the MDW should return to their place of origin to await the new visa and use the yearly allowable vacation entitlement.<sup>538</sup>

## **7.2 Redress mechanisms**

This section outlines several redress mechanisms used to remedy labour rights violations of MDWs.

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<sup>535</sup> Immigration Department 'Guidebook for the Employment of Domestic Helpers from Abroad' The Government of the Hong Kong Special Administrative Region, p.10, Chapter 57, Immigration Ordinance Chapter 115 and the Employees Compensation Ordinance Chapter 282

<sup>536</sup> Immigration Department 'Guidebook for the Employment of Domestic Helpers from Abroad' The Government of the Hong Kong Special Administrative Region

<sup>537</sup> Ibid

<sup>538</sup> Ibid p.9

### 7.2.1 Conciliation

Conciliation is a non-judicial mechanism and is encouraged at all redress forums even after adjudication has commenced. It is accessible to both employers and employees and offers an informal, time saving and simple way of resolving labour disputes.<sup>539</sup> Either party may approach Labour Relations Division for consultation on their rights and obligations under the Employment Ordinance or the contract of employment.<sup>540</sup> If requested by one of the parties, the LRD will arrange a conciliation meeting and request the other party to attend. At the conciliation meeting, the Conciliation Officer will assist parties in exploring the crux of the problem concerned, analysing the situation and seeking a mutually acceptable settlement. The purpose of the conciliation service is to provide for speedy settlement of labour disputes or claims; no legal representation is required or encouraged. However, if one party finds the company of a third party (e.g. a trade union representative) is necessary when attending the conciliation meeting, it is acceptable subject to the agreement of the other party. To ensure the trust of the parties concerned which is important for settlement, the conciliation meeting is held in confidence and both parties are free to make admissions during the meeting for settlement purpose.

If the case can be settled by conciliation and the settlement involves compensation by cash payment, the Conciliation Officer will make arrangements for effecting payment. Where necessary, the Conciliation Officer will also assist in drawing up a settlement memorandum for signature by the parties. On the other hand, if one party declines to make use of the conciliation service or both parties have failed to reach a settlement at the end of the conciliation meeting, the Conciliation Officer will, at the request of the party concerned, refer him/her to seek adjudication at the Minor Employment Claims Adjudication Board (for cases involving not more than 10 claimants and not exceeding \$8,000 per claimant) or the Labour Tribunal (for cases involving more than 10 claimants or exceeding \$8,000 per claimant).

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<sup>539</sup> Labour Relations Division, 'Conciliation Service of the Labour Relations Division' LD 543 (Rev.05/2011) Labour Relations Division Hong Kong

<sup>540</sup> Ibid



Attendance at conciliation meetings is voluntary for both parties. This is because a settlement reached by conciliation is a result of compromise and mutual understanding between them. The willingness of both parties to make use of the conciliation service is the major factor for successful settlement of the labour dispute or claim. The Conciliation Officer is a neutral and impartial intermediary. They assist both parties to understand the problem and to have a frank dialogue so as to resolve each other's differences and prevent the dispute situation from further deterioration. They also seek a settlement which is acceptable to both parties.

The Conciliation Officer does not have adjudication power to impose settlement in disputes or claims. Whether or not to settle a case through conciliation is a free decision of the parties concerned. However, in the event that a breach of the Employment Ordinance is detected, it will be investigated thoroughly with a view to prosecution against the suspected offenders.<sup>541</sup>

### **7.2.2 Minor Employment Claims Adjudication Board (MECAB)**

According to the Hong Kong Labour Department's guide *A Simple Guide to the Minor Employment Claims Adjudication Board*, MECAB was set up under the Minor Employment Claims Adjudication Board Ordinance (Cap.453) and adjudicates minor employment claims in a quick, simple and inexpensive manner. A claim that cannot be resolved amicably through conciliation may be referred to the MECAB for adjudication.

The MECAB is empowered to adjudicate employment claims arising from disputes of statutory or contractual rights of employment, involving not more than 10 claimants in each case for a sum of money not exceeding \$8,000 per claimant. Employment claims falling outside the jurisdiction of the MECAB are heard by the Labour Tribunal. Direct application to MECAB without first going to conciliation is not accepted. The Board has no jurisdiction over claims arising more than 12 months prior to the date of filing, unless the disputants provide a signed memorandum agreeing to MECAB's jurisdiction.

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<sup>541</sup> Ibid

The Board may decline jurisdiction if, in the opinion of the board, the MECAB is not appropriate or the amount of the claim is split into separate claims to fit the jurisdiction of the Board, in which case the claim will be transferred to the Labour Tribunal.

Claims can be made by any party to a claim or any authorised officer of a limited company who provides authorisation in writing. An office bearer of a registered trade union or employers' association who is authorised in writing may also appear as a representative of the claimant. Hearings are conducted in public and in an informal manner, and legal representation is not allowed. The Board may order the production of any documents or other exhibits and make enquiries of parties or witnesses as it sees fit.

The adjudication officer is empowered with the same privileges and immunities as a judge of the Court of First Instance in civil proceedings. An appeal of an award may be made within 7 days of the award and the adjudication officer may reopen and rehear the claim, call or hear new evidence and confirm, vary or reverse the award or order. The registrar of the High Court on good cause may extend the appeal of an award. An appeal of an award made by MECAB may be made in the Court of First Instance on the grounds that it was erroneous in law, or the claim was outside the jurisdiction of the Board. Appeals of decisions by the Court of First Instance may be made to the Court of Appeal. The award or order made by an adjudication officer of the Board is legally binding and may be registered in the District Court and thus becomes a judgment of the District Court and can be enforced accordingly.

Under the Employment Ordinance, if an award of the Board provides for the payment by an employer of any specified entitlement (such as wages, end of year payment, maternity leave pay and severance payment, etc.) and the employer wilfully and without reasonable excuse fails to pay the awarded sum within 14 days after it becomes due, the employer is liable to prosecution and, on conviction, to a fine of \$350,000 and imprisonment for three years.

### 7.2.3 Labour Tribunal

The information below is taken from the *Labour Tribunal Guide to Court Services*.<sup>542</sup> The Labour Tribunal, like MECAB, seeks to offer an informal and inexpensive way of settling monetary disputes between employers and employees, with no maximum limit on the amount of the claim. The Tribunal entertains claims from MDWs for violations of the Employment Ordinance (Cap.57) and claims for breaches of the terms in their employment contracts. The majority of claims filed by employees concern outstanding wages for work done, wages in lieu of notice of termination of a contract by the employer without the required notice, wages for statutory holidays, annual leave and rest days, and severance pay, long service and terminal payments. Employers usually file claims for wages in lieu of notice on resignation of employees.

The Tribunal hears cases over \$8,000 for at least one of the claimants, or where there are more than 10 claimants. However, claims over six years old at the time of attempting a claim will not be accepted under the Limitation Ordinance (Cap.347). Conciliation must be attempted as a first step before lodging a claim at the Tribunal.

To maintain impartiality, the Tribunal staff will not provide any advice or assistance to MDWs. A filing fee is required to complete the filing, which may be reclaimed if the case is successful, but if unsuccessful, they may have to pay the employer Wages in lieu of Notice (one month's wages) and any associated costs. The MDW is provided with a date for hearing 10 to 30 days from the date of filing. Defence and witness statement are required to be completed before the hearing and copies transmitted to the opposing party. The Tribunal officer will use the documents to prepare a summary of facts outlining the allegations of each party to be submitted to the Presiding Officer before the hearing. Again, no legal representation is allowed.

A defendant may ask for an award to be set-aside within 7 days after the hearing. A review of the judgment must also be filed within 7 days of the award to the Court of First Instance followed by the Court of Appeal if additional remedy is deemed necessary.

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<sup>542</sup> Judiciary of Hong Kong, *Labour Tribunal: Guide To Court Services*, August 2015 9 Ed. [http://www.judiciary.hk/en/crt\\_services/pphlt/pdf/labour.pdf](http://www.judiciary.hk/en/crt_services/pphlt/pdf/labour.pdf)

#### **7.2.4 Other redress mechanisms**

MDWs may also make use of other mechanisms such as the Small Claims Tribunal to attempt to recover excessive recruitment agency fees. ‘The Small Claims Tribunal hears minor monetary claims involving amounts not exceeding \$50,000. The hearing is informal and no legal representation is allowed’.<sup>543</sup> MDWs find it difficult in many cases since the payment of illegal recruitment fees are not accompanied by receipts. The Equal Opportunities Commission (EOC) is another statutory body set up in 1996 to implement the Sex Discrimination Ordinance (Cap.480). The EOC is the primary organization tasked with handling discrimination related cases.

#### **7.3 Common violators**

MDWs experience a myriad of violations at the hands of employers and employment agencies and find it difficult to access remedies. At times, this is exacerbated by government policy. In all cases, the combination of factors limits the MDW’s decision-making relative to pursuing a remedy for labour rights violations.

##### **7.3.1 Employment agencies**

Exploitation of MDWs by employment agencies has been a major issue in Hong Kong.<sup>544</sup> There have been numerous news articles and research that have attempted to address this issue. Three of those issues are discussed below; debt bondage, excessive agency fees and inaccurate travel documents.

According to Part XII of the Employment Ordinance and the Employment Agency Regulations (Chapter 57, Part II) the maximum commissions which may be received by an employment agency, shall be:

*‘(a) from each person applying to the employment agency for employment, work or contract or hire of his services, an amount not exceeding a sum equal to ten% of the first month’s wages*

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<sup>543</sup> Department of Justice, ‘Legal System in Hong Kong’, The Government of Hong Kong

<sup>544</sup> United States Department of State ‘Trafficking in Persons Report’ (2015, 2016, 2017) the last three reports have reported that ‘employment agencies generally charge job placement fees in excess of legal limits, which may lead to situations of debt bondage of workers in Hong Kong. The accumulated debts sometimes amount to up to 80 percent of workers’ salaries for the first seven to eight months of employment.’

*received by such person after he has been placed in employment  
by the employment agency...'*

In September 2015, MDWs received a minimum allowable wage (MAW) of \$4,210 per month.<sup>545</sup> In October 2016, the Labour Department Administration decided that, with effect from 1 October 2016, the MAW would be increased to \$4,310.<sup>546</sup> Based on the MAW and the maximum commission outlined above, MDWs in Hong Kong should be charged a maximum of \$421 based on 2015 MAW or \$431 on the current rate by Hong Kong employment agencies. It has been consistently reported that MDWs are charged as much as \$21,000 in recruitment fees a form of debt bondage.<sup>547</sup> The fees are usually paid over several months<sup>548</sup> in the amounts of approximately \$3,000 per month over 7 months.

The Philippine Overseas Employment Administration (POEA) implemented a reform in 2006 affecting Household Service Workers (HSW).<sup>549</sup> Under the resolution, employment agencies in the Philippines are not permitted to charge placement fees to overseas workers bound for Hong Kong. 'They may charge for training, medical examination, photo, video and other necessary miscellaneous expenses but not placement fee'.<sup>550</sup> Despite the decree, many agencies charge a placement fee of up to 150,000 Pesos (approximately \$23,000 HKD) for processing applications of MDWs to Hong Kong.<sup>551</sup> Unlike the Philippines, Indonesian employment agencies are allowed to charge MDWs under a decree (KEP.186/PPTK/VII/2008) dated 10 July 2008 of the Director General for Training and Placement of Manpower. The cost structure for placement of IDW to Hong

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<sup>545</sup> Jennifer Ngo, Phila Siu, 'Domestic strife: Hong Kong helpers disappointed by \$100 pay rise that keeps them lagging behind inflation', *South China Morning Post*, 30 September 2015

<sup>546</sup> Labour Department, Public Services, <http://www.labour.gov.hk/eng/plan/iwFDH.htm>

<sup>547</sup> Angharad Hampshire, 'Help for the helpers: New Hong Kong employment agency aims to stamp out 'modern-day slavery'' *South China Morning Post* 9 Aug 2014, quoting Scott Stiles of the Fair Employment Agency, see also *Amnesty International 'Exploited for Profit, Failed by Governments, Indonesian Migrant Domestic Workers Trafficked to Hong Kong' (2013)*, p.62

<sup>548</sup> Amnesty International 'Exploited for Profit, Failed by Governments, Indonesian Migrant Domestic Workers Trafficked to Hong Kong' (2013), p.62, see also Lee and Petersen, 'Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers', p.1

<sup>549</sup> Philippine Overseas Employment Administration, Resolution No.7 (2006)

<sup>550</sup> HELP For Domestic Workers, <http://helpfordomesticworkers.org/en/key-issues/>

<sup>551</sup> Ibid

Kong was set at the equivalent of \$15,550 HKD for processing a worker's visa to Hong Kong.<sup>552</sup>

Both the Indonesian and Philippine governments require partner employment agencies in the home countries. The agency fees collected by Hong Kong agencies are shared with the agencies in the home country so that employers in Hong Kong can benefit from low local fees.<sup>553</sup> Philippine agencies although not allowed to collect agency fees but nonetheless subject MDWs to excessive agency fees before leaving the home country. In concert with lending companies, MDWs are encouraged to engage with lending companies to borrow the money to pay the fees although they never actually receive the money. The cash from the fake loans are collected by the agencies allowing denial and avoidance of legal problems concerning illegal and excessive commissions contrary to the 2006 decree implemented by the POEA.

The issue of debt bondage and the use of employment agencies to process employment contracts go hand in hand. Research<sup>554</sup> has shown that the exploitation begins at the recruitment stage. MDWs are required to sign contracts without being able to read them or being provided with a copy. Shortly before departing their home country, MDWs are told by their recruiting agents that they would have to pay their recruitment fees through salary deduction. The excessive amounts described earlier are then secured through monthly payments over a 3-7-month period. To secure these payments, MDWs' passports and other documents are seized as collateral.

Another sin attributable to employment agencies and the exploitation of MDWs relates to inaccurate travel documents. In an attempt to make candidates look more desirable and circumvent minimum age requirements in sending countries, agencies

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<sup>552</sup> Amnesty International 'Exploited for Profit, Failed by Governments, Indonesian Migrant Domestic Workers Trafficked to Hong Kong' (2013), p.25

<sup>553</sup> R J Connelly, 'Submission on 'Policies relating to foreign domestic helpers and regulation of employment agencies' – for Legco Panel on Manpower', 21 February 2014, LC Paper No.CB(2)870/13-14(14)

<sup>554</sup> Amnesty International 'Exploited for Profit, Failed by Governments, Indonesian Migrant Domestic Workers Trafficked to Hong Kong' (2013), p.10, *see also* Lee and Petersen, 'Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers' p.2

have been accused of manipulating the dates of birth of MDWs.<sup>555</sup> This manipulation is done without the knowledge of the MDW who only realises the inaccuracy shortly before departure and is now under the weight of an excessive agency fees that must be repaid and has little choice but to continue the process.<sup>556</sup> This adds an additional level of control through fear of imprisonment if discovered by the authorities.

### **7.3.2 Employer abuses and the contract**

The standard employment contract<sup>557</sup> lays out in some detail the responsibilities of the employer and employee. It also outlines specific entitlements owed to the employee on termination of the employment contract. Some of the specific items are discussed below and are usually the claims most associated with the filing of a claim at through Labour Department and at times heard in MECAB or the Labour Tribunal.

There is consensus that workers are subjected to a variety of abuses prohibited by the employment contract, the Labour Ordinance and other mechanisms. Common abuses are also consistent with the ILO indicators of forced labour that identify the conditions of work and coercive methods used to ‘intentionally subjugate the will of the [MDW]’.<sup>558</sup> Common abuses that give rise to claims include denial of rest days, withheld wages, underpayment of wages, excessive working hours, and illegal deployment (MDWs made to work outside the contracted location).<sup>559</sup> Contractual entitlements on termination include outstanding wages, annual leave, airfare to the place of origin and wages in lieu of notice.

### **7.3.3 Government policy**

There has been common criticism of several state policies that are argued to contribute to the exploitation of MDWs. In June 2013, a paper regarding government

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<sup>555</sup> R J Connelly, ‘Submission on ‘Policies relating to foreign domestic helpers and regulation of employment agencies’ – for Legco Panel on Manpower’, 21 February 2014, LC Paper No.CB(2)870/13-14(14)

<sup>556</sup> Amnesty International ‘Exploited for Profit, Failed by Governments, Indonesian Migrant Domestic Workers Trafficked to Hong Kong’ (2013), p.10,

<sup>557</sup> Standard Employment Contract Form ID 407

<sup>558</sup> United States v Kozminski 487 US931 (1988)

<sup>559</sup> Lee and Petersen, ‘Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers’ p.2

policy on excessive agency fees and the two-week rule was published by the Labour and Welfare Bureau and submitted to the Hong Kong Legislative Council.<sup>560</sup> The paper clarified that there was no requirement for MDWs to use an employment agency and that the requirement was imposed by the governments of Indonesia and the Philippines.<sup>561</sup> The paper noted that the Philippine government does not allow first time MDWs to be hired directly without aid of an employment agency, and Indonesia only allows hiring through accredited employment agencies. The Labour and Welfare Bureau did acknowledge overcharging by Hong Kong employment agencies in that they revoked two employment agencies' licences and they were subsequently convicted 'of overcharging, and aiding and abetting an MDW to breach her condition of stay, conspiracy to defraud and conspiracy to make false representation to an Immigration Officer'.<sup>562</sup> In the first four months of 2014, they revoked the licence of one employment agency after it was convicted of an offence involving dishonesty.<sup>563</sup> It was also acknowledged that the charging of excessive agency fees was a concern that had been raised with the sending country's consulates. It was explained that the Employment Agency Administration was very diligent in pursuing the matter and were constantly engaged in unannounced inspections of employment agencies and had conducted just over 1,300 inspections in 2012 and had conducted and over 347 in the first four months of 2013.<sup>564</sup>

In February 2014 R.J. Connelly (Barrister-at-law) submitted a response to the June 2013 paper to the Legislative Council (Legco) Panel on Manpower. His response opened with the following paragraph:

*'When formulating policies on migrant domestic workers (MDWs), the Administration has failed to strike a reasonable balance between the interests of employers and employees. The recent cases of Erwiana Sulistyaningsih and Kartika Puspitasari were exceptional in their brutality, but it is important to understand the policy failures which made them vulnerable and which facilitate lesser yet nevertheless serious abuses on a much*

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<sup>560</sup> Legislative Council HKSAR, 'Intermediary Charges for Foreign Domestic Helpers', (LC No.CB(2)1356/12-13(03), June 2013

<sup>561</sup> Ibid

<sup>562</sup> Ibid p.2

<sup>563</sup> Ibid

<sup>564</sup> Ibid



*wider scale. Hong Kong's policies on MDWs fall far below accepted international minimum standards. The difference between decent conditions of work or slavery-like conditions is a question of luck for MDWs. Respect for human rights cannot be left to the will of employers'.<sup>565</sup>*

Since the MDW programme is administered by the Immigration Department the paper examined five of the Immigration Department policies under the heading 'Unfair Immigration Policy'. It addressed the two-week rule, the live-in requirement, excessive agency fees, maximum working hours and rest days and inaccurate travel documents. Since excessive agency fees and inaccurate travel documents were covered under 'Common Violators' above they will not be addressed here.

### **7.3.3.1 The two-week rule**

Domestic workers who have their contracts terminated must leave Hong Kong within two weeks of termination.<sup>566</sup> The rule is intended '...for maintaining effective immigration control, preventing job-hopping and imported workers working illegally after the termination of contracts'.<sup>567</sup> In defending this rule, it was explained that workers who wanted to return to work in Hong Kong could do so after returning to their home country and applying for a new visa. However, under special circumstances such as the MDW's previous employer is unable to continue the contract because of migration, death, financial difficulty or there is evidence that the worker has been abused or exploited, the MDW may be allowed to change employer in Hong Kong without having to return to their home country. According to Connelly, the two-week rule was introduced in 1987 to manage what was considered illegal work by MDWs.<sup>568</sup> Prior to 1987, a small number of MDWs on 6-month contracts would terminate their contracts prematurely shortly after arriving in Hong Kong and take up illegal employment, since at the time they were allowed to remain

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<sup>565</sup> R J Connelly, 'Submission on 'Policies relating to foreign domestic helpers and regulation of employment agencies' – for Legco Panel on Manpower', 21 February 2014, LC Paper No.CB(2)870/13-14(14) Connelly specializes in Human Rights, Migrant Labour and Refugee law and is the Legal Advisor to the Hong Kong Helpers Campaign.

<sup>566</sup> HKSAR, Immigration Department, <http://www.immd.gov.hk/en/forms/forms/id-e-989.html>, accessed 01/10/2014

<sup>567</sup> Legislative Council HKSAR, 'Intermediary Charges for Foreign Domestic Helpers', (LC No.CB(2)1356/12-13(03), June 2013, p.4

<sup>568</sup> R J Connelly, 'Submission on 'Policies relating to foreign domestic helpers and regulation of employment agencies' – for Legco Panel on Manpower', 21 February 2014, LC Paper No.CB(2)870/13-14(14)

for the length of their visa. The adoption of the policy mitigated the illegal work issue but severely restricted MDW's ability to seek new employment before having to leave Hong Kong, increasing the fear of unemployment. The policy exacerbated the matter since MDWs who feared arrest for overstaying their visa conditions sought ways to remain hidden from the authorities and took up illegal work or by filing asylum applications. In 2014, Indonesian and Filipino MDWs made up one quarter of all asylum claims.

The two-week rule exacerbates the exploitation of MDWs in that the cumulative effect of the policy discourages MDWs who suffer abuse from reporting it. The policy that establishes such a short period to secure new employment after premature termination of a contract, the scrutiny of the number of times and the reasons why a MDW terminates a contract and the requirement to return to the home country for processing a new contract adds cost and contributes to the exploitation of MDWs.<sup>569</sup> On termination, the MDW is not allowed to work, and they are forced to find shelter in boarding houses as they can no longer live with the employer and they must bear the expense of visa extensions in order to remain in Hong Kong to pursue any labour claims.

### **7.3.3.2 The live-in requirement**

MDWs are required to live with their employers during their two-year contract. Again, it is a common argument among advocates including the ILO that this measure isolates the worker, and places them on 24 hour on-call resulting in excessive working hours, denial of rest days or not enough rest because they are required to work prior to leaving the residence on their rest day and because of curfews. This practice violates the law regarding rest days outlined in the employment contract and the Labour Ordinance that should be 24 continuous hours of rest.<sup>570</sup> Connelly makes the point that the Immigration Department through its policy fails to make the distinction between domestic workers and full-time live-in

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<sup>569</sup> Ibid

<sup>570</sup> Labour Department of HKSAR, 'A Concise Guide to the Employment Ordinance', (2011) p.11, *See* Standard Employment Contract Form ID 407, para. 6

domestic workers by resisting the adoption of standard working hours.<sup>571</sup> The policy also affects MDWs in that living with their employers in cramped accommodation affects where they sleep and rest outside working hours; it does not constitute decent living conditions and does not reflect what was promised and represented by the employer to the MDW and the Immigration Department.<sup>572</sup>

## **Conclusion**

The current conditions that contribute to forced labour of MDWs in Hong Kong can be significantly mitigated if the institutions responsible for their protection exercised the necessary due diligence in identifying violations of MDWs rights. The large number of MDWs employed in Hong Kong coupled with the specific underlying vulnerabilities they experience and the frequent complaints to government institutions in particular the Labour Department provides the ideal avenue to identify those abuses. The HKSARG should know or have a duty to know and investigate or refer for investigation the conditions documented in labour claims.

The mechanisms for redress offering an informal, time saving and simple way of resolving labour disputes<sup>573</sup> appear to be inappropriate to address the abuses suffered by MDWs. The encouragement for the use of informal settlement at all redress forums exhibit a strong institutional drive to resolve claims informally focusing on monetary value and ignoring documented abuses in claim statements and affidavits. Even in cases where there is no abuse, the resolution mechanisms may be inappropriate. The majority of claims filed by employees concern outstanding wages for work done, wages in lieu of notice of termination of a contract by the employer without the required notice, wages for statutory holidays, annual leave and rest days, and severance pay, long service and terminal payments. Employers usually file claims for wages in lieu of notice on resignation of employees.<sup>574</sup>

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<sup>571</sup> R J Connelly, 'Submission on 'Policies relating to foreign domestic helpers and regulation of employment agencies' – for Legco Panel on Manpower', 21 February 2014, LC Paper No.CB(2)870/13-14(14)

<sup>572</sup> Ibid

<sup>573</sup> Labour Relations Division, 'Conciliation Service of the Labour Relations Division' LD 543 (Rev.05/2011) Labour Relations Division Hong Kong

<sup>574</sup> Judiciary of Hong Kong, *Labour Tribunal: Guide To Court Services*, August 2015 9 Ed. [http://www.judiciary.hk/en/crt\\_services/pphlt/pdf/labour.pdf](http://www.judiciary.hk/en/crt_services/pphlt/pdf/labour.pdf)

The recognition that claims by employees reflect earned entitlements, yet negotiation is still encouraged ignoring the fact that the employer is profiting at the disadvantage of the MDW. The fact that the majority of the employer's claims are for wages in lieu of notice of termination of the contract and the fact that MDWs are unable to provide corroborating evidence relative to who terminated the contract, provides an avenue for wealthier and resident employers who use the alternative processes to sidestep expensive litigation<sup>575</sup> or settlement.

In addition to inappropriate redress mechanisms, lack of identification of violations and lack of mitigation of employer and employment agency abuses, government policy also contribute to the exploitation of MDWs and act as a barrier to seeking a remedy. The two-week rule coupled with other deficiencies in enforcement and remedial mechanisms has a cumulative effect and discourages MDWs who suffer abuses from reporting it. The live-in requirement immediately and efficiently isolates the MDWs, creates multiple dependencies and limits the worker's ability to refuse excessive hours of work that remains unregulated, limits the ability to separate work and rest hours and the cramped living accommodation affects where MDWs sleep and rest outside working hours.<sup>576</sup>

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<sup>575</sup> Merry, 'Disputing without culture', p.2067

<sup>576</sup> R J Connelly, 'Submission on 'Policies relating to foreign domestic helpers and regulation of employment agencies' – for Legco Panel on Manpower', 21 February 2014, LC Paper No.CB(2)870/13-14(14)

## **Chapter 8. Analysis of the Prevalence of Forced Labour and Conditions of Work**

### **8.1 Introduction**

The data collected through the screening, semi-structured interviews and the questionnaires in this study found that there is a high prevalence of forced labour in the MDW population that sought assistance from the NGO. The data collected in this research found that approximately 66% of the MDW within the sample group fall into this category. In addition, to the ‘serendipitous finding’ discussed in the previous chapter related to the difficulty in applying the indicators of forced labour, the data also yielded two other noteworthy conclusions. The initial working hypothesis was that the use of the ILO methodology would readily identify MDWs in forced labour, and that most MDWs who fell into this category as a result of labour rights violations would likely file claims against their employers with the Labour Department. A part of the original strategy was to review these anticipated claims to assess the claims process. However, analysis of the data revealed the second finding, which was that most MDWs accepted their working and living conditions no matter how appalling and did not see themselves as victims. The most common refrain was ‘I have no choice’. This finding, a passive acceptance of abuse on the part of the victim, was clearly related to the MDW’s desire to meet their family’s financial needs in their home country. This overarching desire affected the decision making of MDW’s and was exacerbated by another factor related to the imbalance in power in the employment relationship. One of the most glaring contributors to MDWs’ limited decision-making ability is Hong Kong’s ‘live-in’ rule, requiring MDWs to live with their employers. By its very nature, this rule turns over almost absolute control of the day-to-day existence of the MDW to the employer by creating multiple dependencies for food, shelter and wages. This gross imbalance in the employer-employee relationship diminishes the ability of the MDW to make independent decisions that are free of actual or perceived coercion. The nature of domestic work outside the eye of the public provides the ideal opportunity for untold assaults on MDWs person, mind and legal rights. The effect of this secretive environment and its damaging consequence extends in all aspects of the relationship, including any redress process.

The factors that contribute to the high prevalence of forced labour also influence the MDWs' decision making on whether to seek a remedy. For this reason, findings are separated into this and the succeeding chapter. In the following four sections, I will discuss: the findings related to the prevalence of forced labour and the frequency of occurrence of the 11 common indicators in identifying forced labour (8.2); the imbalance in power between the employer and MDW (8.3); and the fact that most MDWs do not see themselves as victims (8.4). A comparison with other research studies that show a high prevalence of forced labour will be made to gain an understanding of their relationship to this research and the general MDW population (8.5).

## **8.2 The high prevalence of forced labour in Hong Kong**

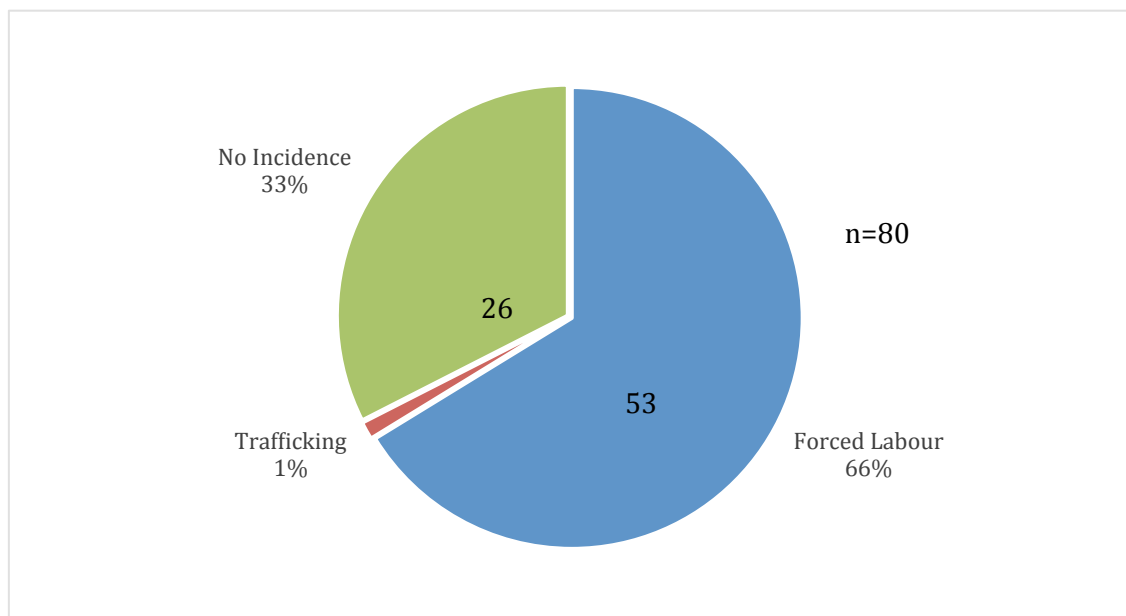
When the accepted ILO criteria for identifying forced labour was applied to the 80 MDWs who agreed to participate in the research, 53 were assessed to be in forced labour. Twenty-six of this group did not provide any information that indicated the presence of coercion. Below I will analyse the findings related to the 11 operational indicators used to identify forced labour.

### **8.2.1 Prevalence of forced labour**

The information gathered from the 80 participants revealed a wide range of abuses showing the broad scope of forced labour, and demonstrated the difficulty in applying some the ILO guidelines to assess the presence of forced labour. The questionnaire I adapted from *Hard to see, harder to count* provides a valuable tool to assess the living and working conditions and the methods of coercion. The screening form represented the most common indicators of coercion associated with MDW employment situations (work and life under duress), and included indicators of involuntariness that allowed for a preliminary assessment for forced labour. Having a list of common indicators to use as a screening tool also eliminated the need for complex analysis to determine strong or medium qualifiers from a list of 77 indicators. The investment of time for each of the initial interviews with the MDWs was approximately 45 minutes to cover the 11 indicators. If there were identified problems in the employment circumstances, the time period to assess was longer.

The screening tool revealed that the top three indicators in frequency were abuse of vulnerability, excessive working hours and debt bondage. The indicator ‘abuse of vulnerability’ is automatically assessed since the abuse on any other of the indicators is only possible through the abuse of the MDWs vulnerable position. The menace of penalty was expressed as fear of dismissal, loss of wages and, in some cases, fear of arrest on false accusations. Fear of dismissal is a significant concern for MDWs. Since they are outside their native country and are often subjected to high and illegal recruitment fees that place them in forms of modern debt bondage, the option to simply leave abusive employment is often impractical. The incurred debt along with other factors such as government policy or reprisals by employment agencies in the form of higher fees for premature termination, increases the fear of termination and thus limits decision-making in escaping the abusive employment. As a result, a participant MDW was assessed for forced labour when deception or involuntariness was found in addition to a menace of penalty.

Figure 1 represents the frequency of indicators of forced labour within the sample group.



**Figure 1 - Frequency of forced labour**

### 8.2.2 Abuse of vulnerability

Abuse of vulnerability was present 84% of the time (67 out of 80 participants) when indicators identified performance of involuntary tasks or where the participant was subjected to some form of coercion.

The single biggest vulnerability identified was the legal requirement that they live with their employers. This law makes the MDW completely dependent on their employer for almost all aspects of their lives, including food, wages and shelter. This single factor completely alters the employer-employee relationship, creating conditions that can lead to abuse and greatly diminishing the ability of the MDW to take any remedial action without reprisal. The response to abuse of vulnerability ‘...is between continuing in employment and bringing a claim’.<sup>577</sup> Being a live-in MDW, if notice of termination is given, most likely the employer would require the MDW to leave immediately.<sup>578</sup> This results in the worker not being provided entitlements immediately as the employer has seven days to make final payments.<sup>579</sup>

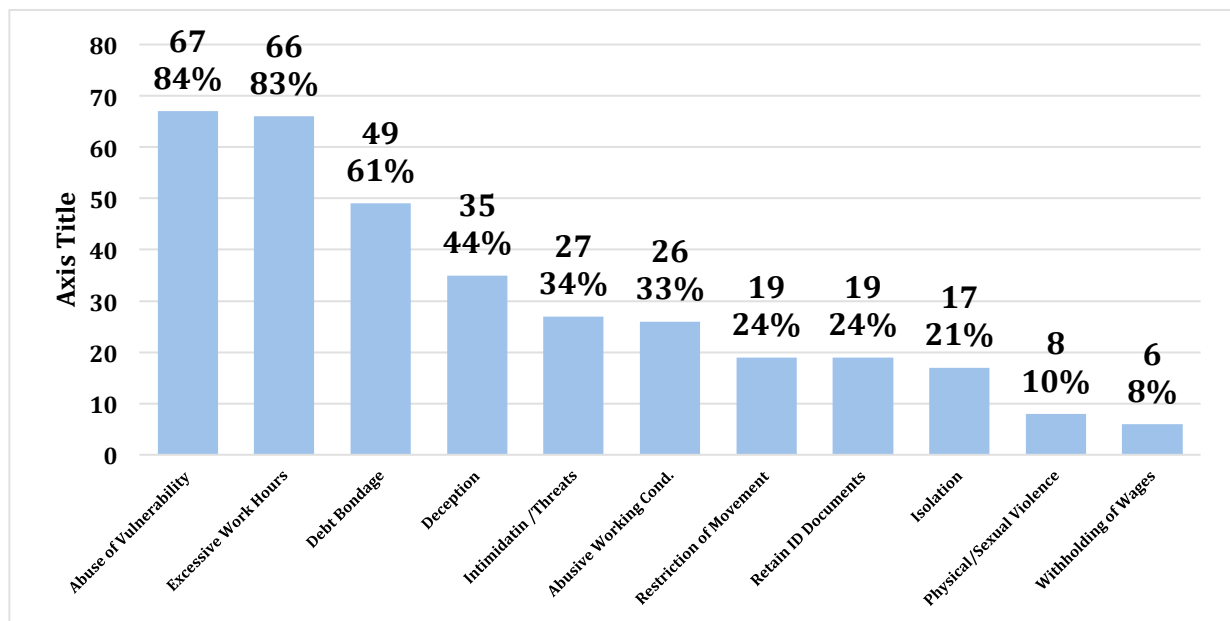


Figure 2 - Frequency of indicators

<sup>577</sup> Sau Wei Chan et.al, A Practitioner’s Manual for Migrant Workers: ringing Claims in Hong Kong and from Abroad, Justice without Borders, (2015), p.5

<sup>578</sup> Ibid

<sup>579</sup> Hong Kong Special Administrative Region, Employment Ordinance CAP 57, (1997) Section 23



One participant explained during the screening process that she felt uncomfortable with the presence of cameras in the house. The employer had told her that the cameras were to better monitor their 5-year-old child who was in her care. On her rest day, the participant performed her regular tasks at 7:00am and again on her return at 9:00pm. The participant was unsure of what would happen if she did not work on her rest days and wanted to demonstrate to her employer that she was willing to work but was unhappy with the long work hours. The participant stated, '...the Hong Kong Government should revise the law and set working hours'. She indicated that she determined her return time to provide time to complete routine tasks before the end of the day. Her daily work hours were from 7:00am to 11:00pm (*16 hours, excessive work hours, strong involuntariness*). Her salary was regularly late by as much as 3-4 days. She slept on a mattress on the floor in the main living area, which offered no privacy. The participant was willing to endure the described working conditions until an issue arose that she felt was deceptive. Three months earlier, when interviewed for the position, the employer failed to mention that she was pregnant. The participant was visibly upset when this was disclosed to her and stated in her own words, 'They did not tell me. They lie in the contract. Why would they do that? Why not tell me so I could prepare and decide if I find another employer'. When asked if she would have taken the job had she known the employer was pregnant, she replied:

'Probably yes, probably no. One of my previous employer stated in the contract that she was pregnant and I took that job. Taking care of a baby is not easy. I need to sacrifice my sleep at night to take care of a baby, sacrifice my health. I need to know so I can decide if I want to care of a baby'.

The participant was evaluating her options when she sought assistance at MFMW. She asked early in the interview if what the employer did was discrimination. I avoided the question by asking what the NGO staff had told her. She responded, 'I want to know what I can do'. By the tone of her voice, she was clearly angry at the employer and at the same time despondent that she was now trapped in an employment situation she did not want or agree to.

She indicated that she feared dismissal with no income because her employer had asked her to go on vacation (after only 3 months employment) which she felt was a

ruse to terminate her (*menace of penalty*). The consequences in her mind were the loss of wages, the strong possibility that she could not seek any form of redress once outside of Hong Kong, and the likelihood that she would have to start the long and expensive recruitment process again, but this time with history of an unsuccessful contract which might hinder future employment.

This participant's experience displays the broad scope of the concept of forced labour, the issue of free and informed consent (voluntariness), the unexpected dimension of deception in recruitment, and the menace of penalty in dismissal.

### **8.2.3 Excessive work hours**

Excessive work hours were present in 83% of the participants (66 out of 80 interviewed). This did not include the abuse experienced from lack of adequate rest on designated rest days, which should be one rest day per week, consisting of 24 continuous hours in duration based on the Hong Kong Labour Ordinance (Cap. 57). During the normal workweek, MDWs worked on average 16 hours per day, with some required to work 19 hours; the average workweek was therefore between 96 and 114 hours per week (6 days, **not** including work on a rest day). On designated rest days, MDWs worked before leaving the house and often worked on return at curfew time. The average number of hours not working on a designated rest day was found to be 12.5 on average, with an overall range of 6 hours at the low end to 15 hours at the higher end of the range. The weekly average working hours of MDWs – 96 – is well above the 69 hours for native workers per a six-day week.<sup>580</sup> The highest number of work hours for a participant MDW was 114 hours for the 6-day period (see Figure 3).

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<sup>580</sup> Labour Department, 'Report of the Policy Study On Standard Working Hours' Hong Kong 2012. p.120-123

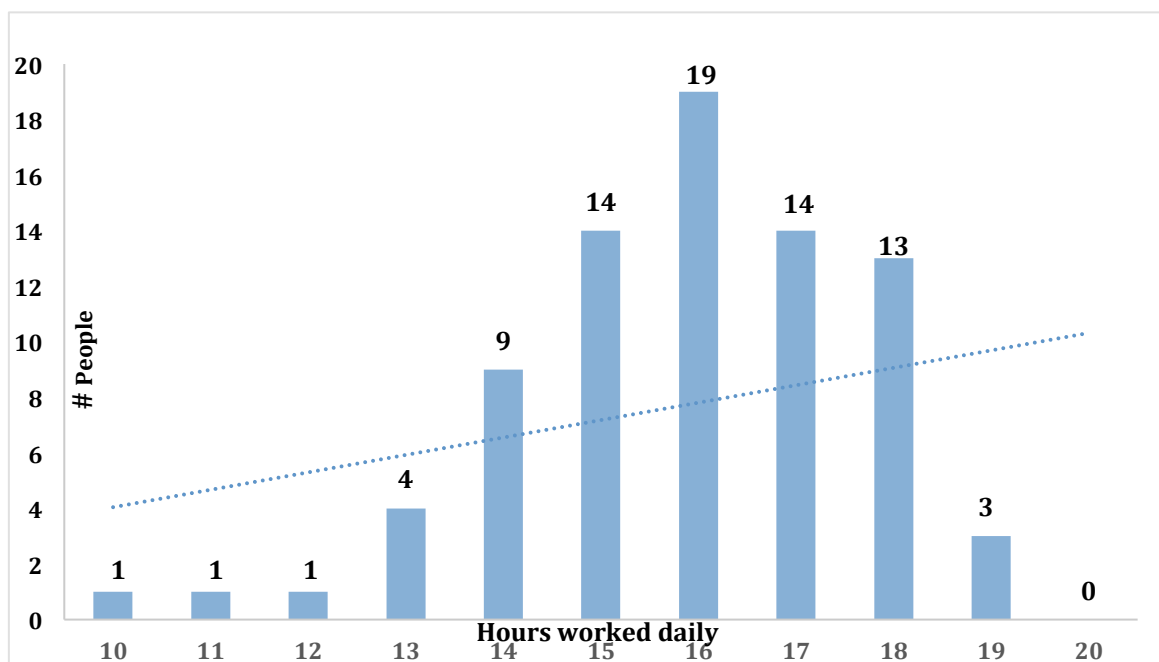


Figure 3 - hours worked daily - 6 days

Excessive working hours is the single most prevalent factor in assessing forced labour. Since this indicator is qualified as a strong indicator of *involuntariness* under the dimension of ‘work and life under duress’, any other indicator that qualifies as a medium or strong form of coercion in the form of threats, lack of food, assault, isolation, etc., satisfies the ILO’s criteria for forced labour. The long hours imposed on the MDWs are as a result of their vulnerable position<sup>581</sup> and one of the impermissible advantages afforded to employers.<sup>582</sup> In Fineman’s theory, the regulation of this issue permits the employer to receive the privilege of long hours of work free from any government regulation to the disadvantage of the MDW who receives no further compensation for excessive work hours.

#### 8.2.4 Debt bondage

In accordance with existing Hong Kong Law (Part XII of the Employment Ordinance and the Employment Agency Regulations Chapter 57, Part II) the maximum recruitment fee that a recruiting agency is allowed to charge is limited to 10% of the MDW’s first month’s wages *after* they have been placed. The current

<sup>581</sup> Satterthwaite, ‘Crossing borders, claiming rights: using human rights law to empower women migrant workers’, p.25

<sup>582</sup> Fineman, ‘The vulnerable subject and the responsive State’

minimum allowable wage for MDWs is \$4,310 and therefore, the maximum fee would be \$431. The Indonesian government allows by decree<sup>583</sup> employment agencies to charge a maximum of \$15,550.<sup>584</sup> The Philippine government under a 2006 decree<sup>585</sup> resolved that MDWs should not be charged a recruitment fee. Despite the limitations set by these three countries, MDWs continue to be charged excessive recruitment fees, placing them in a form of debt bondage. Many of the participants interviewed described the payment of recruitment fees in their home country and in some instances, having to pay a further fee in Hong Kong.

Of the 80 participants interviewed, 66% (53) indicated that they paid a recruitment fee above the legally allowed limit, 10% (8) paid the legal established amount, 22.5% (18) paid no fees (they either self-processed or were hired directly without an agency), and one participant could not recall the fees paid. All participants indicated that the fees were paid by taking loans from family, friends or lending companies. In most instances, the total fees were between \$6,000 and \$24,000 and paid over a 3-8-month period, in amounts ranging from \$2,000 to \$3,000 per month. This was assessed as a strong indicator for involuntariness at the recruitment stage for two reasons; first, because of its illegal nature, and second, because the workers involved in this research were from countries (Philippines and Indonesia) that require a partner agency in Hong Kong to process applicants. This partnering requirement was intended to introduce some oversight from the receiving/destination country on the fees being charged. This indicator was not used in determining the presence of forced labour since it is considered an indicator of involuntariness at the recruitment stage.

Recruitment debt is a significant factor in creating vulnerability in forced labour situations.<sup>586</sup> The debt may be held by the recruitment agency, moneylender, family member or friend making an indirect link that nonetheless directly affects the employment relationship and a MDW's decision to leave the employment. In

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<sup>583</sup> KEP.186/PPTK/VII/2008

<sup>584</sup> Amnesty International, 'Exploited for Profit, Failed by Governments, Indonesian Migrant Domestic Workers Trafficked to Hong Kong' (2013) p.25

<sup>585</sup> Philippine Overseas Employment Administration, Resolution No.7 (2006)

<sup>586</sup> United States Department of State 'Trafficking In Persons Report' (2015, 2016, 2017)

instances where the employer may have paid the agency and the MDW is indebted, the link between ‘menace of penalty’ and any coercion is clear.

### **8.2.5 Deception**

Deception in recruitment appeared in 35 of 80 of cases (44%). An indicator of deception was assessed each time a participant indicated that some element of their employment entailed tasks, wages, living conditions or conditions where the employer was not what or who was promised, either verbally or in writing. Examples of deception included participants being prematurely terminated because they could not speak Cantonese despite informing the recruiting agency of this.

Illegal deployment was another form of deception that occurred when an employer required a MDW to perform work outside the specified address in the contract. Illegal deployment included work to be performed at residences of family and friends of the employer, and work performed at commercial, retail businesses and restaurants. In all instances, this additional work was never mentioned until the MDW was placed with the employer. In one instance, a participant was prematurely terminated because she challenged the employer about making deliveries for the employer’s ‘side business’ selling contact lenses.

### **8.2.6 Intimidation and threats**

Intimidation or threats were reported 34% (27 of 80) of the time. This indicator included the use of abusive or demeaning language, threats of termination, loss of wages through illegal deductions, excessive reimbursement costs charged for alleged damage to household items, and sleep deprivation as a form of punishment. One of the other cited forms of intimidation was the employer’s threat to report false crimes, most often for alleged theft of valuables from the household.

Twenty-three of the 80 participants (29%) indicated that they were not given a reasonable amount of food (Food Deprivation, strong coercion). Although, there are no standardised ways to measure what constitutes daily subsistence, the interviews did provide anecdotal information that corroborated the reporting MDWs concerns. One participant indicated that over a 4-month period of employment she lost 44 lbs. As the participant explained in her own words:

‘Sir, I am stressed. I want to break my contract. I went from 60 kg (132 lbs.) to 40 kg (88 lbs.). There is only dinner no breakfast, no lunch. I don’t think I can survive two years with this employer’.

While there was a consistent complaint about the lack of adequate amounts of food, the research identified several reasons:

1. limited budget of the employer;
2. family members eating first, leaving the MDW with whatever was left;
3. being given stale left-overs; and
4. religious restrictions on diet which were not accounted for by the employer.

Lastly, sleep deprivation was another coercive method used to exert control over the MDW. One participant described being awakened at 1 – 2 AM daily to perform household work that the employer decided did not meet acceptable standards.

### **8.2.7 Abusive working and living conditions**

Abusive working and living conditions were reported by 33% (26) of participants. This indicator was assessed when participants described substandard living conditions, demeaning treatment, or lack of privacy especially in sleeping accommodation. One example cited was an employer’s requirement that the MDW wash her clothes with water used by the employer or family members to bathe. Another example given was where the MDW was called to join the employer for dinner but was required to eat from the same bowl as her male employer.

### **8.2.8 Restriction of movement**

Restriction of movement was reported 24% of the time (19 instances). In instances where CCTV cameras were installed, this indicator was assessed only when participants indicated that the use of the cameras were intended to monitor their movement or restrict breaks during the day.

### **8.2.9 Retention of documents**

Retention of identity documents by the employer or the contracting agency was recorded 24% of the time (19 instances). This act involved the seizure of passports, contracts or ID cards. The seizure of documents by employment agencies was observed in cases where there was outstanding recruitment debt. Sometimes the

employer held documents on behalf of the agency, providing no reason to the MDW. In other instances, the employer seized the documents to prevent the worker from being able to take out loans while employed.

#### **8.2.10 Isolation**

Isolation was reported 21% of the time (17 cases). This tactic involved the employer taking away the MDW's mobile phone to limit contact with anybody outside of the place of employment. In addition to the seizure of communication devices, all 17 participants reported prohibitions from speaking to other MDWs in the area, neighbours and even other workers in the same household.

#### **8.2.11 Physical/sexual violence**

Physical violence was reported eight times (10%). Each of the cases involved physical assaults that ranged from repeated twisting of the ear as an expression of displeasure to more serious incidents of beatings administered with clothes hangers and other objects. No sexual assaults or harassment were reported. Based on the available literature on this latter issue,<sup>587</sup> I would have expected some participants to report on this issue. It is unclear if the lack of reporting was due to the location of the interviews (lack of privacy) or the male gender of the researcher.

#### **8.2.12 Withholding of wages**

Withholding of wages occurred in 6 cases (8%). These incidents had a wide range; arbitrary underpayment of the contractual minimum allowable wage, illegal deductions for alleged damage done to the employer's clothing or minor damage to household items, deductions of illegal recruitment fees by the employer on behalf of the employment agency, and refusal to pay final entitlements on termination. In instances where MDWs were terminated without the required one month's notice, the employer is required to pay one month's wages in lieu. At termination, employers frequently refuse to fulfil this binding contractual obligation. This refusal

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<sup>587</sup> The Hong Kong SAR Equal Opportunities Commission conducted a survey of 981 Foreign Domestic Workers in 2014. It found that 6.5% of respondents reported being sexually harassed during the 12 months prior to the survey.

to pay is largely responsible for delays in settling a complaint filed with the labour department.

### **8.3 Imbalance of power**

In most instances, MDWs are subject to an inordinate amount of control that is exerted by employers or employment agencies, negatively affecting their ability to make basic decisions about their finances and assert themselves when asked to perform work that was not contractually agreed. The effect of this domination also extends to claims that are heard in redress forums. Adjudicating officials at times find it unbelievable that a complaining MDW can be subjected to the abuses and yet appear not to possess enough autonomy to resist.

A case that best exemplifies that occurred in 2011. A Philippine woman claiming to be a victim of human trafficking was arrested and charged by immigration authorities for violating her visa restrictions. She told authorities that she had been brought into the country on a tourist visa by her employer who had family in Hong Kong. She was then handed over to that family to temporarily care for their elderly mother. She had worked for this employer for two years, never leaving the home because she feared the repercussions. Her passport was in the possession of the employer during the entire two-year period and she was never paid for the work that she did. The woman had never previously travelled outside of the Philippines. Learning of her father's death, she demanded to be sent home. That request was denied and her condition remained unchanged. When she subsequently went on a hunger strike to force her employer to release her, she was placed in a taxi cab with \$5,000 Hong Kong Dollars and sent to the Philippine Consulate. The subsequent police investigation resulted in the arrest and prosecution of this worker for working in Hong Kong without a valid visa; after a trial during which she testified to all of the above facts, she was found guilty of the offenses charged and sentenced to four and a half months imprisonment. The "Sun"<sup>588</sup> reported that the magistrate hearing this case had concluded that based on the facts he could not agree that that the worker had been brought to Hong Kong against her wishes; further the magistrate

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<sup>588</sup> Jan Yumul, 'Filipina claiming to be trafficked Jailed', *Sun Internet Edition* mid-February 2012, <http://www.sunweb.com.hk/Story.asp?hdnStoryCode=7179>;



stated that given her age and her prior work experience he also could not accept her testimony that she could not escape from the home in instances when the employer may not have been in. The Magistrate, in concluding that she was not a victim of human trafficking, opined that despite the fact that this was her first time in to Hong Kong, it was illogical that she could have worked with her employers for two and a half years against her will.

There is a lack of understanding or recognition that domestic work reinforces relationships of power and inequality in societies where it is found.<sup>589</sup> It ‘emerges from, reflects and reinforces some combination of hierarchical relationships of class, gender, race, ethnicity migration or age’.<sup>590</sup> Most studies on domestic work recognise that there is a link between inequality and oppression in the employer-employer relationship.<sup>591</sup> Of the 87 participants asked if they were able to negotiate the conditions of their employment, 58 indicated that they could not. Six indicated that they could negotiate with their employers, but when asked why they had not, they replied that they feared being terminated. In 23 interviews, the question was not asked due to the circumstances of the employment, in that there was no indication that there were problems with the employment and in some instances termination was the result of reasons other than mistreatment. The two cases below highlight this imbalance.

### **8.3.1 Case 1 – Alma**

At the time of the interview, Alma had been employed for only 4 months. She had been interviewed by the employment agency and directly placed in the employer’s home. After the first month, she complained that she was unhappy with her employer’s treatment of her. She also complained that she was required to work at the employer’s office (illegal deployment, strong involuntariness, work and life under duress), which was not in her contract. The agency told her that she had no right to change the employer and she still owed the lending company. When recruited in the Philippines, Alma was told she should pay a recruitment fee in Hong Kong. On arrival in Hong Kong, she was referred to a lending company where she

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<sup>589</sup> Constable, *Maid to order in Hong Kong: stories of migrant workers*, p.10

<sup>590</sup> *Ibid*

<sup>591</sup> *Ibid*

took a loan for \$10,960 to be paid over six months. Alma explained that this was a concern for her and one of the reasons she continued working:

‘I was afraid if I refused my employer, she would terminate me. If I got terminated I cannot pay my lending and I might go to jail for not paying. I asked advice from Mission because I don’t know what to do. If they find me working not at my employer, I could go to jail also’.

Alma was working approximately 19 hours for each workday (excessive work hours, strong involuntariness)) and was allotted 11 hours of rest on her rest day. She was told by her employer not to communicate with anyone (isolation, strong coercion) in the neighbourhood or building, and not to befriend other MDWs. Alma also complained that she was not being given enough food for daily sustenance (food deprivation, strong coercion). On the day that she sought assistance, she told me that her employer who had gone on vacation for approximately two months, and had instructed her to work for her employer’s friend during their absence. She had no prior notice of this move or understanding of the work or living conditions at the friend’s residence. Alma informed her employer that she did not think the arrangements were legal per the Labour Ordinance. The employer became enraged and threatened to kill Alma, telling her, ‘Do not follow the contract, immigration rules or labour department. Follow my rules. You are in my house’ (threats against the victim, strong coercion). Alma explained that she sought assistance because she felt that the employer’s arrangements were in violation of the contract and a violation of Hong Kong’s labour laws. Alma was never interviewed by her employer and had never met her before being taken to the employer’s house.

Alma was provided with a letter by MFMW to be taken to the Immigration Department explaining the conditions of her employment. She returned to her employer’s residence that day. When contacted a month later, Alma was still employed and her employer was still on vacation. She advised that the recruitment agency had informed her that her employer had been banned by HK Immigration from hiring another MDW. In this case, the imbalance is clear. The worker had no autonomy or confidence that she could ignore the request of the employer without some form of reprisal. Alma’s bargaining position was limited in that the debt was a

factor in deciding what options she had but also the employer felt entitled to instruct Alma to disregard the authorities and the contract that governed the relationship.

### **8.3.2 Case 2 – Jenny**

Jenny arrived at the NGO at the end of July 2015 having just terminated her contract. At 46 years old, Jenny had worked for 5 years in Saudi Arabia and 2 years in Taiwan as a domestic worker. She had been working for this employer for three months at the time she terminated her employment contract due to abuse. Jenny's interview catalogued a long list of issues and abuses that began the moment that she arrived in Hong Kong. She told me that she had been deceived in her recruitment because she expected to care for two adults, but on her arrival in Hong Kong found that she would be responsible for six people at the employers' residence, and would also be required to work at two additional homes of the employer's family members. She was working 16-hour days, with 12 hours' rest on her rest days. She slept on a mattress on the floor, near the living room, which severely impacted privacy and her ability to sleep as family members were frequently awake until 2:00 a.m. watching television. Her passport had been seized by the employer on arrival in Hong Kong. Jenny, a practicing Muslim, was unable to eat meals prepared for the employer and their family due to dietary restrictions. She was not provided any food allowance and her meals consisted of a slice of bread at breakfast and some rice at night. Jenny explained that she endured the 3 months because she needed to pay off her recruitment fees and was afraid of termination.

At the time Jenny sought help, she was paying two different recruitment fees to the same employment agency, one from a previous employment that was prematurely terminated in 2014 and her current employment. She had been charged a recruitment fee of \$8,800 and had made an initial payment \$2,000, with \$1,000 due each month for six months. Since Jenny had terminated her contract, she wanted to recoup as much of the recruitment fee that she was entitled to. Jenny had two options; she could file with the Small Claims Tribunal or file a claim with the Labour Department against the employer for illegal deductions of \$5,000. The employer had been deducting money from her salary each month, sending it to the employment agency. In early August 2015, Jenny filed her claim with the Labour Department. Her employer did not attend a conciliation meeting that was scheduled, and as a result the

case was scheduled for MECAB. In mid-October, Jenny attended MECAB, with her employer present. The Adjudicating Officer, gesturing in the direction of the man across from her, opened the proceedings by asking Jenny to explain why her employer should pay the claim. Jenny replied, 'That's not my employer!' Jenny then pointed to a man seated in the observing seats and identified him as her employer. The hearing determined that the person seated across from her was the individual who had signed the contract but Jenny had been working for his brother. After several hours of the hearing, the employer offered to pay \$3,000, which Jenny accepted.

In the second claim, Jenny's ability to recover additional fees was hampered by the fact that the recruitment agency did not provide her with receipts for payments made. However, with the support of the NGO, she did file a complaint against the employer to recover fees that were also deducted from her wages and sent to the employment agency. Under the Hong Kong Labour Ordinance (Cap. 57, section 26), the employer is required to pay the worker directly. The agency had received \$6,667 in recruitment fees through an arrangement with the employer to ensure the monthly payments were made over a period of 6 months. At the beginning of the hearing, the Adjudicating Officer informed both parties that the claim was outside the jurisdiction of the MECAB since it was more than a year old. The Adjudicating Officer asked both parties if they wanted to waive their right to have the case moved to the Labour Tribunal or have the claim heard in MECAB. Both parties declined to waive their right and agreed to have the case sent to the Labour Tribunal. The Adjudicating Officer then counselled Jenny, informing her that she should claim against the agency not the employer. He then advised the employer to file a claim in the Small Claims Tribunal if she (employer) paid the agency on behalf of Jenny completely ignoring the illegality of the recruitment fee and the fact that the employer informed the Adjudicating Officer that, 'I asked the agency to come here, but they don't want any part of this case because they know it is illegal to charge the maid the money'. Jenny continued to object, 'I did not give her permission to deduct money from my wages. The employer has no place in any agreement between me and the agency'. The case was adjourned and both Jenny and her employer were informed that the claim along with all documentation would be transferred to the Labour Tribunal.

Both the employer and employment agency were dominant in the relationship with Jenny. The employer felt that she had the authority to insert herself into Jenny's financial affairs and relationship with the agency without resistance from Jenny. The agency overcharged Jenny twice for securing an employer, taking advantage of Jenny's position as a domestic worker needing employment.

Interviews with several key informants, K4<sup>592</sup>, K5<sup>593</sup>, K6<sup>594</sup>, K7<sup>595</sup> and K8<sup>596</sup> were corroborative of the issue of imbalance of power between the employer and employee and was clearly perceived as different from the normal hierarchical relationship found in the workplace. K8's belief was that it stemmed from discrimination based on their status as migrants, issues of race and that they are women. All five key informants agreed that their status as migrants underscores their unequal position as outsiders, temporary and replaceable, workers were powerless to ignore demands that fall outside their contractual agreements. K6 commented that MDWs view themselves as mere workers who do not have the right to speak or act without the approval of the employer. This imbalance is further solidified through the "live in" requirement, and a systematic process that K7 described as "grooming". K7 explained that the employment agencies "brain wash" the MDW in the orientation and training process, conditioning them to be subservient;

'You have to work hard because you love your employer's family. If you love your employer's family they would love you. If you want to have better performance than Filipino, you have to work harder because Filipino may work only eight hours but you Indonesian you have to work. If your employer ask you to do some more work in the evening time or in the night time, you have to follow because of your work, your love''.

This perceived responsibility to please their employers coupled with the fear of termination for disobeying, extends to infractions of the immigration ordinance concerning the "conditions of stay" and an inequitable application of law based on

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<sup>592</sup> Director of NGO

<sup>593</sup> Deputy Director of NGO

<sup>594</sup> Deputy Manager NGO

<sup>595</sup> Social Worker of NGO

<sup>596</sup> Case Worker on Discrimination

overt discrimination. K5 explains that when MDWs are found working illegally at locations not in their contracts, ‘...MDWs are the ones that are arrested and charged. The employer bears no responsibility.’

K4 explained that some employers engage in abusive treatment of their workers because ‘...they have the money. They can treat them [the MDW] as they wish because they are just workers. They (employer) can do anything’. The MDWs are powerless to overcome this imbalance. MDWs, ‘...don’t have the power to fight’. K7 expressed a similar view and explained:

‘... we as Hong Kong people are naïve because we underestimate about the power relationship between the employer and the domestic worker (helper). Our society is who pay the money, who (we) can define who you are’.

#### **8.4 ‘I have no choice’**

One of the unanticipated findings of the research was that many of the participants did not see themselves as victims and, despite having legitimate grievances, repeatedly returned to their work without taking any legal or remedial action. They accepted the abuse and mistreatment as a norm, something to be endured for their own well-being and that of their dependent family. Again, of the total participant population, 64 participants indicated that they had ‘no choice’ when describing why they stayed in the employment as long as they had prior to termination or decided to continue. Of the 53 participants who were initially identified as being in forced labour, 41 chose not to make a claim. Out of those 41, more than half (24) returned to their place of employment after complaining of abuse. Seventeen of those 24 were terminated by the employer or ended their contracts prematurely. Six people assessed as being in a forced labour situation had never filed a complaint despite the obvious issues raised, and indicated that prior to termination, they had no problems with their employer and did not see the conduct as an issue.

Other research<sup>597</sup> has identified a reluctance to accept the ‘victim role’ in accepting assistance as trafficking victims. I found similarity in this participant group. Some

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<sup>597</sup> Anette Brunovskis and Rebecca Surtees, *Leaving the past behind: When victims of trafficking decline assistance* (Fafu Norway 2007)

victims did not see themselves in this light as they were ‘...used to taking care not only of themselves but also their families and the desire to support their family was the motivation for migration’.<sup>598</sup> Family situations were exacerbated by debt incurred to cover the cost of migration, and those who returned home appearing worse off or not able to send money may bear the stigma of being viewed as a failed migrant.<sup>599</sup>

The case studies below will describe the working conditions of MDWs and the reasons why they have ‘no choice’ in enduring the employment conditions exacted on them by their employers. While evaluating the decision to remain in an undesirable employment situation and the need to meet family needs, I was compelled late in the process to consider what family means.

One participant informed me that there is a social and cultural responsibility to take care of other family members if they are unemployed. It was then explained that there were 11 people in her family which included aunts, uncles, cousins, nieces and nephews. She continued to explain that, ‘...this is a factor in deciding if to terminate your contract’. This participant was not in forced labour and had worked in Hong Kong for almost 32 years, 24 years with one employer then 8 years with the daughter of the first employer.

#### **8.4.1 Case 3 – Vera**

Vera was in a forced labour situation working excessive hours of 17 hours per day, she had her passport seized, she complained of lack of food, isolation, poor accommodation and she was in debt associated with her recruitment fees. Vera had only been working for two months before she was terminated. She had borrowed 60,000 Pesos from a lending company and another 40,000 Pesos from a family member.

When asked if she would have stayed with the employer if she hadn’t been terminated, Vera explained that she had given it some thought but she considered the financial implications to be too severe. She explained:

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<sup>598</sup> Ibid p.28

<sup>599</sup> Ibid p.21

‘I have no choice. We have no home, we are renting, I have 3 children and one is special needs. My husband does not work as he has to take care of our child who needs a lot of medication’.

#### **8.4.2 Case 4 – Christine**

Christine was in forced labour employment. She was working 20 hours per day (strong involuntariness), she complained about a lack of food (strong coercion), she was isolated, and she was constantly verbally abused. Christine was required to clean the exterior of the fourth story windows via a narrow ledge. Considering that other MDWs have fallen to their deaths doing the same thing, this was considered a strong indicator of involuntariness. Christine was made to sleep in the kitchen and explained that she was frequently awakened by the male employer cooking at 2:00am. The employers threatened Christine that if she did not obey their instructions, she would be terminated. Christine was one of the early participants and when she explained having to clean the exterior of the windows on the 4<sup>th</sup> floor, I questioned her decision to acquiesce to the employer’s request considering that such an act could result in serious injury or death. Christine replied: ‘I have no choice. We have to do what they say. I have to support my family. I need this job. I borrowed 50,000 pesos from my friend and I’m only one month here and cannot pay her’. After one and a half months, Christine sought assistance and claimed constructive dismissal. Her claim was unsuccessful and she was required to compensate the employer. In both cases, decisions are limited due to family circumstances and debt. Both Vera and Christine were in forced labour not because of their poor working conditions or economic necessity<sup>600</sup> but because of the involuntariness and coercion applied by the employer.<sup>601</sup>

#### **8.5 Comparison – similar methodology and findings**

The methods used in this research are similar to those in other types of research only in respect of the identification of forced labour. Across all studies, the prevalence of forced labour was found to be high. The results of this study found 66% of the people interviewed were in forced labour. Although MFMW has not specifically

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<sup>600</sup> International Labour Conference , (93 Session) ‘Global Alliance Against Forced Labour’, Report I (B) (2005) para 13

<sup>601</sup> ILO, Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children, p.13



done research on forced labour, a look at the clients they serve and the reasons for seeking assistance may shed some light on the prevalence of forced labour within their clients. I will examine MFMW clients first before comparing other studies.

### **8.5.1 Prevalence of forced labour in MFMW clients**

In 2015, MFMW assisted approximately 4,600 MDWs. Many of the complaints involved multiple issues ranging from contract termination, illegal recruitment fees and maltreatment by the employer. Some 54% of MDWs who sought assistance complained of contractual violations, premature terminations, unpaid wages and other entitlements governed by the Labour Ordinance. Another 41% reported problems involving malpractice of recruitment agencies associated with overcharging of recruitment fees and fraudulent loans that places MDWs in modern forms of debt bondage. The 80 participants interviewed in this study represent approximately 2% of the clients assisted by MFMW in 2015. Considering that the clients that appear at MFMW are suffering the worst types of abuses, it would be expected that the number of them in forced labour would be high. At a rate of 66%, it may suggest that, of the 4,600 clients assisted by MFMW, approximately 3,036 could in forced labour. These numbers may differ from a randomised sample of the general MDW population as the types of participants suffering abuses would be more concentrated in NGOs than the general population.

### **8.5.2 Other research**

#### **8.5.2.1 Justice Centre Hong Kong**

Between April and May 2015, at the same time this research was being conducted, the Justice Centre Hong Kong conducted first-of-its-kind, comprehensive research to establish the prevalence of forced labour and human trafficking in Hong Kong, intended to be representative of the larger MDW population.<sup>602</sup> The research relied on the 67 indicators outlined in the ILO's 2009 *Operational indicators of trafficking in human beings* to identify victims of forced labour and human trafficking based on the Delphi methodology. It also used the ILO's questionnaire in *Hard to see, Harder to Count* as a survey instrument adapted to the Hong Kong context to gather

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<sup>602</sup> Jade Anderson, Victoria Wisniewski Otero, 'Coming Clean' Justice Centre Hong Kong 2016

quantitative data, administering it to over 1,000 MDWs. The survey examined the experiences of MDWs both in Hong Kong and the MDWs' home countries, focusing on recruitment debt, recruitment practices, working hours, working and living conditions, access to adequate food and treatment by employers. The survey results were then analysed against the indicators of forced labour and validated through five qualitative focus groups consisting of MDWs from five countries.

The research found that 17% of surveyed MDWs were in a forced labour situation, or 1 in 6 MDWs in Hong Kong. The MDWs most vulnerable were those on their first contract and those who had significant recruitment debt. MDWs worked on average 11.9 hours per day, six days a week, equivalent to 71.4 hours per week. 33.7% of MDWs had to work before leaving home on their rest day and on their return, in clear violation of the Hong Kong Labour Ordinance requiring a full 24 hours of continuous rest. Some 31.9% of respondents did not feel free to leave their jobs, and 37.5% were concerned that if they terminated their contracts it might negatively impact their future prospects ('job hopping') and draw the attention of the Hong Kong Immigration Department, which discourages resignation. Over half of the respondents, 55%, felt they could not leave their abusive situations; the MDWs viewed all of the jobs as similar in nature, including abuses and deprivations.

The use of indicators to identify victims of forced labour makes the real-life abuses of victims a subjective issue and is a means to quantify, validate and defend forced labour findings. If, for example, an interviewed victim was assessed with a medium indicator for involuntariness and a medium indicator for coercion, it would not fit the criteria for forced labour. This assessment is void of any consideration of the victim's capacity, age, cultural background, social or economic status. A medium indicator of coercion may be the most traumatic experience of the participant's life. Furthermore, the identification of forced labour cannot simply rely on established indicators and the qualification of strong or medium. This approach eliminates the real possibility of forced labour occurring on a continuum of severity and creates a reactive posture of identification if service providers must wait on experts to identify new indicators. Indicators can never cover every abusive act, as abuses of MDWs are only limited by the imagination of the abuser. In considering this issue, I believe that the use of indicators to identify behaviours of forced labour is a starting point of

identification and not a definitive end. All instances of forced labour, however slight, that meet the criteria of involuntariness or deception and coercion should be treated as a crime. Thus, considering the method of measurement, the incidence of forced labour could very well be higher than reported. I recognise the necessity for both approaches, as it establishes that there must be differing methods of identification; at least one method that establishes statistical validity to influence government policy and another to rapidly identify victims in the field.

#### **8.5.2.2 Amnesty International**

Between May 2012 and March 2013, Amnesty International produced a report<sup>603</sup> after examination of the experiences of Indonesian MDWs from recruitment to employment in Hong Kong. They conducted 97 in-depth interviews and surveyed 930 Indonesian MDWs. As part of their study, they interviewed Indonesian migrant domestic workers who had arrived in Hong Kong between 2008 and 2012, and experienced problems during the migratory process. The interviewees represented a purposive sample that provided an in-depth understanding of the migration process and the types of human and labour rights abuses experienced. The study gathered information on the recruitment process, at the training centres in Indonesia, while working in Hong Kong, and when they returned to Indonesia. Amnesty International also conducted interviews with recruitment agencies, brokers, local trade unions, NGOs, employers' associations and intergovernmental institutions in both Hong Kong and Indonesia. They conducted site visits to two training centres in Indonesia and met Indonesian officials from several relevant government agencies, including the Ministry of Manpower and Transmigration, the National Board for the Placement and Protection of Indonesian Overseas Workers, the Consulate General of Indonesia in Hong Kong, the Labour Office in Indonesia, and Hong Kong officials from the Labour and Immigration Departments.

Amnesty international made three specific findings:

1. Recruitment agencies in Indonesia and Hong Kong were routinely involved in the trafficking and exploitation of MDWs, placing them in conditions of

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<sup>603</sup> Amnesty International, 'Exploited For Profit, Failed By Governments', 2013

forced labour using deception and coercion to recruit and to compel them to work. The prevalent mechanisms of coercion applied were the confiscation of identity documents, restrictions on freedom of movement and the manipulation of debt incurred through recruitment fees.

2. Employers in Hong Kong frequently subject migrant domestic workers to physical or verbal abuse; restrict their freedom of movement; prohibit them from practicing their faith; pay them less than the minimum wage; deny them adequate rest periods; and arbitrarily terminate their contracts, in collusion with placement agencies.
3. The Indonesian and Hong Kong governments have not complied with their international obligations to prevent and suppress trafficking and the use of forced labour. They have failed to properly monitor, investigate and sanction individuals and organisations violating domestic legislation, such as recruitment agencies in Indonesia and recruitment agencies and employers in Hong Kong. Both governments have regulations in place that increase migrant domestic workers' risk of suffering human and labour rights violations. These include the obligation of migrants to migrate through government-registered recruitment agencies in Indonesia, and the imposition of the two-week rule and live-in requirement in Hong Kong.

As both these studies illustrate, once the migrant domestic workers arrive in Hong Kong local placement agencies and employers may confiscate their documents and restrict their freedom of movement. Amnesty International documented that the vast majority of MDWs interviewed had their documents taken by either their employer or the placement agency in Hong Kong, and about a third of the respondents were not allowed to leave the employer's house. A survey by one migrant organisation found that nearly three quarters of the MDWs interviewed (74%) had their documents confiscated by their employer or the placement agency. Migrant domestic workers are normally told that they will only get their documents back after their debt is fully repaid.

Interviewees reported that contracts could be terminated if the worker complains about their treatment, is not considered to be a good worker or if the placement agency manipulates the situation to collect a new recruitment fee. Some 17% of the

MDWs surveyed had their contract terminated before the agency fee had been repaid. The fear of having their contract terminated and either not being able to secure a new job or having to repay a recruitment fee a second time, compels many Indonesian migrants to remain in abusive and exploitative jobs. As a result of these abusive recruitment practices and poor government oversight of legal requirements for both recruiters and employers, Indonesian migrant domestic workers are at risk of serious human and labour rights violations in Hong Kong.

Amnesty International found that interviewees worked on average 17 hours a day; numerous respondents did not receive the mandated Minimum Allowable Wage; they were physically or verbally abused by their employer; were prohibited from practicing their faith; and did not receive a weekly day off. Some of the policies and regulations in place further exacerbate this problem. The live-in requirement was again identified as a factor in the exploitation of the MDWs. Legally requiring the MDW to live-in the employer's home as a condition of their employment, offers limited alternatives when they suffer abuse at the hands of their employer and contributes to an environment of vulnerability. Amnesty International documented that many of the respondents did not have their own room, leaving workers with diminished privacy, literally putting them on call 24 hours a day, and potentially making them more vulnerable to sexual harassment or violence.

The two-week rule pressures workers to stay in an abusive situation because they know that if they leave their job, they are likely to have to leave the country, which in turn may make it impossible to repay recruitment fees or support their families. It might also diminish their chances for future employment in Hong Kong. This requirement also makes migrant domestic workers dependent on placement agencies to find another job quickly. Their uncertain state places them at risk of further exploitation, including having to accept excessive recruitment fees, a salary below the Minimum Allowable Wage, and poor living and working conditions just to continue working in Hong Kong.

The two-week rule also acts as a barrier to justice. If a migrant domestic worker leaves an abusive situation and is not re-employed within two weeks, they must leave Hong Kong, making it difficult and costly to pursue a case against an abusive employer. The only available alternative is to apply for a visa extension of 14 days,

at a cost of \$160 (US\$20). As the studies noted, to take a case to the Labour Tribunal takes nearly two months. During this time, the MDW would have to renew their visa several times, and pay for their own accommodation, food and any other living expenses while not earning any income. The costs of doing so makes it impossible for the majority of migrant domestic workers to seek redress for human and labour rights violations. In practice, the two-week rule provides a clear disincentive for the workers to denounce exploitative practices and pursue any claims through available mechanisms.

The Amnesty International research did not use established indicators of forced labour; however, their findings are consistent with those in this research. Debt at the recruitment stage places MDWs in a vulnerable position that limits their ability to make decisions later in the employment. The live-in requirement conceals a variety of abuses that go unreported and a lack of enforcement and effective redress mechanisms prevent MDWs from accessing a true remedy.

## **Conclusion**

Both the Justice Centre and Amnesty International research make similar recommendations: abolishing or amending the live-in requirement, abolishing the two-week rule, taking action to prevent and address human rights abuses, and introducing legislation in compliance with the Forced Labour Convention No.29 (1930). In comparing the other research with this one, the prevalence of Forced labour identified by both Justice Centre and Amnesty International may be higher in reality. The methodology executed in this research revealed that there were indicators that were identified that may not have been captured in the other research methods (section 3.2.3.5).

The most prevalent indicator that contributed to the forced labour conditions of MDWs was excessive working hours that result from the employer's abuse of the MDWs vulnerable position and made permissible by governmental policy requiring the MDW to "live-in". The lack of standard working hour legislation contributes to a lack of equity in the employer employee relationship. The employee performs work in excess of the average working hours compared to the general population with no opportunity for remuneration for the excess hours beyond the national standard.

MDWs are constantly under threat of dismissal for non-compliance to requests that fall outside their contracts and also lack the ability to adequately protect themselves from excessively long and physically demanding working hours. Decent working conditions fall on the discretion and whim of the employer. This inherent imbalance and the inability to overcome it forces the MDW to develop coping methods which includes the acceptance of their condition and the perception that they have “no choice”. The perception of a lack of options results in the MDW enduring long periods of abuse until conditions become so extreme that they are no longer able to cope and eventually seek help. The lack of a comprehensive legal framework to protect MDWs and the punitive policies such as the two-week rule adds to the lack of options.

## **Chapter 9. Analysis – Barriers to Remedies**

### **9.1 Introduction**

The original goal of the research was to determine the effectiveness of conciliation in providing an effective remedy to labour rights violations. In pursuit of this goal, three significant findings emerged. First, there was a finding that most MDWs who were classified as being in forced labour did not seek any form of remedy or file official complaints for the variety of abuses suffered at the hands of their employers. They experienced multiple barriers that limited their decision making in whether to pursue a remedy. Second, those MDWs who did seek a remedy also experienced barriers that limited their decision-making during the redress process, and at times provided inappropriate outcomes. Third, because of the strong institutional drive for conciliated settlements, the conciliation mechanism intended to provide resolution in a quick, simple and inexpensive manner proved to be another barrier to an effective remedy.

With both groups of participants, actors both inside and outside the civil justice system and government policy-makers had a negative effect on the filing or handling of claims. The barriers that MDWs experienced included many of those barriers examined in Chapter 6 that frustrated efforts towards or outright denial of a remedy.

The research and the observations of the redress process also showed a lack of enforcement of laws and regulations that are in place to protect MDWs. In many instances, government personnel that became involved in any disputed situation failed to recognise obvious signs of mistreatment or potentially criminal conduct on the part of employers. Lastly, the lack of criminal redress options ultimately served to undermine any effective remedy. The findings are also very clear that the cases are not recognised as criminal in nature; they are categorised as simple labour disputes and at times provide outcomes that appear unfair as workers settle claims for less than entitlements under their contracts. Ironically, the conciliation process intended to assist parties in exploring the problem concerned, analysing the situation and seeking a mutually acceptable settlement in a speedy manner without legal representation proved to be a barrier to an effective remedy in of itself.



The five sections below will provide the analysis of data collected as part of Phase two, accompaniment to redress processes in section 9.2. The case studies in 9.3 Social and Cultural Barriers, 9.4 Institutional Barriers and 9.5 Structural Barriers are intended to elucidate some of the barriers to remedies attributable to factors and actions of actors inside and outside the redress processes, including the police, employers, employment agencies, Conciliation Officers and adjudicatory third parties, and how they affect MDWs' filing or handling of claims during the redress process. The case studies encompass multiple and overlapping actions and actors that contribute to the denial of a remedy. In section 9.6 I will address the use of Conciliation, an Informal and non-judicial mechanism that acts as a Barrier to a remedy highlighting the cautions of the use of Alternative Dispute Resolution some of which are reflected in this thesis.

## **9.2 Data analysis**

Of the 53 participants classified as being in forced labour, 41 chose not to seek a remedy and 12 chose to file claims with the Labour Department. Of the 41 participants who did not seek a remedy, 24 returned to their employers after complaining about their work conditions and 17 contracts were prematurely terminated, 13 by the employer and 4 by the MDW.

The 17 participants who did not seek a remedy and the 12 that did file claims, experienced a variety of barriers and actors that limited their ability to decide whether to pursue a remedy, or they were outright denied a remedy. In some instances, participants settled claims for less than contractual entitlement. The 7 participants who were added outside the original cohort of 80 through referral brought the total number of participants accompanied to a redress process to 17. I was unable to accompany two participants.

Of the 24 participants who returned to their employment after making a work related complaint, almost all indicated that they did so because they had "no choice" but to tolerate the abusive conditions of their employment. The primary fear expressed was termination of their employment, with all of the attendant consequences. For some of the MDWs, the primary concern was the financial impact on their dependents. A premature termination also came at a financial cost to them; new employment meant having to pay recruitment fees, while still paying off the debt incurred from the fees

paid to secure the employment that was terminated. 16 of the 24 MDWs had been employed for 2 years or less; 7 had been with their employer between 3-4 years; and 1 over 4 + years. Those who fell into that first category expressed the need to complete the 2-year contract to mitigate the higher recruitment fee.

Of the 17 MDWs in the study that were terminated but filed no claims, 12 were paid their outstanding entitlements by the employer. 1 MDW received airfare only after being convinced by the employment agency that she was not entitled to the 10 days wages (the length of the employment) because she (the MDW) terminated the contract. This position taken by the employment agency was despite the fact that the MDW had been the victim of an assault by the employer. 1 MDW decided to file a complaint at a later date after she had secured another employment contract. 2 MDWs left without pursuing any claims because they prematurely terminated the contract. They had previously given the required one-month's notice but then agreed to extend their arrangement for an additional three months. Unable to complete that agreement due to the conditions of their employment made them liable to pay WILON, the cost of which negated any outstanding wages owed. 1 decided to forego her final wages of \$5,316 after she was threatened with criminal charges/arrest over an incident that occurred four months prior to termination. It did not appear that the threat was a legitimate one and may have been intended to achieve the result that it did.

17 participants were accompanied to the three redress forums, Conciliation, MECAB or Labour Tribunal, with the following results:

- 4 participants withdrew from the process: 1 participant was convinced by the Conciliation Officer into withdrawing. She was told by the Conciliation Officer that a failure to withdraw would likely result in the employer filing a case of assault against her. This was an unsubstantiated claim by the employer, which had been previously reported. The second participant withdrew because of the length of time the resolution process was taking. A third withdrew after being paid by the employer. The employer resolved the dispute when she learned that the MDW had requested a review of the manner in which the police were investigating a criminal case of assault

alleged against her (the employer) by the MDW. The fourth MDW withdrew her complaint after finding a new employer.

- 2 participants were unsuccessful in their claims at MECAB: The MECAB conclusions were based on the fact that the MDWs could not present evidence to substantiate their claims of mistreatment. Following this ruling, the 2 MDWs were required to pay the employer WILON, and associated costs.
- 5 participants were successful and awarded their full claims.
- 6 participants settled their claims for less than they were legally entitled to:
  - A claim of \$6,000 was settled for \$895 in airfare only, at the Labour Tribunal
  - A claim for \$13,777 was settled for \$5,757 after the employer refused to pay \$8,020 in severance at Conciliation, and the MDW decided to “move on”.
  - A claim of \$6,667 was settled for \$760, as compensation for visa extensions at the Labour Tribunal.
  - A claim for \$6,600 was settled for \$3,000 at MECAB
  - A claim for \$8,400 was settled for \$3,835, less WILON at Conciliation (the MDW found new employer)
  - A claim for \$16,000 was settled for \$12,000, less WILON. The reason for this conclusion was the lack of corroborative evidence of assault on the worker by the employer. The lack of evidence nullified the claim of WILON.

Eight of these 17 participants were administered questionnaires after completion of at least one of the redress processes. In 9 instances, I decided not to pursue any data on the redress process out of concern of the negative impact on the participants. The practical reality was that going through the redress process had created a lot of stress for the participants. Some of these factors included the uncertainty of the redress process, the length of time it took in resolving their claims, the stress of literally confronting their employers while maintaining their composure in handling the queries of the adjudicating officers. The questionnaire addressed the confidence level of the participants in presenting their claim, their motivation in filing the claim and

whether they felt the process was fair. The following questions bear mentioning, and demonstrate some of the barriers in seeking a remedy.

***How did you feel about presenting your case?***

To this question, four participants indicated that they felt confident in presenting their claim and four did not feel confident. In three claims involving the conciliation process where there was a lack of confidence, the participants identified language barriers as an obstacle when the Cantonese-speaking employer and the Conciliation Officer dominated the process, hampering the MDW from understanding what was being said. The fourth participant engaged in the Labour Tribunal expressed a lack of confidence as she felt the Presiding Officer was dismissive and ‘not listening to her argument’.

Of the other four participants who expressed confidence in presenting their claims, two indicated that that it was their right to claim their entitlements, and the third had decided to accept a settlement for less than contractually entitled as she had secured another employer and wanted to “move on”. The fourth participant, while feeling confident, explained that she was frustrated that the Conciliation Officer ‘believed the employer’, and she wanted to focus on finding a new employer and so settled for less than she was entitled to.

***What was your motivation when you filed your claim?***

One participant expressed that it was a means to a fair hearing about her claim. Two participants wanted the employer to live up to the contract and pay what was owed. In five claims, participants expressed the desire to have their employer punished for violating the contract or treating them poorly.

***Overall, would you say the process was fair?***

Seven participants indicated that the process was not fair, with only one identifying the process as fair.

### 9.3 Social and cultural barriers to remedies

Social and cultural barriers are reflected from wider society and are characteristic of the particular jurisdiction, poverty, economic factors, income, inequality gaps, ethnicity, nationality, religion, literacy, discrimination and education.<sup>604</sup> These overlapping factors are widely identified as obstacles to a remedy<sup>605</sup> and, when they go unaddressed, result in the disempowerment and lack of awareness of rights and an actual or perceived subordination to the more powerful in the community. Due to the deep imbalances of power, the stigma and discrimination MDWs suffer, and their socioeconomic disadvantages, MDWs often reasonably decide against seeking a remedy, thereby precluding any possibility of obtaining justice.<sup>606</sup> MDWs may choose not to seek justice because they fear reprisal or sanction from more powerful actors within or outside their community, or fear being stigmatised or discriminated against.<sup>607</sup>

This section provides the analysis through case studies of two significant social and cultural barriers found in this research. Threats of reprisals from outside the labour redress processes such as employers, employment agencies and lack of awareness on the part of MDWs have a negative impact on the filing or handling of claims in pursuing a remedy.

#### 9.3.1 Threat of reprisals

The threat of reprisals includes the intended or unintended consequences of acts of the employer and employment agencies that affect the decision making of MDWs and deter them from pursuing a remedy. The fear of reprisals stems from the ability of the more powerful members of society to impose sanctions or other retributive actions on weaker members.<sup>608</sup> Reports to the authorities about abusive working

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<sup>604</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

<sup>605</sup> Ibid, *see also* Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice', Andreovski, Larsen and Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study', Anne Gallagher and Paul Holmes, 'Developing an effective criminal justice response to human trafficking: lessons from the front line' (2008) 18 *International criminal justice review* 318

<sup>606</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>607</sup> Ibid

<sup>608</sup> Ibid

conditions can have disastrous consequences. Employers have been known to make false accusations of theft, assault and other infractions as a means of terminating the MDW without repercussions.<sup>609</sup> Employers may also feel the need for retributive actions when the abusive treatment of MDWs is exposed, causing embarrassment when efforts to maintain the secrecy of their actions are unsuccessful.<sup>610</sup>

### **9.3.1.1 Reprisals by the employer**

#### ***Case 5 – Mariah***

Mariah is a 32-year old Filipina who had been working in Hong Kong for 1 year. At the time of the interview, Mariah revealed that her employer had assaulted her on numerous occasions but ‘today was the worst’. The employer had instructed Mariah to boil some water and to use a spoon to transfer the boiling water into a thermos. Mariah, fearing that using a spoon could cause boiling water to spill on her hand, decided to use a cup to fill the thermos. The employer became angry and yelled at Mariah, ‘Why you don’t do what I tell you? Why did not you follow my rules?’ Mariah explained that she placed her hands over her ears:

‘...to stop the yelling. I was so tired of all the shouting. The day before was my rest day. She called me six times while I was out. She is always doing this. She wakes me up at 4:30 in the morning, her excuse is that if she doesn’t tell me what she has to say, she might forget. Why must she do that?’

When Mariah attempted to call the police, the employer blocked her path striking her in the head with her elbow and causing her to strike her head on the bedroom door. When Mariah again attempted to enter the room, the employer twisted her arm. The employer warned Mariah not to report the incident because if she did, the employer would put some of her (the employer’s) personal property amongst her belongings and accuse her of theft. Mariah eventually retrieved the purse and mobile, took the daughter to school and went to the police station to report the incident. The police took her statement and then took her to the hospital for an examination. The police Detective instructed Mariah to call her employer and advise her that she had reported the case to the police and would not be returning to work.

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<sup>609</sup> K-4, Director NGO, K-7 Social Worker

<sup>610</sup> K-6 Deputy Director NGO

Five days later, Mariah returned to the employer's residence to collect her belongings accompanied by her sister-in-law. On arrival at the residence, Mariah encountered a group of police officers at the residence along with the employer and the employer's attorney. The employer had accused her of theft and assault. The police arrested Mariah and took her to the police station where she was 'cautioned'.<sup>611</sup> The police informed Mariah that if she dropped the case against her employer, the employer would not pursue the charges against her. Mariah realising that she would not fare well and feeling powerless in the situation agreed. The police took two statements from Mariah, one concerning the assault on the employer and the other concerning the accusation of theft. When asked by the detective if she understood her right and wanted to make any statements, Mariah wrote, 'yes I understand. I have nothing to say and I don't want to pursue this case'.

I have been a detective responsible for investigation in major criminal cases and I find the statements of Mariah to be important, lending credibility to the quid pro quo arrangement she entered into. In both statements Mariah is the suspect and would have no ability to decide that she did not want to pursue a case. In these instances, it is the employer who would need to make such a statement. Due to the secretive nature of this type of employment, Mariah also lacked any corroborative evidence<sup>612</sup> and coupled with the corrupt actions of the police, this factor could not be overcome.<sup>613</sup> The subtle forms of coercion are highlighted in this case. Mariah's description of the on-going ill treatment, the constant shouting, sleep deprivation and the constant phone calls reflects the psychological coercion intended to control the day to day aspects of the worker's lives.<sup>614</sup> The actions of the employer and the police will have negative implications for Mariah when she files her claim for wages and other entitlements with the Labour Department.

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<sup>611</sup> Advised that you have the right not to make any statements, but if you do, it can be used against you.

<sup>612</sup> Andrevski, Larsen and Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study' p.6

<sup>613</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice' p.13, parties in disadvantaged positions may '...have their claims and cases delayed, denied or discontinued.'

<sup>614</sup> *United States v Kozminski* US (Supreme Court) 487 US 931 (1988) para 956-957

### ***Case 6 – Lynn***

Lynn is a 35-year old Filipino who was terminated by her employer after she decided that she would no longer make deliveries for the employer's contact lens business (medium involuntariness), a task outside the scope of her contract. Her employer had seized her passport (strong coercion) and she was constantly threatened with withholding of wages. For the first 6 months of her employment, Lynn did not have any rest days. After refusing to make the deliveries, Lynn continued working for another three months. In the latter 3 months, she was allowed only 13 hours rest on her rest days. She was not allowed to take rest breaks during the day. After Lynn had worked for 9 months the employer notified her that they were terminating her contract. Lynn did not receive final wages, airfare, travel allowance, food allowance or accrued vacation-pay. In total Lynn intended to claim \$5,316. When the employer threatened that if a labour claim was filed, they (the employers) would report her to the police for child neglect for an alleged incident that occurred during her first week of employment. She did not file a claim. Lynn decided that she did not want to 'cause any trouble' and so she returned to the Philippines without filing a claim for any contractual entitlements.

### ***Case 7 – Sophia***

Sophia is a 29-year old Filipina who had been working for her employer for six months. On or about the 23 September 2015 Sophia asked her employer if she could be allowed to have a holiday on 1 October. She explained that the employer became angry at her request and shortly thereafter asked her to 'pack your things' (termination of contract). Sophia packed her things and was forced to immediately find a boarding house where she could sleep and store her belongings. The employer instructed her to go to the agency to receive her final contractual entitlements but because of the pressing need to find shelter, Sophia did not go to the agency until the next day. On arrival at the agency, Sophia was paid her final entitlements except 'wages in lieu of notice' (WILON). Sophia indicated that the agency informed her that the employer failed to pay WILON because 4 months earlier, she had cut the employer's daughter's fingernails too short. Sophia hesitated making a Labour Department claim since the employer had told Sophia that if she pursued a claim with the Labour Department, she (employer) would file a report with the police



claiming mistreatment of her (employer) daughter regarding the fingernail cutting incident. The employer also did not provide airfare to Sophia's 'place of origin', another contractual obligation of the employer, but the employer was willing to provide it on notice of a departure date provided by Sophia. The employer claimed that Sophia was the one who terminated the contract. Sophia filed a claim with the Labour Department claiming WILON of \$4,110.

In all three cases, the participants shared a real fear of arrest and possible conviction for the offenses alleged. This significantly impaired their ability to assess the information presented to them and impaired their decision making resulting in actions that ultimately frustrated efforts for an effective remedy. Mariah withdrew her claim, Lynn did not file a claim even after being advised to do so at the NGOs office, and Sophia did pursue a claim and prevailed.

### **9.3.1.2 Reprisals by the employment agency**

In the recruitment process of MDWs, the employment agency holds a critical position in the movement of workers. Agencies are the link between the employer, the worker and the Immigration Department. The influence of the employment agencies could be an opportunity for the protection and mitigation of some barriers when MDWs claim their rights, since the agency is at the centre of the hiring and termination process. Unfortunately, in many instances the agency provides some of the barriers to accessing a remedy. It represents both parties in the employment contract; they are the representatives of the employer seeking a worker and the representatives of the worker seeking an employer, a direct conflict of interest. In the event of a dispute concerning abusive working conditions, which party receives the benefit of the doubt? The economic benefit to the agency through the chronic overcharging of MDWs not only contributes to the MDWs' conditions of employment in violation of the prohibition of forced labour, but also through reprisals that directly impacts the MDWs decision to seek a remedy. Four participants discussed the practice of agencies charging a higher fee for MDWs who do not finish their contracts.

One Indonesian MDW explained that the policy of the Indonesian Government was that Indonesian MDWs were not permitted to change employment agencies, and thus there was little or no ability to escape abusive employment situations without

expecting some form of retribution. Not only would there be an expectation of higher fees for changing employers, but there is also a possibility that the agency may refuse to process a new employment contract.<sup>615</sup>

The agency also has the ability to influence the termination of MDWs through the ‘3 for 1’ scheme. Two Key Informants<sup>616</sup> described the scheme as when the employment agency promises the employer that they (the agency) will change the MDWs up to three times at no additional cost to the employer. This scheme makes it easier for the employer to terminate the worker as a form of reprisal; the worker is constantly in fear of the threat and the agency boosts its economic rewards by supplying a new worker and at the same time requiring additional fees from the terminated worker for new employment.

### ***Case 8 – Aque***

Aque is a 34-year old Filipina who worked for her employer for only 10 days. She reported that: she was working 18-hour days (strong involuntariness); was not provided with sufficient food (strong coercion); was isolated by lack of communication with people outside the employer’s residence (strong coercion); and over the short employment period, threatened with assault. She was also subjected to demeaning treatment, as she was required to wash her clothing in the bath water remaining after her employer had taken her bath. Aque was only allowed to launder her bed sheets at 10pm in the parking lot of the residence.

On the day Aque terminated her contract, she was assaulted by her employer who became angry over what was considered poor performance and while scolding Aque grabbed her by the arm and twisted it. Aque explained that the employer was very demanding and required that her ‘hair pins’ were cleaned one at a time and that the floors were mopped six times per day. Aque complained to the agency, since she did not know what to do as she was only employed for a short time. The agency convinced Aque that she was the one who terminated the contract and was thus not entitled to any salary or benefits, only a ticket home. The agency promised Aque that they had another employer for her and instructed her to return to the Philippines and

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<sup>615</sup> K-4 Director NGO

<sup>616</sup> K1- Employment agency Manager, K6- Deputy Director NGO

wait for her new contract. Seven days after the interview, Aque's cousin informed me that she had returned home to the Philippines without seeking entitlements in wages for the 10 days of employment, travel allowance and WILON. Additionally, the employer was not prosecuted for assault.

The actions of the agency in this case suggest that it was intent on protecting the employer from arrest. To achieve their aim, they promised Aque that they would secure another employer, and ensured that she exited Hong Kong thereby preventing a complaint to the police. The need for employment outweighed the need to complain about the assault or seek compensation for the days worked. Additionally, the agency convinced her that she was the one who terminated the contract, that would mean that Aque would have to pay the employer WILON (1-month wages) for early termination, a cost Aque could not afford. Surprisingly, Aque followed the instruction of the agency rather than the advice of the NGO, which would have been to make a complaint of assault.

### **9.3.2 Lack of awareness by MDW**

A lack of understanding and awareness on the part of MDWs of remedy procedures and their rights in applicable hearings makes it difficult to realise a remedy to their complaints. During the interview process, it was evident that many MDWs were not fully aware of their contractual obligations and rights.<sup>617</sup> The assistance provided by NGOs provides a significant improvement, but when MDWs are asked about their claims or to explain how it is based in the Labour Ordinance or their contracts in administrative and judicial proceedings they are unable to do so. Five of eight Key Informants provided similar assessments of this finding.<sup>618</sup>

#### ***Case 2 – Jenny***

In the case of Jenny (see Section 0), she resorted to memorising her statement provided to the Labour Department at filing, but when asked about specific elements

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<sup>617</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>618</sup> K-4 Director NGO, K-5 Deputy Director NGO, K-6 Deputy Director NGO, K-7 Social Worker, K-9 UN Agency Representative

of her case, Jenny could not explain. Similarly, the cases below demonstrate this lack of understanding of laws, policy and contractual elements by MDWS that affects their ability to present their claims effectively.

### ***Case 8 – Aque***

Aque (see Section 0), like Jenny, was unaware of her rights and was convinced by the employment agency that she was the one that terminated the contract even though she was assaulted. She was convinced to return to the Philippines without wages and other entitlements.

### ***Case 9 – Jaz***

Jaz was a 31-year old Filipina who had been working for her employer for 23 months. She was working 17-hour days, subjected to psychological coercion through demeaning language when the employer constantly called her a stupid, crazy Filipino and telling her that Filipinos were bullshit. Jaz was also threatened with physical violence on several occasions. Sometime between May and June 2015, Jaz's employers were leaving on vacation and sent her to live with their friends and to work in their restaurant. Jaz did not feel as though she could refuse, because she was only 20 months into her 2-year contract and she feared termination if she complained. She knew working at the restaurant was illegal, but she needed to work and felt that if she broke the contract it would be difficult to find new employment in Hong Kong. She explained that MDWs who break their contracts are seen as 'trouble makers' by agencies and employers and agencies will charge higher agency fees. When asked why she eventually terminated her contract, Jaz stated that she was afraid that the immigration authorities would arrest her for working outside her contract.

Jaz filed a claim with the Labour Department and, in late August 2015, a conciliation meeting was scheduled. I attended the meeting with Jaz. The Conciliation Officer began the meeting, explaining that it was intended to establish a framework for settlement, that it was not a court and that she had no judicial authority. She was to facilitate dialogue between the employer and the MDW. The Conciliation Officer asked Jaz to explain her claim against her employer. After Jaz explained the conditions in which she was employed, the employer, through the aid of an

interpreter, denied Jaz's account and accused her of filing the claim to remain in Hong Kong. The employer further explained that he had provided airfare in the form of a ticket in accordance with his contractual obligations. The Conciliation Officer then asked Jaz to explain why she did not use the ticket and leave Hong Kong. Jaz seemed confused, and told the Officer that she had the right to remain in Hong Kong for 14 days. The Conciliation Officer asked to be excused from the room and left, returning after approximately 10 minutes. On her return to the meeting, the Conciliation Officer produced a copy of Immigration policy relating to the ability to remain in Hong Kong after termination and began reading it to Jaz. The Conciliation Officer explained to Jaz that while she had the ability to remain in Hong Kong, it was not a right and that she should have used the ticket provided and left Hong Kong. At this point Jaz became emotionally incapacitated and turned to me and asked, 'sir, what should I do?' The Conciliation Officer turned to me and nodded, encouraging a response. I felt compelled to assist and, being familiar with the claim, I explained that the main issue was that the employer was obligated under the contract to provide airfare to the worker's place of origin. The ticket provided was from Hong Kong to Manila and Jaz would need another flight to get home, so accepting the ticket from the employer could have been a tacit acceptance that the employer's obligation had been fulfilled. Jaz was simply claiming the appropriate airfare to her home. The employer protested for another hour but, on convincing from the Conciliation Officer, finally agreed and paid Jaz's claim with a request that she apologise to his wife who had become very fond of Jaz. The Conciliation Officer explained that she could not ask Jaz to agree to an apology, and that the request was unrelated and not within the scope of the services provided by the Labour Relations Division.

Jaz's case, while demonstrating the lack of awareness about her rights, also shows that conciliation is not necessarily concerned with the law (Labour Ordinance) and is focused on settling the claim at hand.<sup>619</sup> The Conciliation process was not concerned with the merits of the claim.<sup>620</sup> There was no initial interrogation of what Jaz's concerns were, and the initial focus was on why Jaz wanted to remain in Hong Kong.

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<sup>619</sup> Genn, 'What is civil justice for? Reform, ADR and access to justice' p.411

<sup>620</sup> Ibid

The priority of the process was on the parties willingness to settle and reach an agreement they both could live with,<sup>621</sup> but the parameters were framed by the position of the employer. This case also demonstrated the element of language barriers. The employer spoke Korean, and was accompanied by a translator. The translation was into Cantonese to communicate with the Conciliation Officer. The Conciliation Officer was then required to translate the dialogue into English so Jaz and I could follow the conversation. Jaz's preferred language is Tagalog. This language barrier created two problems. First, the numerous translations and interpretations may well have not accurately conveyed the original message. Second, there was no way for Jaz or me to know if everything that was being conveyed by the employer was being translated to us.

#### **9.4 Institutional barriers to remedies**

Institutional barriers are linked to governmental policy and dedicated resources to the structure and operation of the country's justice and dispute resolution systems.<sup>622</sup> These barriers exist as a result of inadequate or non-existent legal frameworks, inadequate administrative structures lacking resources or effective management, limited judicial capacity, and inadequate training of the judiciary and other officials resulting in poorly reasoned, inconsistent and biased decisions. Other factors concern the lack of diligence in recognising rights-holders and recording complaints that affect vulnerable groups and lead to the impunity of perpetrators of violations, in contrast to victims who are disregarded or mistreated.<sup>623</sup>

Most of the barriers identified fell into this category and included a lack of legal frameworks, a lack of access to authorities linked to government policy, a lack of representation, a lack of awareness on the part of the government, a lack or corroborative evidence, a lack of awareness or recognition on the part of administrative and judicial decision makers, and a lack of enforcement of decisions.

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<sup>621</sup> Ibid

<sup>622</sup> J Beqiraj and L McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report 02/2014, International Bar Association, October 2014)

<sup>623</sup> Ibid

#### 9.4.1 Lack of legal framework

The legal framework provides the foundation on which the effective preventive and redress measures are built, and mitigates socio-cultural, institutional and structural barriers to adopt holistic approach.<sup>624</sup> An effective legal framework is essential and must criminalise forced labour, provide clear definitions, give avenues for protection, and support appropriate and proportionate penalties.<sup>625</sup> These legal frameworks must also include regulatory systems and monitoring schemes to prevent or stop violations.<sup>626</sup>

When accompanying participants to redress processes and evaluating the inability of many others in accessing a remedy, the most significant and glaring gap was the lack of any legislative measures criminalising forced labour (see Chapter 2). All cases that proceeded to conciliation, MECAB or Labour Tribunal regardless of the working conditions and circumstances described, were treated as a labour disputes and the focus was solely on reaching a monetary settlement. In some cases, the participant was successful and awarded the claim amount and in some cases, they settled for less than their entitlement. Although Hong Kong is bound to the Forced Labour Convention and the prohibition of forced labour has been incorporated domestically<sup>627</sup> using the language directly from the ICCPR, no further steps have been taken to give effect domestically. This lack of a legal framework provides no basis for the recognition, investigation, prosecution or punishment of violators.<sup>628</sup> Even when the claims of MDWs pointed to violations of the Labour Ordinance or Employment Contract, in none of the 17 claims I attended was the employer sanctioned in any manner.

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<sup>624</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'

<sup>625</sup> Andrevski, Larsen and Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: an Indonesian case study'

<sup>626</sup> Satterthwaite, 'Crossing borders, claiming rights: using human rights law to empower women migrant workers' p.12

<sup>627</sup> Hong Kong Bill of Rights Ordinance, CAP. 383, Article 4

<sup>628</sup> *C.N. v The United Kingdom* app. No. 4239/08, para. 76, also *Siliadin v France* app. No. 73316/01, para.148

In a recent High Court case in the Hong Kong,<sup>629</sup> the government argued that there were sufficient existing laws to provide a framework to combat trafficking and forced labour. In the government's assertion, it was presented that:

‘Although Hong Kong does not have a single piece of legislation dealing with human trafficking, or forced labour as such, we do have a comprehensive and solid legislative framework to deal with various conduct encompassed within the definition of TIP in the Palermo Protocol, which includes forced labour. Moreover, the HKSARG has in place a system of comprehensive and multi-faceted administrative and operational measures to deal with the issue in practice’.<sup>630</sup>

The Judge disagreed with the government's argument, having considered the jurisprudence of other forced labour and human trafficking cases in Europe<sup>631</sup> and included in his ruling that:

‘There is a specific prohibition against a form of conduct and yet there is no legislation that criminalises it. Claims are made that features or symptoms of the prohibited conduct are addressed by existing criminal or regulatory offences, but the real mischief is not being criminalised as required. There is no law that prohibits slavery or trafficking in slavery, servitude or trafficking in servitude, and forced labour or trafficking in forced labour’.<sup>632</sup>

In this regard, Hong Kong is not fulfilling its positive obligation to give effect domestically to the rights enshrined in the ICCPR or the Forced Labour Convention No.29. To fully discharge its obligations, it must ensure the protection of all individuals against violations, not only from its agents but also from private people or entities.<sup>633</sup> The incorporation of the ICCPR and the Forced Labour Convention into the Basic Law of Hong Kong is insufficient, as steps must be taken to establish whether a violation has occurred and to redress the violation.<sup>634</sup> The lack of legal frameworks does not absolve Hong Kong from responsibility; this understanding is

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<sup>629</sup> ZN v Secretary for Justice and Others, HCAL15B/2015

<sup>630</sup> Ibid para. 300

<sup>631</sup> *Rantsev v Cyprus and Russia* app. No.25965/04; *Siliadin v France* app. No.73316/01; C.N. v The United Kingdom app. No.4239/08

<sup>632</sup> ZN v Secretary for Justice and Others, HCAL15B/2015 para.304

<sup>633</sup> UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc, 2004) para 8

<sup>634</sup> *Judicial Guarantees in States of Emergencies*, Advisory Opinion OC-9/87, Inter-American Court of Human Rights Series A No.9 (6 October 1987)



made clear in the Vienna Convention on the Law of Treaties.<sup>635</sup> Hong Kong is also responsible for providing reparations for human rights violations. Without reparations, the obligation to provide an effective remedy is not discharged.<sup>636</sup>

In response to questions submitted to the Director of Public Prosecution on whether there had been any prosecutions or cases of forced labour in Hong Kong since 2013, the response was that there were no statistics on prosecution of cases of forced labour.<sup>637</sup> The response to an additional question on whether there was any specific legislation criminalising forced labour was:

‘Although there is not a single comprehensive piece of anti-human trafficking legislation, different forms of human trafficking or human exploitation are covered by various existing common law and statutory offences, which prohibit a wide range of criminal conduct such as assault, intimidation, blackmail and establishing a vice establishment, etc., and to that extent prohibit a broad range of underlying criminal conduct that may be categorised as forced labour’.<sup>638</sup>

#### **9.4.2 Access to authorities and redress**

Access to authorities such as courts, police stations and government organisations are not hampered by geography,<sup>639</sup> but by government policy that MDWs live-in with their employers who control their daily existence and movement. MDWs needing assistance are primarily limited to their day off to access support service providers (NGOs). MDWs experiencing problems may be unable to seek advice or assistance from government organisations since they are unable to leave their places of employment during the workweek.<sup>640</sup> This constraint also impacted this research with the majority of participants interviewed on their day-off. In addition to the restriction of movement in seeking assistance from governmental agencies during normal working hours, MDWs are also exposed to similar unfamiliar environments

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<sup>635</sup> United Nations, Vienna Convention on the Law of Treaties , 23 May 1969, United Nations, Treaty Series, vol. 1155, p.331

<sup>636</sup> Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc, 2004)

<sup>637</sup> G3 Director of Public Prosecution

<sup>638</sup> Ibid

<sup>639</sup> Sepulveda Carmona, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice’

<sup>640</sup> CEDAW Committee, General Recommendation No.26 on Women Migrant Workers, p.7

encountered when seeking help from NGOs. Access to adjudicatory tribunals is also controlled by government policy. MDWs seeking remedies for labour rights violations are required to schedule a conciliation meeting with their employers on filing a claim for final contractual entitlements.

Although the conciliation process is voluntary, all 17 people that I accompanied attended or attempted conciliation, viewing it as a first step even when termination included assaults on the MDW. For a variety of reasons, the MDWs settled; some because they couldn't afford to wait for resolution, some withdrawing their claims or considering withdrawing, and some withdrew because of coercive actions by actors inside and outside the system.

### **9.4.3 A lack of representation**

Lack of representation presents a significant barrier to MDWs who are not versed in the Hong Kong Labour Ordinance or, at times, their own employment contract. The inability to be represented or accompanied by someone who can effectively present their case puts MDWs at a disadvantage because, within the redress process, neither party is allowed legal counsel. This factor is not mitigated by the NGOs' provision of statements and affidavits, since MDWs must still accurately articulate those facts contained within their statements which, rooted in labour law and the interpretation of labour laws, may be too technical or beyond them. Representation goes beyond the redress process and extends to instances of contact with the police, whether as a victim or suspect, the Immigration Department or at the Labour Department. The case below will provide an example of how the lack of representation hampers the ability to effectively present a claim and can have a negative effect and produce an inappropriate outcome of a claim. Again, this barrier is also linked to the lack of awareness on the part of the MDW and the third parties within the resolution process that are unaware of or disregard the disadvantaged position of MDWs.

The problem with the lack of representation is that even when a MDW knows their case, when it is their time to speak they're not able.<sup>641</sup> The process in MECAB and the Labour Tribunal is that it '...is supposed to be informal but the court requires

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<sup>641</sup> K-5 Deputy Director NGO.

formal evidence, documents and the procedure is foreign to MDWs'.<sup>642</sup> If MDWs are allowed representation, many of the barriers could be mitigated. The consensus of five of the key informants is that MDWs do not fare well without assistance.<sup>643</sup> The pressure to settle in all resolution forums may be overcome with representation.

#### **9.4.3.1 Case 2 – Jenny**

Jenny's claim (see Sections 0 and 0) was transferred to the Labour Tribunal. Jenny was assisted by the NGO in providing a statement to the Tribunal when she filed her claim. I was provided a copy of the statement, and the crux of the complaint relied on two elements of the Labour Ordinance:

- The employer must make payment of wages directly to the employee.
- A Hong Kong employment agency may not charge more than 10% of the employee's first month's wages as a recruitment fee.

Since Jenny's employer withheld wages from Jenny's salary and made the payments to the employment agency, Jenny claimed against the employer as she claimed that she did not give the employer permission to deduct any money or make payments to the agency. Furthermore, the amount of \$6,667 deducted was above the legally allowed recruitment fee (at the time \$410). Jenny could not articulate the reasons for her claim and resorted to memorising her statement in anticipation of the hearing.

In late October, Jenny attended the hearing and, when asked to explain her claim, she had difficulty explaining to the Presiding Officer the grounds for her claim. She referred to being mistreated by her current employer, and by employers in the past. She discussed her family in the Philippines and then suddenly appeared to remember to mention that she did not give permission to her employer to deduct money from her wages and forward it to the employment agency.

The employer repeated her statement from the earlier MECAB hearing, where she had told the Tribunal that she tried to encourage the employment agency's owner to

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<sup>642</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice'; also K-5

<sup>643</sup> K-4 Director NGO, K-5 Deputy Director NGO, K-6 Deputy Director NGO, K-7 Social Worker, K-9 UN Agency Representative

come to court and explain the fees but ‘they did not want any part of this case because they know it is illegal to charge the helper the money’.

The Presiding Officer spent a significant amount of time trying to convince both parties to settle the claim. The employer initially refused, but was eventually persuaded by the Presiding Officer to agree to settle. Once the employer agreed, the Presiding Officer turned to Jenny and explained to her:

‘you the claimant may win in the Labour Tribunal but, the employer may file against the agency in small claims court. The agency will file against you claimant, and if (you) out of the country, judgment may be entered in your absence and may affect your ability to work in Hong Kong’.

The Presiding Officer never addressed or relied on the Labour Ordinance and did not address the fact that the employer admitted to transferring the wages to the agency and that she (employer) knew from conversations that the amount was illegal.

Jenny appeared confused and dispirited, and she eventually agreed to settle the claim of \$700 to cover the cost of four visa extensions. The employer, however, was directed to provide copies of the receipts from the employment agency to Jenny so she could seek assistance from the Philippine Consulate in recovering the recruitment fee.

Jenny’s inability to understand and argue her claim could not overcome the Presiding Officer’s position on the matter. The illegality of the recruitment fee was never addressed, not even as a means of educating the employer. The Labour Tribunal is part of the judiciary and has the power to compel the employment agency owner to appear, but this was never presented as an option. The caution to Jenny that the agency may claim against her even in her absence removed any hope that she would prevail in the Labour Tribunal and she agreed to settle the claim. The employer similarly did not appear to understand the implications of her actions, and may also have benefitted from representation.

#### **9.4.4 Lack of government awareness**

The lack of awareness of government officials at all stages has a significant effect on the pursuit and handling of remedies. Government officials failed to recognise

violations of forced labour and resolved the complaints in a forum inappropriate and ineffective for the nature and gravity of the violation. In no claim where I accompanied participants to resolution forums, did any Conciliation Officer, Adjudication Officer or Presiding Officer make any analysis of the conditions of the employment, or make any determination whether a more serious violation than a labour violation was occurring.

In addition to the lack of recognition of forced labour in the Tribunals, two places where significant gaps appear are the response of the police to initial termination disputes where the employer of MDW seeks assistance, and at the border crossing into Mainland China. The police, as the first point of contact, in many instances lack the awareness to recognise forced labour or forms of exploitation and the immigration officers at the border allow MDWs to cross frequently to and from China without question. The frequency with which some MDWs make the crossing should draw the attention of immigration officials for two obvious reasons. First, MDWs are not allowed to work outside the employer's residence and frequent crossing should be a 'red flag'. Second, MDWs as a group are vulnerable to trafficking and a part of the government's due diligence to prevent forced labour or exploitation, mechanisms should be implemented to detect frequent crossing and to determine the purposes and voluntariness of the travel.

The cases below highlight the response and impact of the lack of awareness in the police response and the Immigration officials.

#### **9.4.4.1 Case 10 – Angel**

##### ***Police first point contact***

Angel was one of the additional seven participants who were only accompanied to the redress process. She explained that she decided to terminate her contract out of frustration that her employer was never satisfied with the quality of her work. A separate assessment of Angel's circumstances determined that she was a victim of forced labour under the dimension of 'inability of leaving'. The circumstances of this case support a finding that a MDW may be employed and not be in forced labour while working (work and life under duress), but may be classified as being in forced labour under the work dimension of 'inability of leaving'. Had this case been part of

the initial group of participants, it would have been classified as forced labour under the dimension ‘work and life under duress’.

Angel was a 25-year old woman from Indonesia. She had been working for her employer for four months. During her employment, Angel worked 18-hours per day (strong involuntariness), her passport was held by the employment agency (strong coercion), and she made payments to cover her recruiting fees of \$2,145 per month for a period of six months. Angel was isolated by the denial of the use of communication devices and was unable to contact her family during the four months she was employed (strong coercion). Angel had no privacy, as there were six CCTV cameras in the residence, with one in the kitchen where she was made to sleep. In August 2015, Angel gave her employers the required one month’s notice. When Angel produced the notice to her employer, she refused to sign it. The employment agency staff told Angel that it was not a problem and that the employer did not have to sign; she just needed to provide the notice.

In early September 2015, the employer received a call from the Immigration Department attempting to determine if Angel was terminating her contract. Angel assumed that the employment agency had notified the Immigration Department. On receiving the call, the employer became angry and told Angel that if she wanted to leave, she had to provide a new ‘notice letter’. Angel refused to write a new letter and the employer then demanded she pay them (employer) one month’s salary for premature termination of the contract. When Angel refused to provide a new notice or to make any payment, the employer called the police and told Angel she would be reported for theft of \$20.

During the first month of employment, Angel needed to ‘top up’ her mobile phone but did not have cash at the time. She decided to use the employer provided ‘Octopus card’<sup>644</sup> to top up the phone. She later explained that she had reimbursed the employer with cash shortly after topping up her phone. At this stage Angel is in a forced labour situation. She has given the proper one-month notice as required indicating that she no longer wants to continue working for the employer

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<sup>644</sup> An Octopus Card is a card that can carry a monetary balance and used for travel on the Hong Kong transportation system or used to purchase items at convenience stores without producing cash.

(voluntariness). The employer refusing to recognise Angel's right to terminate the contract and demanding a new notice of termination that would extend the employment by at least one month,<sup>645</sup> is demanding payment from Angel and threatening arrest (strong Coercion) and has not paid angel any outstanding wages and other entitlements (penalty).

When the police arrived at the residence, they told Angel not to worry after she explained that the money was repaid and the incident was 'old already'. The police then tried to convince Angel that she should sign a letter the employer had drafted and pay them the one-month salary. After 3 hours, Angel reported that another police officer arrived and urged her to sign the letter and pay the employer so she could leave the house and later claim to the Labour Department. Angel finally signed the letter and paid the employer \$1,600 in cash that she had from her previous month's salary, and only then was she allowed to leave.

Angel filed a claim against the employer with the Labour Department for a total of \$3,918. At the time of filing, Angel was told that if she wanted to recover the \$1,600 she had paid to the employer, she would have to file a separate claim with the Small Claims Tribunal. Angel was scheduled for a conciliation meeting in late September, but the employer did not attend. The claim was then scheduled for a hearing at the MECAB in mid-October, but again the employer did not attend. On 21 October, I received a call from Angel indicating that she would no longer pursue the claim and that she had already travelled to Macau to seek new employment as she needed to work, and waiting for her claim would take too long.

The lack of awareness by the police exacerbated the situation, as they were unable to recognise the crime of forced labour and their encouragement to sign a termination letter and pay the employer made it more difficult for Angel to realise a remedy. The letter could be used in any hearing as proof that Angel prematurely terminated the contract although she had provided the proper notice of termination. This lack of

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<sup>645</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), International Labour Conference (96 Session) 'Eradication of Forced Labour' Report III (Part 1B) (2007) The concept of forced labour is broad in scope and emphasizes the employee's right to free choice of employment as 'inalienable' p.21

awareness and improper handling of calls for assistance from MDWs contribute to violations of labour rights and a cycle of impunity on the part of employers.<sup>646</sup>

#### **9.4.4.2 Immigration checkpoint**

##### ***Case 11 – Judy***

Judy was a 42-year old Filipina who had been employed for two months with her employer. She described working 18-hour days (strong involuntariness) and had 12 hours rest on her days off. She was isolated while in her employer's residence, and was prohibited from using any communication devices or speaking to others in the neighbourhood (strong coercion). Judy was being paid \$3,100 instead of the minimum allowable wage of \$4,210, a shortfall of \$1,110. She slept on the living room sofa with no privacy because there was a CCTV camera in the room. When she asked her employer about the legality of working in China, her employer told her '...don't worry is ok'. Judy explained that she did not feel she could negotiate terms of employment, and since she had paid 70,000 pesos in agency fees, she could not afford to process a new employer. When asked if she thought of leaving the employment, she explained that she thought about leaving but was afraid of losing her salary owed.

In the two months of her employment, Judy had been taken across into Mainland China 4 times for approximately one week each time. In China, Judy was locked inside the residence, was not allowed to go outside, not allowed to use her mobile, not allowed to speak with neighbours, had no rest days, and was not provided with sufficient food. At the time of interview (6 August 2015) Judy complained that her arms were weak from cleaning the floor with small pieces of cloth with her hands. When she had complained to her employer about her weak hands, she was taken to the hospital but was told that that was her rest day. On 7 August Judy was again taken to China to work at the employer's parents' residence. On 8 August, I received a call from Judy who was in China. She informed me that she was terminated because the employer's parents felt that she was not cleaning the floor well. She also informed me that her employer was on the way to pick her up and bring her back to

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<sup>646</sup> International Labour Conference, 'Global Alliance Against Forced Labour' (93 Session) Report I (B) p.2



Hong Kong. After the phone call from China I did not have the opportunity to interview her again.

Another participant relayed similar circumstances. When directed to remain in China indefinitely, she feared she would be left in China and became emotionally distraught. The employer reconsidered his instruction and she returned to Hong Kong. On return to Hong Kong the employer terminated her, paid all outstanding wages and contractual entitlements, so there was no need to file a claim.

Both instances, the first where multiple crossings occurred within two months of being employed and the second case after being employed for only three weeks, should have raised questions about the MDWs travel to China by immigration control at the border crossing. MDWs have visas specific to the nature of their work, and Hong Kong identification cards numbers for MDWs begin with a two-letter designation (WX) to identify the holder as a MDW. The underlying principle of how states are required to ensure protection against future violations is by raising awareness, educating members of key government sectors about indicators on trafficking, and to establish institutional mechanisms to deter and to identify violations.<sup>647</sup> This proactive preventive measure obligates Hong Kong SAR ‘...to ensure the principles of human rights throughout its entire ‘legal, political and institutional system’.<sup>648</sup> The state must organise its government in such a manner that all institutions are capable of ensuring that individuals can fully enjoy rights granted to them,<sup>649</sup> and to be free of exploitation, forced labour and human trafficking.

Both cases raise the issue of due diligence in protecting domestic workers across the border into China. Even though Hong Kong is a part of China, to work in China a MDW would need a visa. Therefore, work being done in China by MDWs contracted to Hong Kong would be illegal. In *Rantsev v Cyprus and Russia*, the ECtHR held that the Cypriot authorities were aware that women were being trafficked across the border to Russia for the purposes of prostitution. The Council of Europe

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<sup>647</sup> See section 4.2.2

<sup>648</sup> *Chumbivilcas v Peru* (The Inter-American Commission of Human Rights) para V3

<sup>649</sup> *Velasquez- Rodriguez v Honduras*, Judgment of 29 July 1988, Series C No.4, para 166

Commissioner of Human Rights noted the absence of immigration policy and legislative shortcomings that encouraged trafficking to Cyprus, and the visa regime that facilitated the movement of women as cabaret artistes did not provide practical and effective protection.<sup>650</sup> It was further determined that the Cypriot authorities were aware of the practice and the immigration authorities tolerated it, thereby violating their positive obligation to take protective measures. Similarly, Russia had programmes in place to educate the public about trafficking to Cyprus and was unaware of circumstances that gave rise to a credible suspicion to take operational measures. Therefore, no fault was attributed to the Russian authorities in either their obligations to implement appropriate legislative and administrative frameworks or to take protective measures.<sup>651</sup> However, the Russian authorities were found in violation of their duty (Article 4 European Convention on Human Rights) to investigate potential trafficking to Cyprus.<sup>652</sup>

By extension, Hong Kong similarly has a duty under the Forced Labour Convention at a minimum to implement legislative and administrative frameworks, take protective measures to prevent MDWs being exploited by being taken across the border to work in China and, considering the frequency of travel, to investigate the possibility that MDWs are being forced to work in China against their will.

#### **9.4.5 Lack of corroborative evidence**

Lack of corroborative evidence significantly hampers the pursuit of a remedy. MDWs are frequently the only ones able to recount the abuses and circumstances of their employment or termination, ‘...yet their testimony is often not enough to meet the burden of proof or credibility for prosecution or benefit of doubt’.<sup>653</sup> This lack of evidence negatively affects the MDWs and at times results in awards against them as the burden of proof is placed on them to satisfy any claim against the employer.

The lack of evidence affects a variety of areas concerning the termination circumstances and seeking a remedy. In a purely labour related claim, one of the

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<sup>650</sup> *Rantsev v Cyprus and Russia* app. No.4239/08 para 291

<sup>651</sup> *Ibid* para 301 - 306

<sup>652</sup> *Ibid* para 306 - 309

<sup>653</sup> Andreovski, Larsen and Lyneham, ‘Barriers to trafficked persons’ involvement in criminal justice proceedings: an Indonesian case study’

main problems surrounds WILON and this is often one of the most filed counterclaims by employers against MDWs.<sup>654</sup> Employers frequently avoid paying WILON, as there are usually no witnesses to corroborate the MDWs claim that the employer is the one that terminated the contract prematurely. A lack of witnesses also affects criminal cases where the MDW is the victim, unless there are significant injuries as proof.<sup>655</sup>

In the case of Mariah (see Section 0), the employer was never arrested for the initial complaint of assault. However, Mariah was arrested the very day the employer claimed an assault by her. Similarly, Angel (case 10) reported that she had given the employer the required one-month's notice, which the employer denied receiving. The responding police officers encouraged Angel to pay WILON to the employer and sign a termination letter. The end result of these actions created a de facto penalty in the loss of wages without any appropriate process and generated a piece of negative evidence that would be difficult for the MDW to overcome at any subsequent hearings.

#### **9.4.5.1 Case 7 – Sophia**

In mid-October, I again accompanied Sophia to the MECAB hearing. At the hearing, the Adjudicating Officer asked each party to explain the evidence to support their claim. Sophia explained the circumstances surrounding her termination, but had no other evidence to produce. She did, however, inform the Adjudicating Officer that the employer had CCTV cameras in the residence and the video recordings from the cameras should be produced, as it would support her version of events.

The employer filed a counterclaim for one month's wages, claiming Sophia terminated the contract without notice, and one day's salary because Sophia took too long leaving the residence causing her to miss a day of work. The employer provided a video on her mobile phone showing Sophia on the phone calling for a friend to come and assist her. The Adjudicating Officer took a short recess to review the video and at the same time encouraged the parties to discuss a settlement. During the recess, both parties indicated that they were not interested in settling. This hearing

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<sup>654</sup> see section 7.5.3

<sup>655</sup> K4

was emotionally taxing on Sophia, as she felt that she could not overcome what she described as the ‘employer’s lies’.

The Adjudicating Officer resumed the hearing and asked if the parties had any other evidence to support their case. Both parties indicated that they did not and, at that point, the Officer, citing the late hour (the hearing had been going on for four hours) and a need for additional evidence, decided to adjourn and give the parties additional time to find additional evidence or witnesses to support their claims. The case was adjourned until mid-November.

In November when the case was recalled, the Adjudication Officer again asked the parties if they wanted to settle the claim and both parties indicated they did not. The Adjudication Officer then indicated that he had reviewed the phone video provided by the employer and was able to hear the conversation between Sophia and the employer at the time of termination. In the recording, Sophia could be heard saying, ‘You will have to pay one month salary’. The employer then responded, ‘It’s OK’. The Adjudication officer concluded that the employer’s response was an admission that she was the one that prematurely terminated the contract. It is worth noting that had the employer not provided the video, Sophia might not have been successful in her claim.

#### **9.4.5.2 Case 12 – Rose**

Rose was a 37-year old Filipina who was with her current employer for three years and five months. She had over 17 years’ experience, having worked in Singapore, Dubai, Jordan, Saudi Arabia and Hong Kong. Rose left her employer in late July 2015, claiming constructive dismissal after her employer physically assaulted her. Following the assault, Rose left the residence and went to the hospital where she was diagnosed with a contusion to the right shin. Rose later made a police report.

In early October, Rose was asked to report to the police station as a decision had been made as to whether criminal charges would be filed against the employer. I accompanied Rose to the police station, where we met with the investigating detective and his superior, an Inspector. The Inspector explained that the police had concluded the investigation and had forwarded a report to the Prosecutor’s Office, resulting in a decision of insufficient evidence to charge the employer. Rose was

disappointed and began to cry, but mustered the courage to ask the question ‘why is there not enough evidence? Must we, domestic helpers be bleeding or killed before there is evidence?’

This decision not to prosecute the employer nullified Rose’s claim of constructive dismissal and therefore she was unable to claim WILON at the Labour Tribunal.

#### **9.4.6 Lack of awareness of redress**

MDWs who file claims with the Labour Department provide the opportunity at all stages of the claim process and during assistance by the police to assess their working and living conditions. MDWs often explain their living conditions and the reasons for their termination, which are documented in their detailed statements and affidavits, required for filing a claim in MECAB and the Labour Tribunal. At conciliation, the circumstances surrounding the employment conditions and reasons for termination are only minimally documented. At all stages of the claims process, Labour Department officials fail to recognise instances of forced labour, treat the instances as a crime, or select a mechanism that is appropriate for the abusive treatment exacted on MDWs. This lack of assessment, recognition and appropriate redress denies MDWs a remedy consistent with international law and Hong Kong’s obligations. The cases below will highlight this lack of awareness and reflects information documented in support for her claim.

##### **9.4.6.1 Case 13 – Citra**

Citra was a 28-year old Indonesian who had been employed in Hong Kong for 3 months. She was classified as being in forced labour as she reported several indicators consistent with the ILO’s established criteria concerning excessive recruitment fees, her passport being retained by the recruitment agency. She was made to work 16 hours a day and was not provided sufficient food. She was allowed 8 hours rest on her day off and complained of little sleep as she slept in a ‘storage room’ that had no door and provided no privacy. Citra was also instructed to refrain from speaking with others in the neighbourhood, and her use of communication devices was restricted. She was also physically assaulted by the employer who would physically push her around the residence if she (the employer) were unhappy with any aspect of Citra’s performance, while calling her ‘crazy’. Citra also reported that

she was required to clean the outside of the windows that ‘was very dangerous’ as the residence was on the 13<sup>th</sup> floor.

Citra filed a claim with the Labour Department after she was terminated in mid-June 2015, claiming airfare, wages and WILON, putting the monetary value at approximately \$10,000, within the jurisdiction of the Labour Tribunal if conciliation was unsuccessful. On the day of conciliation, the employer agreed to pay airfare and salary, but Citra rejected the offer and insisted on WILON since the employer was the one who abruptly terminated the contract. In late August 2015, the claim was heard in the Labour Tribunal and focused solely on trying to get the parties to settle. The employer had filed a counterclaim for WILON against Citra, claiming she terminated the contract.

When Citra was asked to explain her claim and how the contract was terminated, she had difficulty, even with the aid of an interpreter. The hearing was conducted in Cantonese so I was unable to follow in detail what was being said, but I interviewed Citra after the hearing and she provided a recap of what she told the Presiding Officer.

On the day Citra was terminated, she was denied any rest breaks during the day as was the custom imposed by the employer. To resist this treatment Citra would eat her lunch slowly to get some rest:

‘Because she no allow me to take rest whole day. Sometimes when I eat lunch I take time very long because I can take a rest also, she say, ‘why you eat very long?’ She take my plate and then she throw in the rubbish bin’.

Citra continued to explain that the employer scolded her, ‘Don’t waste your time, faster eat’. When the employer tried to force Citra to continue working past 10:00 pm, she refused due to fatigue, and the employer terminated her.

Citra explained that the Presiding Officer told the employer that she should not have filed a claim for WILON against her because she (Citra) felt unsafe. The employer provided a video recording to the Presiding Officer that showed her physically pushing Citra who was refusing to work past 10:00 pm.

She explained that the aggressive behaviour continued over a long period of time during which Citra threatened to call the police, and eventually threatened to jump from a window if she was not allowed to leave. When the police arrived, they intervened and Citra was allowed to leave the residence.

The Presiding Officer strongly suggested that the parties reach a settlement and the employer finally agreed to provide airfare and all the cash she had in her purse, which was \$895. Citra accepted the offer of settlement. When asked why she decided to settle, Citra replied, 'I just wanted it to be over so I could go home'.

This case, like so many others, demonstrated a bias in favour of the employer. The Presiding Officer, recognising that the employer's behaviour was inappropriate in that it made Citra feel unsafe and that it was also inappropriate to file a counterclaim against Citra, did not provide any relief to Citra in finding merit and awarding Citra's claim, even as a labour violation. The Presiding Officer's handling of this claim raises the question of impartiality in the process. The disregard of the facts and relevant doctrine diminished the goals of rights vindication and application of the law.<sup>656</sup> The desire for settlement seemed to be more about getting rid of the claim rather than facilitating the exercise and recognition of Citra's rights.<sup>657</sup> The expected protection of the more formal Labour Tribunal process<sup>658</sup> was absent and supports the concern that reliance on settlement processes amounts to unconstitutional evisceration of statutory and common-law rights.<sup>659</sup>

#### **9.4.7 Lack of enforcement of judgments**

MDWs who go through the redress process at times encounter problems receiving awards because the current mechanisms are unable to enforce their decisions. The two cases below involve multiple elements of the effect of time on securing a remedy and a lack of awareness on the part of those within the administrative redress mechanism. However, the cases demonstrate that when employers fail to comply

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<sup>656</sup> Surbin, 'A Traditionalist Looks At Mediation: It's Here to Stay And Much Better Than I Thought' p.216

<sup>657</sup> Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* P.679

<sup>658</sup> *Ibid* p.679 - 680

<sup>659</sup> Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' p.2804

with the judgments against them, the Adjudicating bodies appears unwilling or incapable of forcing compliance and the MDW is further burdened with pursuing fulfilment of their awards.

#### **9.4.7.1 Case 14 – Jean**

Jean was a 35-year old Filipina who had worked for her employer for one year before she was prematurely terminated. During her employment, Jean's passport and contract were confiscated by the employer (strong indicator of coercion), she worked 18-hour days (strong indicator of involuntariness), she was deprived of food (strong coercion), and for the entire year of employment, she was only allowed one meal per day at dinner, there was 'no breakfast, no lunch, only dinner'. She was isolated (strong coercion) by the mere nature of her job and she was also instructed to refrain from speaking with neighbours or others in the neighbourhood. She had wages deducted of \$1,400 for allegedly damaging the employer's clothing (strong coercion).

On the day Jean was terminated, the employer had summoned a representative from the building management who was told to watch Jean because she was going to be terminated. The employer asked Jean to sign a letter but she repeatedly refused to sign. The employer then told her that if she was not going to sign the letter, 'you pack your things'. While Jean was packing, six police officers arrived at the residence and entered Jean's room. The police officer instructed Jean to bring all her things out of the room so the employer could see what she was packing. The employer accused Jean of stealing a 'Prada' purse that was to Jean from a friend. When contacted, Jean's friend confirmed Jean's claim to police. This scenario was repeated with another article which Jean was forced to leave behind finally ending with the employer's demand that Jean compensate her \$100 for a broken mug. Jean informed the police that she had not yet been given her final payments but she was told that her employer would settle at the agency the next day. The following day the employer did not present herself at the employment agency to meet Jean. The second day after she was terminated, the employer sent an unknown man to meet Jean. He informed Jean about the amount the employer was willing to pay, and showed a plane ticket booked for her to fly five days later. Jean did not agree with the amount



the employer was willing to pay and, fearing that accepting the air ticket would hamper her chances to collect her contractual entitlements, she refused both.

In February 2015 Jean filed her claim with the Labour Department with the assistance of the NGO. Jean was not paid her final entitlements that were calculated at \$9,261. On attempting to file her claim, Jean was told by Labour Relations Division Officer that she could not claim airfare since her employer had already provided it. A conciliation hearing was scheduled for mid-March 2015, but the employer did not attend. The Conciliation Officer advised Jean that she would contact her within two days and, if the employer could not be contacted, the claim would be transferred to the Labour Tribunal. In late March, the claim was transferred to the Labour Tribunal and between April and early June, the employer failed to show up for Tribunal hearings on three different occasions. On 4 June 2015, the Presiding Officer ruled on the claim and awarded Jean \$8,164 plus costs of \$190. On 15 June, the employer filed an appeal challenging the award, and the appeal hearing was scheduled for 23 July.

By 19 July, it was six months since Jean's termination and six months since Jean had been unemployed due to the immigration policy. She had a potential new employer who was willing to wait, but Jean was unsure how long she would have that benefit. The cumulative effect of the length of time, lack of work and the possibility for new employment caused Jean to divulge that she was considering abandoning her claim. Jean expressed her anxiety to the NGO staff and discussed her intended plan to abandon her claim. The NGO staff tried to encourage her not to withdraw, but to fight. Jean was visibly upset when she later told me; 'I need to work. It's been so long. What about my kids in the Philippines? I just want it to be over. Is it my right to stop the claim?'

On 23 July, the employer again failed to appear for the scheduled appeal hearing and the appeal was dismissed. On 27 July, I accompanied Jean to the High Court to obtain a copy of the final award needed to provide to the Immigration Department to extend her visa on the 28 July. Jean expressed the frustration that she had to extend her visa six times at a cost of \$198 each time for a total cost of \$1,188. Although Jean had a claim pending, the Immigration Department extended her visa for only one week while awaiting the resolution of her claim. On 29 July, Jean finally picked

up the appeal but her employer did not show up for the hearing and would not pay the award. Fearing that the employer would not pay the award, Jean contacted the Labour Department to ask what options she had in the event the employer refused to pay. She was advised if this should occur, she could get the court bailiffs through an 'execution order' to seize the employer's property, but she would need to provide a \$12,000 deposit to cover the cost or she could apply to the 'solvency fund' for payment. Approximately one week later, Jean contacted me to report that her employer finally paid the awarded amount.

Jean was in a forced labour situation. The circumstances of her employment were missed by the employment agency, the police in the initial contact, the Labour Department Conciliation Officer, the Labour Tribunal Presiding Officer even though the circumstances were documented in Jean's statement when filing her claim. The government's policy that MDWs cannot work while awaiting resolution of their claims has the potential to prevent a remedy for even labour claims, the time needed to resolution has the same impact when it relates to process or as a tactic by unwilling employers to fulfil their contractual obligations. The Labour Department resolution mechanisms lack the teeth to force employers to pay awards and finally there was a lack of recognition of Jean's employment conditions as a crime.

#### **9.4.7.2 Case 12 – Rose**

Rose (see Section 0) lived with her male employer and looked after his six-year old daughter. She left her employer in late July 2015, claiming constructive dismissal after he physically assaulted her. Rose's case was complicated, since the employer of record on her employment contract was the employer's ex-partner and mother of his child. She had left the residence a year earlier due to domestic violence.

Rose filed a claim with the Labour Department for \$5,410 against her employer and I accompanied her to the conciliation meeting in mid-September. The employer claimed that he had intended to terminate Rose and presented her with a termination letter on the day she left the residence after she claimed he assaulted her. The employer then produced a list of damage to appliances that he claimed Rose had caused. When questioned about the damaged appliances by the Conciliation Officer, the employer admitted that he had never discussed it with Rose. After discussing the claim for approximately an hour, the Conciliation Officer asked the employer if he

wanted to make an offer to settle. The employer made an offer of \$3,600 which Rose rejected, and the decision was made to proceed to MECAB.

In late October, I accompanied Rose to the MECAB hearing. The employer did not attend. The Adjudication Officer informed Rose that the notification of the hearing to the employer was returned undelivered. Rose was informed that the claim would be dismissed and once a valid address was obtained, she should re-file. It was also determined that due to the years of service with the employer, Rose was entitled to severance pay of an additional \$9,000 which would put the claim outside the jurisdiction of MECAB and thus, the claim would be transferred to the Labour Tribunal.

Rose eventually discovered the ex-partner's address, and notice was served on her. After several months of the employer failing to show, requesting postponements or being ill, Rose eventually prevailed in the Labour Tribunal in February 2016, seven months after filing her claim. On 1 March Rose received her award letter of \$12,000 less wages in lieu of notice (WILON). By the end of March, the employer had not made payment, and she was encouraged to apply to the 'insolvency fund'. While waiting for the processing of the claim to the insolvency fund, the employer finally made payment to the Labour Department in middle of May 2016. In the latter part of May, the Labour Tribunal informed Rose that the cheque from the employer could not be cashed and Rose would have to go to the police and make a report of fraud. It was not until mid-June 2016 that Rose received her award from her employer, 11 months after she left the job.

Even after award, time needed to satisfy claims may deter MDWs from a remedy. Rose complained constantly about the length of time for resolution of the labour claim, but she was determined that the employer would have to pay what was owed. She was not going to abandon her claim and was willing to stay in Hong Kong as long as it took to remedy the actions of the employer. The frequency with which these lengthy types of cases occur, was not ascertained.

Both Jean and Rose encountered problems in getting the employers to satisfy the judgments against them. The employers, almost defiantly, made no diligent efforts to comply and the adjudicatory bodies were essentially sidelined, exerting no coercive

power to force compliance. Jean and Rose were counselled on what they should do to get the employers to comply with the awards. The realisation of a remedy even for labour claims is not realised unless the awards of the adjudicating bodies are enforced through some more severe sanction if need be.<sup>660</sup>

#### 9.4.8 Government policy as reprisals

In addition to the live-in requirement that places MDWs in a vulnerable position by creating multiple dependencies on the employers, domestic workers who have their contracts terminated must leave Hong Kong within two weeks of termination.<sup>661</sup> The ‘two-week rule’ is intended to maintain ‘...effective immigration control, preventing job-hopping and migrant workers working illegally after the termination of contracts’.<sup>662</sup> It is one of the factors that impairs the MDW’s ability to make a decision on whether to leave forced labour, considering the high costs to migrate for employment opportunities in Hong Kong. It also requires repatriation within two weeks after termination, which has the same effect as the threat of deportation associated with irregular migrants who experience threats of denunciation to the authorities, which is considered a strong indicator of coercion.<sup>663</sup> If MDWs are investigated for job-hopping, it can also affect their ability to secure future employment. The ILO considers the exclusion of MDWs from future employment opportunities a medium indicator of coercion.<sup>664</sup> The cases below highlight this issue, and how it affects decision making about seeking a remedy.

‘The purpose of the ‘two-week rule’ is to provide sufficient time for an FDH to prepare for returning to their place of domicile in case of pre-mature termination of their contract. On the other hand, the rule has also been an effective immigration control measure in preventing an FDH from job-hopping or taking illegal employment after contract termination’.<sup>665</sup>

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<sup>660</sup> Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary p.73

<sup>661</sup> HKSAR, Immigration Department, <http://www.immd.gov.hk/en/forms/forms/id-e-989.html>, accessed 01/10/2014

<sup>662</sup> Legislative Council HKSAR, ‘Intermediary Charges for Foreign Domestic Helpers’, (LC No.CB(2)1356/12-13(03), June 2013, p.4

<sup>663</sup> ILO, Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children, p.24

<sup>664</sup> Ibid

<sup>665</sup> G-5 Immigration Department Official (G = Governmental Key Informant)

The ‘two-week rule’ was intended to provide a solution for one issue, but the effect on MDWs has not been addressed effectively. The CESCR has noted its concern stating:

‘The Committee is concerned about the unfavourable working conditions faced by migrant domestic workers in Hong Kong, China, particularly due to the ‘two-week rule’, whereby migrant domestic workers have to leave the territory within two weeks on termination of their contracts, and the requirement for migrant domestic workers to live-in the employing household. The Committee regrets that Hong Kong, China, has not taken any concrete measures to repeal these rules, and that migrant domestic workers are therefore exposed to abuse and exploitation’.<sup>666</sup>

#### **9.4.8.1 Case 15 – Jackie**

Jacki was a 51-year old Filipina who had been working for her employer for five months. Using the established ILO indicators, she was assessed as being a victim of forced labour under the dimension ‘work and life under duress’. She was working 16-hour days (strong involuntariness), was required to work at three other locations in violation of her contract (medium involuntariness), was isolated by the restriction of communication devices and instruction not to communicate with others in the neighbourhood, to include other MDWs (strong coercion), and was constantly under intimidation and threat (strong coercion) described as constant shouting<sup>667</sup> by the employer who always seemed angry.

The excerpt below is part of the conversation with Jackie:

Q. Are you comfortable with your work conditions?

A. No problem

Q. Do you know it is prohibited working in a location not in your contract?

A. Yes

Q. Why did you?

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<sup>666</sup> Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China, UN Committee on Economic, Social and Cultural Rights (CESCR), E/C.12/CHN/CO/2 (13 June 2014)

<sup>667</sup> *United States v Kozminski* US (Supreme Court) 487 US 931 (1988)

A. I don't want argument.

Q. You're concerned if you raised the issue of working in 3 houses there would be an argument?

A. Yes and possibly early termination.

Q. Why are you so concerned about termination?

A. I don't want to go home. It's not easy to find a job in Hong Kong if you're terminated. You only have 14 days and if you cannot find, you have to go home. Sometimes it is easy, sometimes you run out of time. If you're terminated, the agency fee is higher. If finished contract or employer no longer need me it is 10%. If I break the contract the fee is higher.

Q. If you had known about the conditions of this employment, would you have taken the job?

A. Yes, no problem. I come to work but I don't want shouting. It makes me feel she is angry. It scares me. I think she will call the police and accuse me of doing something wrong. We are afraid of the 14-day rule, it is expensive going back home, paying agency again. Even if complain at Labour (Department), no action.

Jackie's decision-making was influenced by the two-week rule, even though she realises she is engaging in employment contrary to the conditions of her employment contract. She is willing to perform, albeit illegally, to retain her job because of the two-week rule, compounded by the illegality of the employment agency's practice in charging higher recruitment fees for MDWs who do not complete their two-year contracts. The rule and the lack of regulation of the employment agencies affects Jacki's decision to even consider seeking a remedy for relief from her conditions of employment.

#### **9.4.9 Excessive delays**

A lengthy remedy process more negatively impacts MDWs. One of the major barriers to MDWs seeking a remedy is time. This issue becomes more limiting when coupled with the government's policy that MDWs are not allowed to work while pursuing a claim. MDWs either withdraw or considered withdrawing claims because of the uncertainty about the length of time for resolution. Of the 17 participants accompanied to redress processes, four withdrew their claim, four considered withdrawing before prevailing in their claims and six accepted settlements lower

than entitled in order to ‘move on’ and secure new employment. Employers often use time as leverage in getting MDWs to settle by postponing hearings. The length of time to settle also works against the MDWs who must bear the cost of visa renewals.

#### **9.4.9.1 Case 16 – Ellen**

Ellen was a 50-year old Filipina who had been working for her current employer for three years and five months. She was considered to be a victim of forced labour as she revealed during the interview that was frequently assaulted by the employer (strong coercion). She was not provided with sufficient food (strong coercion) and was required to work in two additional houses (medium involuntariness). Ellen was terminated abruptly at the end of June 2015, but her final wages were not immediately paid. Ellen was forced to file a claim with the Labour Department and was scheduled for a conciliation meeting on 20 July. Due to the requirement that she leave Hong Kong within 14 days (2-week rule), Ellen was required to extend her visa on 14 July, at a cost of \$198, which allowed her to remain until the 29 July. Ellen’s claim totalled \$13,777, which included severance pay based on the number of years she was employed by the same employer. On 20 July, the employer agreed to pay all final entitlements except the severance pay, which amounted to Ellen being offered \$5,757 to settle her claim. Ellen expressed the view that the resolution of her claim might take too long and

‘I feel the period of 14 days I am allowed to stay here is very short for me to find another job which I must need to do. I think I will be troublemaker and might not be good for my new employer’.

On 24 July, I received a call from Ellen indicating that she was withdrawing her claim and accepting the employer’s offer. She explained that, ‘it will take too long for this case. I must take care of my family so I need to focus on a new employer. This will hamper me processing a new employer’. Ellen returned to the Philippines on the 27 July relinquishing \$8,020 in severance pay.

#### **9.4.9.2 Case 7 – Sophia**

To pick up from where we left off, (see Section 0), in mid-November, the hearing resumed and Sophia indicated that she had no other evidence to provide. The employer provided a series of printouts of text messages she claimed were sent

between the employment agency and Sophia. The messages purported to show that Sophia intended to terminate the contract and included in the messages were warnings to Sophia about the employer's dissatisfaction with her performance. The employer also informed the MECAB that Sophia's performance was unsatisfactory. The Adjudicating Officer countered her assertion by asking why did she not report the unsatisfactory performance of Sophia in the notification to Immigration about the termination, and the reason for termination. The employer responded that she did not understand how to fill out the notification and she did not know Sophia would file a claim. The Adjudicating Officer again decided to adjourn to consider the additional evidence, and instructed both parties to return in early-December for his decision. Again, this hearing was emotionally draining for Sophia, who had to be comforted by another MDW who had accompanied her to the hearing. Sophia was also concerned about the length of time the process was taking and was constantly assessing whether she should discontinue the process.

In early December, I again accompanied Sophia to the MECAB hearing. At the beginning of the hearing, the Adjudication Officer again asked if there was any additional evidence to be presented. After both parties indicated there was not, the Adjudication Officer again asked the parties to consider settlement so they would not have to return an additional time. Both parties indicated that they did not want to settle. The Officer later found in favour of Sophia and awarded her the one-month's WILON, the cost of airfare, and costs for a total of \$5,310. The Officer justified his decision on the video recording provided by the employer. In the video, Sophia could be heard telling the employer that she would have to pay 'the one month salary' (WILON) to which the employer responds, 'no problem' indicating that the employer was the one that terminated Sophia without notice.

These two cases demonstrate the dilemmas of MDWs when faced with the possibility of lengthy periods of time to resolve their claims. In Ellen's case, she was terminated at the end of June and within a month's time, she settled for less than



entitled. The employer received a clear advantage from the process by not having to pay the full amount owed.<sup>668</sup>

In Sophia's case she endured approximately four months to realize the successful resolution of her claim. During the four months, Sophia considered withdrawing her claim could not afford to lose the month's wages being claimed. Since the video that ultimately supported Sophia's claim was received by MECAB in October, the delay seemed unnecessary.

The delays fail to take into consideration the special urgency of cases involving individuals living on the economic margins<sup>669</sup> and the need for the adjudicating bodies to exercise the necessary force to enforce judgments to ensure an effective remedy is realised.<sup>670</sup>

#### **9.4.10 Fees of cost and claiming**

MDWs encountered fees for filing claims and renewing visas as there are restrictions on their stay after termination. These fees of \$198 per extension are burdensome, as government policy prohibits employment while MDWs are engaged in claims for final entitlements. The fees for counterclaims by employers are also a deterrent to MDWs filing claims, who are already sceptical of the resolution process and aware of the existing imbalances and low expectation of their success. The possibility of losing to an employer who files a counterclaim where the unsuccessful party is often required to pay the legal costs of the prevailing party is unaffordable for MDWs, and acts as a disincentive.<sup>671</sup> Employment agencies also charge higher recruitment fees to place MDWs who do not complete their two-year contract.

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<sup>668</sup> Fineman, 'The vulnerable subject: Anchoring equality in the human condition' p.18

<sup>669</sup> Rhode, Access to justice p.377

<sup>670</sup> Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary p.73

<sup>671</sup> Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice', p.13

## **9.5 Structural barriers to remedies**

Structural barriers are less clearly attributable to social-cultural or intersectional barriers. Rather, they are characterised as operating at the very intersection of societies and their justice institutions.<sup>672</sup>

The structural perspective focuses on the interdependent aspects of society or culture, and relationships among individuals, institutions and organisations.<sup>673</sup> It seeks to understand how individuals are affected in their decisions to resolve disputes and the impediments encountered through state-imposed mechanisms and those that occur naturally in wider society. One significant factor that denies MDWs a remedy is corruption. The lack of diligence in recognising the rights of MDWs and recording their complaints leads to impunity of perpetrators of violations leaving MDWs mistreated or their complaints disregarded.<sup>674</sup>

### **9.5.1 Police corruption**

#### **9.5.1.1 Case 17 – Celia**

Celia was a 25-year old Filipina who terminated her contract prematurely after being assaulted by her female employer. Celia began working for her employer whom she referred to as ‘my master’, in early September 2015. She reported that her employer would frequently kick, pinch and punch her and use her fingers to poke Celia in the temple while telling her she was ‘stupid’. When asked why she stayed after being constantly being assaulted, Celia replied that she did not know where to go to seek help, but she had told a friend.

Celia worked 20-hour workdays. During the first 40 days of employment, she did not get any rest days. On Sundays, she was required to go to the employer’s father-in-law’s house to clean. In the middle of October 2015, Celia was allowed to go out on her rest days on Sundays, but limited to only six hours rest. Her passport and contract had been seized by the employer. During the interview, Celia indicated that her employer had told her that surveillance cameras in the home were there to keep

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<sup>672</sup> McNamara, *International Access to Justice: Barriers and Solutions*

<sup>673</sup> Landman, *Studying human rights*, p.45

<sup>674</sup> *Ibid* p.21

watch on her. Celia explained that she was afraid of her employer and, because the cameras were there, she never tried to retrieve her documents. On one occasion, Celia misplaced a household item resulting in the employer deducting \$200 from her wages. Despite the contract indicating that Celia would share a room with the employer's mother, she was made to sleep on a mattress in a corner of the living room. This meant that Celia had no privacy and there was an additional surveillance camera in the living room.

On 27 October 2015, Celia was serving dinner to her employers in the living room when some food almost fell off a plate she was carrying. The employer threw a pair of serving tongs at her, hitting Celia in the arm and chest. The following night on 28 October, the employer again became angry and asked Celia, 'can you use your mind?' Celia reported that the employer became angrier and asked her 'did I hurt you?' Celia responded, 'Yes ma'am, you hurt me last night'. The employer then punched Celia in the eye and again asked, 'Did I hurt you?' Celia again answered yes and the employer punched her again in the nose. The scene repeated with the employer again asking Celia if she had hurt her. The third time when Celia answered, the employer took her by the jaw and slapped her face 'more than ten times'. Celia remained silent that night but indicated that she did not sleep, she cried all night. The morning of 29 October Celia informed her employer that she was terminating the contract. Celia left her employer's residence and sought help from a friend who advised her to go to the hospital. On the 30 October, Celia went to the hospital for examination and made a formal report of the assault to the police post at the hospital. Because the assault occurred outside the police area of jurisdiction, Celia was informed that she would have to go to the police station in the district where her employer lived. Celia later sought assistance from the NGO and was provided shelter while awaiting the police investigation and payment of her final entitlements.

On 8 November, Celia received a call from the police, asking her to go to the police station to provide a statement. She did so, accompanied by Rose (Case 12). After Celia and Rose had waited for some time, a police detective arrived and instructed Rose to leave the room so he could begin the interview. Celia reported that the detective asked her if the statement she had provided to the police at the hospital was

correct and she answered 'yes'. Celia said that the detective 'wrote and wrote, he wrote the whole statement without any question'. When he was finished writing, he asked Celia to sign the statement while using his hand to cover what he had written.

Celia asked why she 'should need to sign. I already had. I had already a statement in (place of prior statement), I did not change what is in my statement'. The detective responded, 'No your employer will pay you, your employer will give you the plane ticket. Nobody, nobody can know about this you and me only'. Celia again asked, 'why I need to sign sir?' The detective replied, 'Just sign it because your employer will give you the money, we'll pay you and she will give you the plane ticket, so that you can now go home. Don't worry me and you only to know this, nobody can know'.

Celia signed the statement and was provided a copy. Once Celia read the statement she realised that the statement did not reflect what she had previously reported. The detective had written (excerpt):

Q1. Are there any witnesses who can see the whole course that your employer assaulted on you, on your mentioned date and location?

A1. No, anyone was there, just only me and my employer.

Q2. According to the medical examination form of you done in (hospital), there were tenderness and bruising on your left face and left wrist respectively. Do you remember the causes of your injuries and happened on which day?

A2. I refuse to talk more about it and I decide not to inquire into my employer's liability, but I do remember all the things my employer she did to me. The requirement for me, not inquiring into my employer's liability is that my employer give me back all the things, passport, salaries and contract to me.

I have read the above statement and I have been told that I can correct, alter, or add anything I wish. This statement is true. I have made it at my own free will.

Realising the inaccuracy of the statements, Celia asked the detective, 'why like this Sir? This is a liar. I remembered all what my statement in the (hospital). You ask me before and then why you write it like this'. The detective continued to insist that the

statement was okay and the employer would pay all entitlements. When asked why she signed the statement, Celia replied that she was locked in the interview room and was afraid of the police, 'I'm afraid, maybe because they are the police sir so that's why I'm afraid. Because they locked me (locked inside interview room) sir so that's why I confuse already'.

Celia reported the incident to the NGO staff and was assisted in filing a complaint with the Complaints Against Police Office (CAPO). Celia was also scheduled for a conciliation hearing on 4 December 2015. Celia's claim against her employer consisted of outstanding wages, wages in lieu of notice, travel allowance, bus fare to the airport and airfare totalling \$8,936.08. Shortly after filing the complaint with CAPO, the employer paid the claim amount and a conciliation hearing was not necessary.

When I asked Celia if she understood what conciliation was and what she expected, she replied that she wasn't sure what conciliation was only that that is where she would settle her claim with her employer.

Celia was clearly in forced labour, she was involuntarily working excessive hours of 20 hours per day, she was being illegally deployed at the employer's father-in-law's residence in violation of her contract, she was experiencing strong coercion through physical assault, and her documents had been seized by the employer, all strong forms of coercion. The police response was ineffective, not only in relation to the assault for which they had a medical report, but the detective (although providing a false report protecting the employer) included in the statement that the passport and contract was in the possession of the employer and that the employer was willing to pay final salaries for signing the statement. The actions in this case clearly meets the criteria of forced labour but appeared to have been ignored. Regardless of the motivation, the resulting effect was the denial of an effective remedy for the harm caused. The employer escaped prosecution for the assault, the crime of forced labour went unrecognized and again the only sanction of the employer was the payment of entitlements that was already owed.

## **9.5.2 Corruption at conciliation**

### **9.5.2.1 Case 5 – Mariah**

Mariah (see Section 9.3.1.1) filed a claim with the Labour Department for contractual entitlements such as wages in arrears, travel allowance and airfare to her place of origin, with a total amount of just over \$8,000. On the day of the conciliation meeting, the employer failed to attend and Mariah met the Conciliation Officer alone. I was not allowed to accompany her, but she recorded the meeting on her phone which was later transcribed.

During the Conciliation meeting, the Officer continued the coercive practice that had been initiated by the employer and reinforced by the police, and the final denial of any remedy was to be delivered. The Conciliation Officer persuaded Mariah to withdraw her claim as, if she did not, the employer would decide to pursue the case of theft and assault. Mariah was advised to consider the predicament and to inform the Conciliation Officer of her decision. A week later she withdrew her claim and received nothing in compensation. She was advised to go to the Immigration Department for an extension of her visa and seek another employer. Mariah did receive the visa extension and approximately 2 weeks later I received a call that she had found a new employer.

Under the employment contract,<sup>675</sup> if a party fails to give the required notice of termination of the contract, they are obligated to pay one month's wages to the damaged party. In Mariah's case, if the assault charge against the employer had been pursued, she could have claimed constructive dismissal, arguing the employer's conduct was so egregious that she could no longer be expected to continue working there and she would be entitled to the wages in lieu of notice. The accusation of assault against Mariah worked in favour of the employer, since she could claim that Mariah was summarily dismissed for theft and assault.

Mariah was in forced labour and sought assistance from the authorities. Although she did not specifically report that she was a victim of forced labour, her report of the

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<sup>675</sup> Paragraph 10 states that any party can terminate the contract with one month's notice in writing. If one of the parties fail to give proper notice, they are obligated to pay one month's wages in lieu.

employer's treatment and her vulnerable status as a MDW should have been a trigger for a thorough investigation. Not only did Mariah suffer from the loss of all monetary entitlements, she was threatened with possible imprisonment. Denunciation to the authorities is often associated with workers with an illegal status, however workers with a legal status also suffer from threats of arrest or imprisonment for false crimes because of their status and discrimination. The police are likely to believe the employer, rather than the MDW.

#### **9.5.2.2 Case 7 – Sophia**

In early October, I accompanied Sophia to the conciliation hearing but was not allowed to attend due to the objection of the employer. After approximately an hour, Sophia emerged from the meeting visibly upset. She reported that the Conciliation Officer had informed her that the employer had filed a police report the day before, accusing her of mistreating her daughter by cutting the daughter's fingernails too short. The Conciliation Officer also told Sophia that the employer would file a counterclaim against her if she did not settle the claim and pursued it in MECAB. The Officer produced a settlement document that reflected a zero amount of settlement. Sophia expressed concern that the Conciliation Officer was trying to force her to settle. Unable to decide what to do, Sophia called MFMW and later indicated that she was encouraged to reject the offer of settlement and pursue the claim at MECAB.

### **9.6 Conciliation as a Barrier**

This section links the vulnerability of MDWs, barriers to accessing remedies for forced labour and the non-judicial resolution mechanism of conciliation, a form of Alternative Dispute Resolution (ADR) that produces inequitable outcomes. Literature on ADR and on barriers to remedies often cites findings to show that marginalised or poor communities are more likely to make use of the informal civil justice process or ADR.<sup>676</sup> However, the true effectiveness of this mechanism has been in dispute given that both parties to disputes are not always on an equal footing. These differences are often exacerbated due to deficiencies in the informal process,

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<sup>676</sup> Magdalena Sepulveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Access to Justice' (2012)

to include limited procedural protections.<sup>677</sup> Without the formal procedural protections offered in traditional courts, ethnic minorities and those at the lower end of the socio-economic spectrum in a society are placed at a further disadvantage in ADR settings.<sup>678</sup> Fiss long ago recognized the shortcomings of informal processes when vulnerable individuals are engaged with the system and warned that ADR should be seen as highly problematic and should not be implemented in an indiscriminate manner.<sup>679</sup>

Laura Nader posits that power imbalances adversely impact the disadvantaged in society, '[U]nequal power does not enter the paradigm'.<sup>680</sup> Methods of ADR are not neutral because they are designed and implemented by parties, court administrators or governments who have specific goals and agendas.<sup>681</sup> To better evaluate and understand the use of a specific process, she suggests an interrogation of the purpose for which a dispute resolution process is created.<sup>682</sup> The questions to be asked toward this goal are:

- How did this particular institution come to be?
- What value does it serve?
- Who is achieving what with the particular structure of the system in place?

Nader's scepticism rests on the belief that power imbalances that exist within a given society find their way into the resolution process as well.<sup>683</sup> Her argument reinforces the claim that barriers to remedies are at times developed through poorly formulated

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<sup>677</sup> Harry Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?', *Harvard Law Review*, Vol. 99, No.3 (Jan., 1986), pp. 679

<sup>678</sup> Carrie Menkel-Meadow, 'Mothers and fathers of invention: The intellectual founders of ADR' (2000) 16 Ohio St J Disp Resol 1, p.13

<sup>679</sup> Owen Fiss, 'Against Settlement', *The Yale Law Journal*, [1984] vol. 93, p.1075

<sup>680</sup> Laura Nader, 'The ADR Explosion – The Implications of Rhetoric in Legal Reform', (1988) 8 Windsor YB Access Just. 269 p.282

<sup>681</sup> Menkel-Meadow, 'Mothers and fathers of invention: The intellectual founders of ADR' referencing the work of Laura Nader p.11-12

<sup>682</sup> Ibid

<sup>683</sup> Ibid. see also Sally Engle Merry, 'Disputing Without Culture', [1987] *Har. Law Rev.* vol.100 No.8 2057-2073, p.2070, '...the ADR movement seem naive about the political implications of alternative processes, failing to question sufficiently for whom these processes are designed, whose interests they serve, and what politically significant differences exist between forms and applications of ADR'.



laws, and policies which may reflect the values and interests of the elites in a society. Nader's position also dovetails with Fineman's vulnerability theory, that those more privileged in society disproportionately receive advantages. Nader's and Fineman's perspectives provides a framework to evaluate the appropriateness of conciliation when dealing with MDWs, in Hong Kong.

While ADR proponents argue for more use of informal mechanisms, the benefits afforded through the use of formal mechanisms are undeniable. The ongoing contention reflected in the ADR discourse evolves around how much procedural and substantive protections should be afforded to disputants as these protections are discarded in the name of efficiency. Formal mechanisms are more in alignment with international human rights norms discussed earlier and are better able to mitigate impediments to an effective remedy.

In the three sections below I will highlight the benefits of using the formal and adjudicatory processes. In section 9.6.1 I will discuss the benefits of formal mechanisms that provides more meaningful access to justice. In section 9.6.2 I will discuss procedural justice and the relevance of the perception of fairness and transparency. In section 9.6.3, I will discuss the often overlooked impact of culture on the resolution process and society as a whole.

### **9.6.1 Benefits of Formal Processes**

Formal mechanisms are consistent with human rights principles and jurisprudence and mitigates some if not all of the critiques of he use of ADR such as conciliation. The critiques relate to the lack of application of the law than enables vindication of rights, lack of protection that harms the vulnerable, losses to society through the private nature of Conciliation. Additionally, formal mechanisms it is argued mitigates discrimination and prejudice in the justice system.

#### **9.6.1.1 Formal Mechanisms**

Benefits related to formal mechanisms include the protection of rights granted by law, the availability of judicial review, the ability to enforce settlements resulting from a resolution process, the availability of legal representation, fairness in the process, and impartiality. Proponents for the use of ADR have long advocated its many positives, including greater efficiency in reaching a resolution, reduced

formality in the process and procedures, and reduced legal costs.<sup>684</sup> There appears to be significant agreement that, depending on the ADR process, some sacrifices of ‘public law rights ...such as the right to an attorney, due process and the appellate process’s assurance of accurate application of public laws’.<sup>685</sup> Many have recognised the need for legal protections and have advocated for ADR processes to be incorporated into the court system,<sup>686</sup> but there is concern that even this may not afford ADR parties the full protection of the law.<sup>687</sup>

Proponents of ADR even while promoting its use concede that ADR mechanisms are problematic for vulnerable individuals. Menkel-Meadow asserts that it is the participation in ADR and not substantive agreement that is required, even when mandated ADR processes are used as a means of diverting cases to ‘manage’ or reduce caseloads.<sup>688</sup> She contends that due or just process does not necessarily require litigation or a day in court. There is very little argument that the ‘creative and gentler’ forms of ADR such as mediation and conciliation can provide ‘greater access to more individualised justice in a variety of case types’ that affect the disadvantaged, and there are concerns of ‘equality, access, and economic support’.<sup>689</sup> She contends that creative and participatory problem-solving should be available to everyone and that ‘...access and resources are as important in mediation and consensus building as in the formal justice system’.<sup>690</sup>

Reuben<sup>691</sup> acknowledges the need for legal protections through application of law, but suggests developing an ADR mechanism that, while offering avenues of negotiation, must ensure that rights that are constitutionally protected remain in

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<sup>684</sup> Carrie Menkel-Meadow, ‘When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering’ (2002) 10 Wash UJL & Pol’y 37 p.42, *see also*, United Nations Development Programme, ‘Access to Justice: A practice note’ (2004)

<sup>685</sup> Richard C. Reuben, ‘Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Justice’ [2000] 47 UCLA L. Rev. 949 p.964, *see also* Rhode, *Access to justice*

<sup>686</sup> Edwards, ‘Alternative dispute resolution: Panacea or anathema?’ p.673, *see also* Reuben, ‘Constitutional Gravity’ p.958, *discusses constitutional integration*

<sup>687</sup> Richard C Reuben, ‘Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice’

<sup>688</sup> Carrie Menkel-Meadow, ‘Mediation, arbitration, and alternative dispute resolution (ADR)’ (2015) *International Encyclopedia of the Social and Behavioral Sciences*, Elsevier Ltd , p.4

<sup>689</sup> *Ibid* p.57

<sup>690</sup> *Ibid*

<sup>691</sup> Richard C. Reuben, ‘Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Justice’ [2000] 47 UCLA L. Rev. 949

focus. He proposes that in creating this mechanism, constitutional integration would need to be ‘minimal but meaningful’ to avoid recreating the litigation system. If due process standards are taken to extremes, it could erode the ADR process by limiting its informal nature and making rules complicated.<sup>692</sup> In his analysis of informal mechanisms - outside court constitutional protections are absent.<sup>693</sup>

Reuben contends that legal protections are greater in an adjudicatory process such as litigation or arbitration, while consensual processes such as mediation and conciliation offer far less protections. Reuben recognises the need for due process. Under the established system, an individual’s waiver of right to due process of legal claims is required. In the alternative process, ‘the waiver is of one’s substantive legal rights and most, but not all, of the full panoply of procedural rights available at trial’.<sup>694</sup> However, he further explains that for the waiver of one’s rights to be valid, the waiver must be voluntary, clearly and knowingly given. This voluntary and consensual waiver is less troubling to a settlement reached through ADR, but an agreement where there is no such waiver and where the process is compelled, it can result in the removal of available redress protections, either substantively or procedurally.

Resnik<sup>695</sup> and others believe that the requirement that ADR be used as a remedy amounts to unconstitutional evisceration of statutory and common-law rights. Those that advocate that the rule of law should remain in focus realise that ‘mechanisms for ADR should be cause for concern’.<sup>696</sup> In the traditional court system, the process is adversarial, adjudicatory in nature and focuses on the law.<sup>697</sup> ADR processes are informal in nature and operate outside the public view, while constitutional processes

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<sup>692</sup> Ibid p.1046; Carrie Menkel-Meadow, ‘Mediation, Arbitration, and Alternative Dispute Resolution (ADR)’ *International Encyclopedia of the Social and Behavioral Sciences*, para. 4.4

<sup>693</sup> Reuben, ‘Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice’, p.953

<sup>694</sup> Reuben, ‘Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice’ p.959

<sup>695</sup> Judith Resnik, ‘Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights’ *Yale Law Journal*, Vol. 124, No.8 [2015]

<sup>696</sup> Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, *Harvard Law Review*, Vol. 99, No.3 [Jan., 1986], pp. 668-684

<sup>697</sup> Ibid

are based on formality to ensure procedural fairness and assure public witness.<sup>698</sup> An ‘essential function of law is to reflect the public resolution of irreconcilable differences’<sup>699</sup> and the use of ADR may be more about getting rid of disputes instead of the application of law and vindication of rights.<sup>700</sup> Democracies enact laws that grant rights and protect them through application of the law that is predictable, non-arbitrary<sup>701</sup> and relies on formal processes to facilitate fairness.<sup>702</sup> Facts trigger consequences, and legal consistency is critical to society’s wellbeing.<sup>703</sup> If ADR disregards the facts raised during a dispute and the ‘relevant legal doctrine, then the goals of rights vindication, law application and predictability are diminished’.<sup>704</sup> ‘Once a law has been duly enacted its interpretation and enforcement is for the courts; courts have been instituted, not to mediate disputes, but to decide them’.<sup>705</sup> Arbitrators, like mediators and Conciliation Officers, are generally not bound by the law in the procedures or standards they use to resolve disputes, other than rules outlined in court-related programmes or defined in contractual documents.<sup>706</sup>

Genn<sup>707</sup> expresses similar views and argues that ADR can be an important supplement to courts and should be made available to anyone contemplating settling. It is not suitable in all cases, nor is it suitable for all parties, and therefore it should not be made compulsory.<sup>708</sup> One of the pillars of ADR is self-determination.<sup>709</sup> It is the belief in the act of disputing parties coming to a voluntary uncoerced decision

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<sup>698</sup> Ibid

<sup>699</sup> Edwards, ‘Alternative dispute resolution: Panacea or anathema?’ p.679, Reuben, ‘Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice’ p.961

<sup>700</sup> Edwards, ‘Alternative dispute resolution: Panacea or anathema?’

<sup>701</sup> Ibid

<sup>702</sup> Reuben, ‘Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice’ p.957

<sup>703</sup> Stephen N Subrin, ‘A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better than I Thought’ (2002) 3 Nev LJ 196, p.216

<sup>704</sup> Ibid

<sup>705</sup> Lon Fuller, ‘Mediation – It’s Forms and Functions’ 44 S. Cal. L. Rev. 305, [1971] p.328

<sup>706</sup> Reuben, ‘Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice’, Richard C Reuben, ‘Democracy and Dispute Resolution: The Problem of Arbitration’ (2004) 67 Law and Contemporary Problems 279

<sup>707</sup> Hazel Genn, ‘What is civil justice for? Reform, ADR and access to justice’, *Yale Journal of Law & the Humanities*: Vol. 24:Iss.1, Article 18. [2012]

<sup>708</sup> Ibid

<sup>709</sup> Timothy Hedeon, ‘Coercion And Self-Determination In Court-Connected Mediation: All Mediations are voluntary, But Some Are More Voluntary Than Others’. [2005] *The Justice System Journal*, Vol 26, 3

where both parties are responsible for crafting the process and outcomes desired.<sup>710</sup> In attempting to establish ADR as a viable alternative to litigation, there is a danger of overestimating what mediation can offer to the wide range of civil disputes.<sup>711</sup> There is the risk of losing the value of the public justice system and what it stands for.<sup>712</sup>

The role of law and the rule of law are fundamental to liberal democracies that emphasise justice and equality before the law.<sup>713</sup> Consensual forms of ADR such as negotiation, mediation and conciliation do not contribute to access to the courts because it is non-court related.<sup>714</sup> It does not contribute to substantive justice because parties are encouraged to relinquish their ideas of legal rights and instead focus on solving the problem at hand.<sup>715</sup> Mediators are not concerned about substantive justice because their role is to assist the disputing parties in reaching a settlement.<sup>716</sup> They do not make judgments about the merits of the case or the quality of the settlement.<sup>717</sup> The outcome is based on the parties' willingness to settle and reach an agreement that both can live with.<sup>718</sup> It is clear from Genn's commentary that Mediation and conciliation may provide a conclusion to the dispute but it does not provide access to justice.<sup>719</sup>

### **9.6.1.2 Protecting The Vulnerable**

This critique of ADR as lacking the ability to adequately protect the disadvantaged has 'bite',<sup>720</sup> and there appears to be significant agreement on this issue. There is hardly a commentator on ADR that does not acknowledge the potential negative effect of ADR on disadvantaged individuals and groups that are poorly resourced.

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<sup>710</sup> Ibid quoting from the American Arbitration Association *Model Standards of Conduct for Mediators* [2004]

<sup>711</sup> Genn. What is Civil Justice For? Reform ADR, and Access to Justice. Yale law School [2012], p. 411

<sup>712</sup> Ibid

<sup>713</sup> Ibid p.411

<sup>714</sup> Ibid

<sup>715</sup> Ibid

<sup>716</sup> Ibid

<sup>717</sup> Ibid

<sup>718</sup> Genn, 'What is civil justice for? Reform, ADR and access to justice,' *see also Fiss* 'Against settlement'

<sup>719</sup> Hazel Genn, 'Why The Privatisation of Civil Justice is A Rule of Law Issue', 36 F A Mann Lecture, Lincoln's Inn, 19 November [2012] p.16

<sup>720</sup> Surbin, 'A Traditionalist Looks At Mediation: It's Here to Stay And Much Better Than I Thought'

Two dilemmas present themselves when the disadvantaged are considered: first, there is an access problem, and then there is the imbalance of power issue.

Edwards<sup>721</sup> is concerned that the use of ADR affects future access and remedies for the disadvantaged. He warns that there must be careful attention taken that ADR does not diminish the development of legal rights or result in the reduction of possibilities for legal redress of wrongs suffered or by the poor, disadvantaged and underprivileged under the guise of ‘access to Justice and judicial efficiency.’<sup>722</sup> Inexpensive, expeditious and informal adjudication does not always equate with fair and just adjudication.<sup>723</sup> The practice of diverting cases from litigation limits the jurisdiction of the courts and may result in diminished rights for minorities and other groups, whose cases are in areas of civil rights, prisoner suits and equal opportunity<sup>724</sup> and these cases may be the first to be removed from the docket. To ensure that justice is served and rights protected, Edwards argues that ADR should not replace litigation, but that it should be used to make the traditional court system work more efficiently and effectively.<sup>725</sup>

Edwards<sup>726</sup> also recognises the problems with imbalances in resources. He asserts that in imposing ADR, decision makers may not understand the values at stake, as there is often a significant imbalance in power between disputing parties. Parties to disputes do not always possess equal power and resources, sometimes because of inequality, sometimes because of deficiencies in the informal process and sometimes because of the lack of procedural protections.<sup>727</sup> The critical nature of this imbalance lies in the fact that disputing parties may not have equal access to resources, and this harms their ability to adequately engage in negotiation.<sup>728</sup> Fiss<sup>729</sup> recognised this issue and argued that if disputes remain in the courts, the judge can level the playing

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<sup>721</sup> Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, *Harvard Law Review*, Vol. 99, No.3 (Jan., 1986), pp. 668-684

<sup>722</sup> Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, p.679

<sup>723</sup> *Ibid*

<sup>724</sup> *Ibid*

<sup>725</sup> *Ibid*

<sup>726</sup> Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, *Harvard Law Review*, Vol. 99, No.3 (Jan., 1986), p. 679

<sup>727</sup> *Ibid*

<sup>728</sup> Edwards, ‘Alternative dispute resolution: Panacea or anathema?’ p.679; Owen Fiss, ‘Against Settlement’, *The Yale Law Journal*, [1984] vol.93 p.1076

<sup>729</sup> Fiss, ‘Against Settlement’, *The Yale Law Journal*, [1984] vol.93 p.1077

field by asking questions, calling witnesses and asking other people and institutions to participate.<sup>730</sup> Litigation and ADR are about the ability to access and analyse data to develop legal awareness and an informed bargaining position.<sup>731</sup> Inequality to amass the required data affects the ability to adequately bargain a fair settlement.<sup>732</sup> Without the protection and the formality of the courts, racial and ethnic minorities and the economically disadvantaged will be taken advantage of by those more powerful within the informal, opaque and confidential settings of ADR.<sup>733</sup> ‘Disputes between people of unequal power are unlikely to be fairly settled by arbitration or mediation unless the force of law is available as a last resort’.<sup>734</sup> Weinstein<sup>735</sup> like Fiss<sup>736</sup> believes that the judge has an obligation to mitigate the imbalanced position of lesser-resourced disputants.

In addition to the issues of access to resolution mechanisms and the ability of accessing resources and necessary information, other imbalances have significant impact. Clarke and Davies<sup>737</sup> contend that where there are psychological or emotional imbalances, mediation or conciliation are inappropriate;<sup>738</sup> it exacerbates power imbalances and favours the emotionally and economically stronger person.<sup>739</sup> This may cause some to settle disputes for much less than they are entitled or would receive from a judge in a traditionally adversarial process<sup>740</sup> because of the inability to withstand long waiting periods for awards or protracted litigation or ADR processes.<sup>741</sup> ‘Compromise only is an equitable solution between equals; between

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<sup>730</sup> Ibid

<sup>731</sup> Ibid

<sup>732</sup> Ibid

<sup>733</sup> Laura Nader, ‘Disputing without the force of Law’, 88 *Yale Law Journal*, 998, 1003 (1979) p.1019 - 1020; see also Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, p.679

<sup>734</sup> Ibid

<sup>735</sup> Jack B Weinstein, ‘Some benefits and risks of privatisation of justice through ADR’ (1996) 11 *Ohio St J on Disp Resol* 241, p.260

<sup>736</sup> Fiss, ‘Against settlement’, p.1077

<sup>737</sup> Richard C. Reuben, ‘Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Justice’ [2000] 47 *UCLA L. Rev.* 949

<sup>738</sup> Gary R Clarke, Iyla T Davies, ‘ADR-Argument For and Against Use of Mediation Process Particularly In Family And Neighborhood Disputes’ *QUT LJ*. Vol 7 81-86

<sup>739</sup> Ibid quoting Laura Nader, ‘Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology’, 9 *Ohio St. J. On Disp. Resol.* 1, 3 [1993]

<sup>740</sup> Ibid p.968

<sup>741</sup> Fiss, ‘Against Settlement’, *The Yale Law Journal*, [1984] vol.93 p.1076

unequals it inevitably reproduces inequality'.<sup>742</sup> The use of alternative mechanisms may produce nothing more than inexpensive and ill-informed decisions<sup>743</sup> that may legitimise the decisions made by the existing power structure within society.<sup>744</sup> In theory, at least, the established court recognises everyone as equal and by design is intended to 'redress imbalances and protect against manifest injustice' but this protection is absent from many ADR processes.<sup>745</sup> Merry<sup>746</sup> suggests the claims of second-class justice fall on poorer disputants as they are less likely to afford legal help in contrast to wealthier disputants who use the alternative processes to sidestep expensive litigation<sup>747</sup> or settlement.

This discourse highlights the dilemma of MDWs and the lack of protection offered through conciliation. The lack of any structure that considers their disadvantaged status, limited legal awareness and the inability to overcome this barrier while negotiating with their more powerful employers or effectively argue their position to a Conciliation Officer or adjudicator cannot ensure a just outcome. Government policy that encourages conciliation without application of law also encourages employers to use time to their advantage as MDWs are less likely to withstand long waits before resolution and may settle claims for less than they believe they are entitled to.

### **9.6.1.3 Privatisation: Losses To Society**

The arguments surrounding the private nature of ADR and its use as a redress mechanism involve the claims of causing significant damage to the development of adequate public law, lack of contribution to society by preventing citizen participation, regulation of behaviour, education of the public, and its ability to mitigate bias and ensure neutrality and public oversight through the transparency of the process. 'For law to serve its function as giving expression to enforceable

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<sup>742</sup> Richard C. Reuben, 'Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Justice' [2000] 47 UCLA L. Rev. 949, *referencing Jerold S. Auerbach, 'Justice Without Law?'* [1983] 136

<sup>743</sup> Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, p. 679

<sup>744</sup> *Ibid*

<sup>745</sup> Weinstein, 'Some benefits and risks of privatisation of justice through ADR', p.246

<sup>746</sup> Merry, 'Disputing without culture', p.2067

<sup>747</sup> *Ibid*



behavioural norms, it must be made publicly for all to see'.<sup>748</sup> Various forms of dispute resolution have different effects on individual disputants and on society as a whole.<sup>749</sup> When disputes are handled publicly through litigation, the resolution of those disputes will have an effect on the whole of society, either formally through precedent or informally by notifying wider society how the matter was resolved.<sup>750</sup> Closed processes preclude the public from assessing the qualities of what gains the force of law and participation through debating what law ought to require.<sup>751</sup> There may be benefit to the public to have information revealed in a suit or dispute,<sup>752</sup> involving abuse of workers in corporations, manufacturing or domestic households. The diffusion of disputes to a range of private, unknowable alternative adjudicators also violates the constitutional protections accorded to the public who have the right to observe state-empowered decision makers as they impose binding outcomes on disputants.<sup>753</sup> It is through public legal proceedings that the court has the opportunity to act on the behalf of wider society which is not party to the litigation or dispute but may be affected none the less.<sup>754</sup> These public processes can inform the public and increase awareness of laws, rights and the avenues for seeking remedies and the manner in which important legal societal issues are resolved.

Genn<sup>755</sup> explains that the rule of law contributes to society by transcending private interests and contributes quietly and significantly to social and economic wellbeing. The courts have very important functions in providing protections against arbitrary government actions; they promote social order, facilitates the peaceful resolution of disputes and protects rights. In the adversarial process, the disputing parties offer their version of the facts and the laws that support their argument. The proceedings are conducted within established rules and procedures developed over time through case law and legislative bodies. In publishing their decisions, courts communicate

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<sup>748</sup> Weinstein, 'Some benefits and risks of privatisation of justice through ADR', p.246

<sup>749</sup> Jean R Sternlight, 'ADR is here: Preliminary reflections on where it fits in a system of justice' (2002) 3 *Nev LJ* 289, p.296

<sup>750</sup> *Ibid*

<sup>751</sup> Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' *Yale Law Journal*, Vol. 124, No.8 [2015]

<sup>752</sup> Weinstein, 'Some benefits and risks of privatisation of justice through ADR', p.263

<sup>753</sup> Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015)

<sup>754</sup> Weinstein, 'Some benefits and risks of privatisation of justice through ADR', p.279

<sup>755</sup> Genn, 'What is Civil Justice For? Reform ADR, and Access to Justice'

and reinforce civic values and norms. The state's responsibility to provide '...effective and peaceful forums for the resolution of disputes is being shrugged off through a discourse that locates civil justice as a private matter than as a public and socially important good'.<sup>756</sup> The private value of civil justice is the resolution of disputes, while the public function is linked to adjudication. According to Genn,<sup>757</sup> authoritative judicial decision serves the public good by creating the framework critical in common law systems. It provides the coercive underpinning that brings unwilling litigants to the negotiation table and makes it possible for disadvantaged litigants to take on more powerful opponents in an attempt to vindicate their rights and expose wrongs.

The reduction in court cases as a result of ADR diminishes the value of public adjudication and the loss of precedent that is critical in common law systems. 'It is mostly by chance and individual circumstances which brings cases before the court rather than by any design purposefully intended for the planned development of the law'.<sup>758</sup> Less than three percent of cases make it to trial, resulting in the deprivation to society of the opportunity to participate in governing, and in the public airing of important issues, whether as a result of settlement through mediation, arbitration or some other form of non-judicial method.<sup>759</sup> Public adjudication is the lifeblood of common law, without which it will die.<sup>760</sup> A constant stream of cases is necessary to continue to provide guidance on the law, refine its application and on occasion make new leaps.<sup>761</sup> The public determination of legal rights is to provide authoritative statements of what the law is, who has rights and how those rights are to be

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<sup>756</sup> Ibid p.398

<sup>757</sup> Ibid

<sup>758</sup> Wayne Martin, The Honourable chief Justice of Western Australia, '*Managing Change in the Justice System*' [2012] Brisbane 18 AIJA Oration

<sup>759</sup> Subrin p225, see also Edwards n 503 p670 'ninety percent of all cases are settled prior to adjudication'.

<sup>760</sup> Martin, '*Managing Change in the Justice System*' p.13

<sup>761</sup> Genn, '*What is civil justice for? Reform, ADR and access to justice*, p.398; see Edwards, '*Alternative dispute resolution: Panacea or anathema?*', p.679, also Weinstein, '*Some benefits and risks of privatisation of justice through ADR*', p.246 '*Widespread privatisation of dispute resolution has the potential to stunt the common law's development as entire areas of law are removed from the courts; deprive the public of important information*'

vindicated.<sup>762</sup> For civil justice to perform its public role, adjudication and public promulgation of decisions is critical.<sup>763</sup>

Fiss argues that opposing ADR processes is not intended to force disputants into litigation, since that would interfere with their autonomy.<sup>764</sup> He suggests that it merely means that society gets ‘less than what appears’ at an undetermined cost leaving gaps in justice.<sup>765</sup> This high rate of resolution seems to support Merry’s<sup>766</sup> research that found individuals preferred to talk over their problems and were not overly litigious, however, by the time a dispute has escalated to the point of requiring outside intervention, the parties had come to view the dispute in terms of rights and principles and no longer wanted to discuss the matter.<sup>767</sup>

It can be argued that the lack of recognition of forced labour as a crime and the limited use of judicial determination results in a lack of jurisprudence and education on an issue that bears significant importance to the public and the more than 350,000 MDWs in Hong Kong. The preference for conciliation also fails to prevent the impunity of violators who subject MDWs to forced labour conditions and reduce the high prevalence of forced labour. MDWs who finally decide to file a claim against their employers are less likely to be interested in a settlement because it nullifies their original financial goals and, if a victim of forced labour, may seek to have their employers punished.

#### **9.6.1.4 Discrimination**

The sections above have addressed concerns of ADR in terms of the functionality of the process itself, the effect of the process on its users and on society generally, the role of the courts, and issues of access and fairness, legitimacy and transparency. The focus on the effectiveness of mitigating these concerns assumes that the mechanisms are implemented in its purest form, to say there is no malfeasance in its

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<sup>762</sup> Ibid p.13

<sup>763</sup> Ibid see also Fiss, ‘Against settlement’, p.1085

<sup>764</sup> Ibid p.1085

<sup>765</sup> Ibid

<sup>766</sup> Merry, ‘Disputing without culture’, p.2063

<sup>767</sup> Ibid *see also* Fiss, ‘Against settlement’, p.1075

implementation. The latent prejudice and indifference within the system is often overlooked.

Delgado observed that the issue of racial and ethnic bias was absent from the discourse on ADR.<sup>768</sup> Relying on several research theories on the subject of prejudice, he concluded that to mitigate the introduction of prejudice in the system, disputes were best resolved using the formal court process, especially if there were imbalances in status. He argued that responsibility of equalising the imbalances falls on the court and the trial judge, using the established rules and applying them even-handedly. The rules require judges to recuse themselves and jurors to be disqualified if there is a conflict of interest or they cannot be impartial. They allow challenges to decision makers who may exhibit bias that might affect the fair process or outcome. Another manner in which prejudice or bias is mitigated is through judicial decisions: '[i]t puts judges' reasoning into the public record, allows for appellate review and encourages judges to find facts in an unbiased manner.'<sup>769</sup> Delgado believed that, although judicial proceedings do not guarantee an error free process, the use of closed door ADR creates greater opportunities for prejudice. Highly prejudiced people tend to externalise their prejudice toward groups or individuals who are highly visible with little power to retaliate driven by the need for status and power in personal relationships, and once acquired, prejudice tends to persist and is reflective of the individual's social group. To reduce the likelihood of prejudice, Delgado argued that three conditions need to be met: first there must be equality established between the parties; second, the engagement must be seen as mutually beneficial and not antagonistic or threatening; and third, individualisation must be established and must be intimate rather than casual or impersonal.<sup>770</sup> The court provides the atmosphere, rules and expectations to mitigate overt prejudice, and the adversarial nature of the court has been shown to limit bias of the decision-maker in that it counteracts the natural tendency for swift judgments. When the decision-maker or third party in alternative processes are from the superior group or class, the danger of

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<sup>768</sup> Richard Delgado and others, 'Fairness and formality: Minimising the risk of prejudice in alternative dispute resolution' (1985) *Wis L Rev* 1359, p.1367, Three theories on prejudice contributed to the findings, psychodynamic, social-psychological and economic.

<sup>769</sup> *Ibid* p.1373

<sup>770</sup> *Ibid* p.1386

prejudice increases and therefore the disadvantaged disputants should opt for a formal adjudicatory process. Delgado concluded that disputants of equal resources are more likely to benefit from ADR and any party desiring the assistance of an advocate, attorney or experienced representative should have the ability to secure one or be provided with one.

### **9.6.2 Procedural Justice As Fairness**

Procedural fairness not only recognizes the importance of rules and procedures intended to ensure fairness but also the perception of fairness. According to Maiese, procedural justice is action in accordance with the requirements of law, and when an action seems to violate some universal rule of conduct it is likely to be called ‘unjust’.<sup>771</sup> She contends that justice pays due regard to the proper interests, property, and safety of others using rules to ensure that people receive their ‘fair share’ of benefits and burdens and adhere to a system of ‘fair play’. The expectation of those involved in a dispute is that the process will be fair and that any decision maker will treat them equally. Thus, the principles of equity and equality are most relevant in the context of distributive justice.<sup>772</sup> They focus on the idea that fair treatment is a matter of giving people what they deserve. The principles of fairness are also central in procedural, retributive, and restorative justice ensuring procedures that generate unbiased, consistent, and reliable decisions so that a just outcome might be reached.

To ensure ADR procedures of negotiation, mediation and conciliation and legal proceedings are fair, any third party carrying out the procedures must be impartial and be capable of making a just decision based on relevant information; ‘For example, judges should be impartial, and facilitators should not exhibit any prejudice that gives one party unfair advantages’.<sup>773</sup> According to Maiese, rules should also be impartial and consistent to ensure equal treatment and do not favour some people over others to ensure a level a playing field for all involved, and disputing parties want their voices heard and they need to be part of the decision making process. This need is referred to as the principle of standing, it suggests that people value their

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<sup>771</sup> Ibid

<sup>772</sup> Ibid

<sup>773</sup> Ibid, p.3; *see also* Hollander-Blumoff, ‘Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution’, p.5, p.8

membership in a group and those societal institutions and decision-making procedures should affirm their status as members. 'Fair treatment by an authority can reveal that one is a valued, or not valued, member of a group, which in turn has the potential to affect one's self-esteem, one's sense of self-worth, and one's social identity'.<sup>774</sup>

'In particular, disadvantaged members of a group or society should be empowered and given an opportunity to be heard. When decision-making procedures treat people with respect and dignity, they feel affirmed. A central premise of restorative justice, for example, is that those directly affected by the offense should have a voice and representation in the decision-making process regarding the aftermath of the offense, be it punishment and/or restitution'.<sup>775</sup>

Disputants want to tell their story to convince a third party about their position, and have a decision rendered in their favour.<sup>776</sup> They care whether they had the opportunity to tell their version of the story.<sup>777</sup> The importance of being heard also influences the perception of neutrality in decision-making, because neutrality involves the use of 'objective information about the situation, people are more likely to view procedures as neutral when they are given an opportunity to present evidence and explain their situation'.<sup>778</sup>

A number of experiments involving disputing parties and their opportunity to be heard have concluded that it has a significant effect on the perceptions of procedural justice:<sup>779</sup>

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<sup>774</sup> Hollander-Blumoff and Tom R. Tyler, *Procedural justice and the rule of law: fostering legitimacy in alternative dispute resolution*, p.6

<sup>775</sup> *Ibid* p.10

<sup>776</sup> *Ibid* p.12; see also Lon Fuller 'Adjudication and the rule of Law' *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, Vol. 54 (APRIL 28-30, 1960), p.5 'Adjudication is a form of social decision which is characterised by a peculiar mode of participation accorded to the affected party, this participation consisting in the opportunity to present proofs and arguments for a decision in his favor. Whatever impairs the meaning and force of that participation impairs the integrity of adjudication itself'.

<sup>777</sup> Hollander-Blumoff, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', p.5

<sup>778</sup> Tom R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law', (2003) *Crime and Justice*, University of Chicago Press, Vol. 30, p.350

<sup>779</sup> Nancy A. Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?', (2001) 79 *Wash. U. L. Q.* 787 p.821-822, *referencing E. Allan Lind, 'Procedural Justice, Disputing, and Reactions to Legal Authorities'*, p.180

‘When disputants feel that they have been allowed a full opportunity to voice their views, concerns, and evidence, the disputing process is seen as fairer and the outcome is more likely to be accepted’.<sup>780</sup>

The opportunity for voice not only applies in the courtroom or ADR proceedings, but also in contact with the police and in political decision making and work in organisational decision-making.<sup>781</sup> ‘Even in countries where the judicial systems typically use non-adversarial procedures, citizens often prefer procedures that allow a full opportunity for voice’.<sup>782</sup> Both field and laboratory studies have concluded that the opportunity for voice heightens judgments of procedural justice even when disputants knew that their voice would not influence the final outcome.<sup>783</sup>

Procedural justice is concerned with the fairness of the procedures or processes that are used to arrive at outcomes. ‘Distributive justice, in contrast, focuses on perceptions of and criteria to determine the substantive fairness of the outcomes themselves’.<sup>784</sup>

If members of society believe that authorities are concerned with their well-being and needs and they are treated with dignity and respect, they are more likely to trust the system that is designed to resolve their disputes. One measure of fairness is whether people’s judgments of procedural fairness result from perceptions that they have been treated ‘honestly, openly, and with consideration’.<sup>785</sup> If they believe that the authorities took their viewpoints into account and tried to treat them fairly, they are more likely to support and engage in the broader social system. Maiese argues that, in the absence of fairness, confidence in an organisation’s or society’s institutions may be undermined. If procedural justice principles are applied effectively, organisations and societies will tend to be more stable and its members will feel satisfied and secure.<sup>786</sup>

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<sup>780</sup> Welsh, ‘Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?’, p.821

<sup>781</sup> Ibid, p.821

<sup>782</sup> Ibid

<sup>783</sup> Ibid p.822

<sup>784</sup> Ibid p.817

<sup>785</sup> Michelle Maiese, ‘Principles of justice and fairness’ p.6

<sup>786</sup> Ibid p.5

Procedural justice (fairness of the process) is also of significance as it affects the legitimacy of governments and institutions. Gangl's<sup>787</sup> research finds that perceptions of procedural justice are more important than preferred outcome when the process is perceived favourably. When disputes are portrayed as balanced and inclusive of the differing points of view, people's assessments of the fairness of the process or its procedural justice improves, and they accept the legitimacy of the process. In contrast, when issues are closed and partial to one side, people's policy preferences become more important and they question the legitimacy of the process. She also found that the type of issue under consideration affects the extent to which process considerations rather than the preferred outcome informs people's legitimacy assessments. This imperfect relationship suggests that perceived fairness increases the likelihood that people report that the outcome matched their own preferred position. It also suggests that people are more likely to accept a decision that is not entirely consistent with their own initial policy predispositions when the process is perceived favourably. Fair procedures contribute to the legitimacy of and acceptance of the decisions reached.

Gangl's findings and those of Maiese suggest that fairness, equality in treatment and impartiality of the decision maker must be accompanied by transparency of the process, participation and a perception of fairness which is critical to lending legitimacy to governments and institutions. Sternlight reinforces both Gangl and Merry with the assessment that '...the subjective perception of fairness is critical, because even assuming objective fairness, the system could not function well if it were perceived to be unfair or unjust'.<sup>788</sup> She further contends that the legal system should be designed in such a way that it earns the trust and respect of the society, or else lawlessness and violence may occur. Thus, in designing the system, more research needs to be done to determine what disputants want, and what they perceive to be fair, sufficiently accessible and is perceived to treat like claims equally'.<sup>789</sup>

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<sup>787</sup> Amy Gangl, Procedural Justice Theory and Evaluations of the Law-making Process, 25 *POL. BEHAV.* 119, 121 (2003) p.127

<sup>788</sup> Jean R. Sternlight, 'ADR is here: Preliminary Reflections on where it fits in a system of justice', [2003] 3 *Nev. L.J.* 289, p.297

<sup>789</sup> *Ibid*



### 9.6.3 The Impact of culture

In examining the place and role individuals play in the dispute process, the impact of culture may sharpen the focus on what really leads to settlement. In resolving a dispute, an individual essentially has three options, avoidance, mediation or conciliation, and adjudication.<sup>790</sup> In some cases we can avoid the conflict altogether, for example, by simply not patronising a business that we have a dispute with or deciding not to file a claim against an employer. Another option is that we mediate, using a third-party neutral to secure agreement between disputing parties. There are others that may seek the full force of the law and will wait for their day in court and seek resolution through adjudication.

One early theory on cultural ties was proposed by Felstiner<sup>791</sup> and focused on ‘social organisation’ which determined that successful dispute processing was based on multiple variables, influenced by the types of social organisations available for dispute resolution and the importance of personal relationships and cultural ties. He defined social organisation as any regularity in geographic, economic, kin or other relationships among people in a single society. According to Felstiner, there are two different types of social organisations when it comes to resolving disputes, the Technologically Complex Rich Society (TCRS) and the Technologically Simple Poor Society (TSPS). TCRS do not follow the traditional norms as high mobility may mean that there are large geographic distances between disputants, and there are no bonds between family groups, rather a bond between individuals and there is no reliance on the extended family for companionship, economic, political or educational support.

In TSPS, geographical distances are smaller in this group and friends tend to be neighbours and rely on each other for support. Work in the community tends to be a cooperative effort. The differences in organisation of these two groups (TCRS and TSPS) give an understanding of why and how the choice of resolution mechanisms

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<sup>790</sup> William L.F. Felstiner, Influences of Social Organisation on Dispute Processing, 9 *Law and Society Review*, (1974) p.76

<sup>791</sup> Ibid

is influenced.<sup>792</sup> It also demonstrates that the choice to use litigation has then to do with the closeness of individual relationships and sense of community bonds.

Felstiner identified five variables that he considered critical to successful resolution that may suggest that successful resolution which includes the participant's willingness to settle may be best suited to neighbourhood resolution, smaller communal groups or people belonging to the native population. The variables identified are, geographical distance, the presence or absence of a social group, the presence or absence of coercive power, the need to preserve the relationship and a willingness to resolve the dispute, all necessary elements to successful resolution of the conflict. He concluded that, should the dispute require adjudication by a third party, that third party must have available to them a form of coercive power such as the court.

In research conducted on political conflict and violence, Ross<sup>793</sup> investigates the relationship of cultural and cross-cultural ties to internal and external violence and conflict. The research does not specifically refer to Felstiner's work, but it reaches the same conclusion; that is, cross-cultural '...ties link different members of the same community and different communities in the same society'.<sup>794</sup> These cross-cultural ties limit the existence or severity of conflict, promotes dispute settlement through interests shared by the group and individuals. In providing social and political links among differing groups and communities there is a reduced risk of conflict and polarisation.<sup>795</sup> This research, while focusing on a broader social issue of cultural dynamics on conflict highlights the importance of exposure to and establishment of ties across communities and the individuals place within those

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<sup>792</sup> see also see Manuel Gomez, All In The Family, The influence of Social Networks on Dispute Processing (A Case Study of A Developing Economy), *Georgia Journal of International and Comparative Law*, vol.36, 2 [2008] 300-302 Gomez cautions, research shows, even in the societies that contain many features of modernism, indigenous aspects often play an important role. An understanding of how social institutions perform is best gained by looking beyond the 'apparent' modern/ traditional dichotomy that prevailed in scholarly discourse. See also, Alexandra Crampton, Addressing Questions of Culture and Power in the Globalisation of ADR: Lessons from African Influence on American Mediation, *Journal of Public Law and Policy* vol. 27 [2006] 231-234 discussing the 'Kpelle Moot' project by Danzig, Lowy and Wahrhaftig to apply Ghanaian practice to the United States

<sup>793</sup> Marc Howard Ross, 'A cross Cultural Theory of Political Conflict and Violence' *International Society of Political Psychology*, vol.7, No.3[1986] 427-469

<sup>794</sup> Ibid

<sup>795</sup> Ibid

communities. Donnelly contributes to this perspective, referring to understanding of rights in differing cultures as ‘horizons’. He explains that, in order to effect change concerning rights in differing cultures, one may have to ‘cross or penetrate foreign horizons to persuade people of another culture to accept certain rights, ... rights are always understood within a horizon and from a point of view...’.<sup>796</sup>

In contrast to Felstiner’s early theory and Ross’ more recent research, other early scholars were more narrowly focused on individual needs in the dispute resolution process and recognised the importance of individual relationships. Fuller’s theory surrounding social reorientation highlighted this importance. He explained that the aim of the mediation process is to re-orient the disputing parties toward each other. Because the mediator has no coercive power and thus does not rely on rules to help achieve a settlement, they must help develop a renewed perception of their relationship and a change in their attitudes toward each other.<sup>797</sup> ‘Mediation in Fuller’s words is for the “administration and enforcement of rules of social norms” between parties, not for the creation of state-made law’.<sup>798</sup>

Menkel-Meadow, referring to work by Nader, explains Nader’s conclusion that a disputing process and the acceptance of that process by the larger community is intimately tied to the culture in which they are situated.<sup>799</sup> The way people process conflicts says a great deal about cultural values and its institutions will reflect those values. She suggests that introducing and implementing a resolution mechanism that is not compatible with existing culture is unwise.<sup>800</sup> Sally Engle Merry also argues that the ADR movement ‘ignores the social, cultural and political dimensions’ of alternative disputing processes and that ‘this neglect accurately represents the

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<sup>796</sup> Samuel JM Donnelly, ‘Reflecting on the rule of law: Its reciprocal relation with rights, legitimacy, and other Concepts and Institutions’ (2006) 603 *The ANNALS of the American Academy of Political and Social Science* 37, p.39

<sup>797</sup> Lon Fuller, ‘The forms and limits of Adjudication’ [1978] *Harvard Law Rev.* 92. No 2 353-409, Lon Fuller, *Collective Bargaining and the Arbitrator*. [1963] *Wis Law Rev.*

<sup>798</sup> Carrie Menkel-Meadow, ‘Mothers and Fathers of Invention: The Intellectual Founders of ADR’ Quoting Lon Fuller: *Mediation – Its Forms and Functions*. 44 *S. Cal. L. Rev.* 305 [1971]

<sup>799</sup> *Ibid* p.10-11 referring to Laura Nader, see also Sally Engle Merry, ‘Disputing Without Culture’, [1987] *Har. Law Rev.* vol.100 No.8 p206, ‘The way a dispute is handled depends on the structure of the society in which it arises and the social relationship between the disputing parties’.

<sup>800</sup> *Ibid*

unreflective nature of the ADR movement'.<sup>801</sup> She argues that the disputing process is different for each individual and is significantly affected by the culture in which they belong. Disputants with strong multi-stranded social relationships will seek resolution through compromise; however, those with single-stranded ties will seek victory in an adversarial process 'To understand disputing or any other social process, an observer must get "inside the heads" of the actors to discover what they think they are doing and what it means to them'.<sup>802</sup> The same can be said for users of the formalised justice system with each party having a different idea of what they are doing, the reasons for doing it and an expectation of the process.<sup>803</sup> Some may be concerned about protecting their own rights, while others may have an agenda of punishing perceived rule breakers.

This issue of the impact of culture on the individual's willingness to settle suggests that ADR may be incompatible in some cultures or where the disputing parties have conflicting cultural values, weak geographic ties or perceived lower socio-economic status and are seen as outsiders. As an example, migrant domestic workers lacking geographic proximity to family, perceived lower social status in the foreign environment and who are not recognised as members of the local community may find conflict with locals and even employers more likely and resolution of conflict more difficult, especially if the relationship involves ill treatment. Merry speaks to this issue, suggesting that 'small-scale societies' (Felstiner's TSPS) do not typically have a 'highly developed cultural awareness of legal rights, equality, or the rights to legal participation'.<sup>804</sup>

ADR is not and cannot be expected to be universal, since the manner in which disputes are settled is a reflection of the cultural values of a particular society.<sup>805</sup> The meaning, methods used and willingness to find resolution is intrinsically tied to the individual who is significantly influenced by the culture and society to which they

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<sup>801</sup> Sally Engle Merry, 'Disputing Without Culture', [1987] Har. Law Rev. vol.100 No.8 p.2060

<sup>802</sup> Ibid p.2064

<sup>803</sup> Ibid

<sup>804</sup> Merry, 'Disputing without culture', p.2062

<sup>805</sup> Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* [1990] Stanford University Press

belong.<sup>806</sup> The decision to force would-be litigants into the use of this mechanism fails to take into account the important role of the individual in the resolution process, and the decision to penalise, it is argued, turns a voluntary process into a coercive one that denies disputants constitutional protections of rights and streamlines court dockets by removing cases that appear trivial in nature.<sup>807</sup> It seems likely that political leaders will resist the creation of autonomous dispute resolution institutions, drawing those that are formed into the orbit of existing state-run institutions or relegating to the consideration of ADR only those cases that are deemed trivial.

## 9.7 Conclusions and Recommendations

An ILO study published in 2013<sup>808</sup> conservatively estimated the domestic worker population worldwide to be 53 million; this number represented an increase of 19 million from the mid-1990s. The study also found that 80% of domestic workers are women, with domestic work representing 7.5% of women's wages from employment worldwide. Overall, domestic work accounts for 1.7% of total employment worldwide and some 3.6% of all wage employment. Although domestic workers are a big part of the global economy, they continue to remain a group very vulnerable to exploitation and abuse at the hands of recruitment and employment agencies and their employers. The extreme dependency on an employer and the fact that most, if not all, of their work is in the privacy of households are huge contributory factors to that vulnerability.

The issues and concerns regarding domestic workers have been documented in numerous research studies over the last 70 years; yet these issues, and the abuses, continue to remain largely the same. Some of these abusive practices include verbal and psychological abuse, non-payment of wages, restrictions on their freedom of movement at their places of employment, cases, inadequate and abusive living conditions, and debt bondage. In the case of migrant domestic workers in particular,

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<sup>806</sup> Merry, 'Disputing Without Culture' p.2063

<sup>807</sup> Ibid p.2069

<sup>808</sup> ILO, Domestic workers across the world: Global and regional statistics and the extent of legal protection (ILO Geneva 2013)

their unstable immigration status in the host country and their lack of knowledge of the local language, customs and laws, substantially adds to their vulnerability.

While significant strides have been made globally, a lack of prioritisation of the issues concerning migrant workers, of which domestic workers are a subset, and a failure to enact appropriate legislation or gaps in existing legal schemes, continue to make domestic workers vulnerable to exploitation and abuse. Hong Kong's experience with migrant domestic workers is a microcosm of these global issues. Although there are a multitude of issues that plague Hong Kong over MDWs, the primary concern centres around the lack of a legislative framework that criminalises forced labour in accordance with the Forced Labour Convention No.29 (1930) and therefore ineffective in providing an effective remedy. This lack of a framework of laws and a supporting regulatory scheme effectively disengages the government from any aspect of involvement in issues related to the crime of forced labour, either proactively or retroactively. Relevant government agencies are not empowered, either through the provision of resources, or by an institutional priority, to prevent exploitation, to investigate legitimate complaints, or to prosecute those who are responsible for abuses, be they employment agencies or private individuals.

Victims have no real ability to protect themselves due to the policies of the government that act as contributory barriers to the existing impediments to accessing appropriate assistance. On the occasions that migrant domestic workers seek assistance from the police to report abuses, the police response is at times limited to a recommendation to the Labour Department of what is viewed as 'employer – employee' dispute. In most instances of complaints, the authorities do not document the complaints and there is almost no follow-up to investigate, to gather evidence, and to hold abusive employers accountable. Corrupt or indifferent police officials and Conciliation Officers appear to be simply focused on reaching a resolution to a case, often putting pressure on MDWs into withdrawing complaints, or siding with employers who might pursue false claims as a reprisal against a complaining MDW.

Viewed on a broader scale, the MDW scheme is designed either accidentally or intentionally to ensure subordination of MDWs. From the live-in rule that creates multiple dependencies of food, shelter and wages, excessively long working hours that remains unregulated, inadequate rest days, and exacerbated by recruitment debt,

further exacerbated by limited options of changing employers as a result of recruitment agency malfeasance of additional recruitment debt, compounded by the 'two-week' rule and a bias in favour of the employer regarding evidence concerning who terminated the contract constitutes the labour conditions minefield. To cap this inequitable scheme, MDW are then constantly pressured to negotiate with their employers through conciliation about how much of their already-earned wages and entitlements they would like to leave with the employer. Every itemised claim to the labour department reflects a contractually obligated entitlement.

When these obstacles are linked to the MDWs' lack of awareness of their rights, perception that they have 'no choice', and the cost benefit analysis of continued care of their families against pursuing the claim, their decisions to 'move on' become clear. Some MDWs may decide that it is in their best interest to forego a claim and as such conciliation should be available.

The lack of a comprehensive legal framework that addresses the inequalities experienced by MDWs and the privileges extended to employers demonstrate Hong Kong's lack of commitment to the protection of the migrant worker community.

The use of a form of ADR, conciliation has also added another layer of negative issues for the MDW. By its nature, the process of Conciliation is focused on assisting the parties reach agreement and is not concerned about substantive justice or even a fair result. Conciliation Officers may also bring their own biases into the process and they do not make judgements about the quality of the settlement or merits of a case.<sup>809</sup> Conciliation results in the reduction of procedural protections for redress of wrongs suffered by MDWs in the name of judicial efficiency.<sup>810</sup> Although judicial proceedings do not guarantee an error free process, the use of informal

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<sup>809</sup> Hazel Genn, 'What is Civil Justice for-Reform, ADR, and Access to Justice' (2012) 24 Yale JL & Human 397

<sup>810</sup> Harry T Edwards, 'Alternative dispute resolution: Panacea or anathema?' (1986) 99 Harvard Law Review 668

processes like ADR creates greater opportunities for prejudice<sup>811</sup> and can 'mask a world of mischief'.<sup>812</sup>

MDWs are at a real disadvantage because of their unequal bargaining positions. Their lack of awareness of their rights and the uncertainty of the processes intended to resolve their issues, places them in a psychological and emotionally disadvantaged position that makes conciliation inappropriate;<sup>813</sup> it exacerbates power imbalances and favours the emotionally and economically stronger employer.<sup>814</sup> Compromise is only an equitable solution between equals; between unequals it reproduces inequality.<sup>815</sup>

MDWs make no distinction between informal and formal processes for handling their claims. Prior to attendance to any of the redress forums, they exhibited the same high levels of anxiety. Their hope was that the Conciliation Officer, Adjudication Officer (MECAB) or the Presiding Officer (LT) was going to listen to them and would decide that they deserved to be paid what was allowed under their contract. For first time users of these redress mechanisms, one forum was just more formal than the others.

The experiences of MDWs mirror the warnings of Fiss.<sup>816</sup> The disparities between the parties influence the quality of settlement in three ways. First, the MDW is less able to gather and analyze the information needed to secure a successful outcome without assistance, and thus starts from a disadvantaged position in the bargaining process. Second, they need the awards they seek immediately and thus can be induced to settle as a way of accelerating payment, even though they may get less now than they might if they awaited judgment. MDWs because of their economic situation, they want their damages immediately and this need acts as

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<sup>811</sup> Delgado and others, 'Fairness and formality: Minimising the risk of prejudice in alternative dispute resolution' p.1367,

<sup>812</sup> Richard C Reuben, 'Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice' (1999) 47 *Ucla L Rev* 949

<sup>813</sup> Gary R Clarke, Iyla T Davies, 'ADR-Argument For and Against Use of Mediation Process Particularly In Family And Neighborhood Disputes' *QUT LJ*. Vol 7 81-86

<sup>814</sup> Ibid quoting Laura Nader, 'Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology', 9 *Ohio St. J. On Disp. Resol.* 1, 3 [1993]

<sup>815</sup> Reuben p.968

<sup>816</sup> Fiss, 'Against settlement' p.1076



leverage for the employer. Because their need is so great the employer can force them to accept a sum that is less than their entitlement. Third, MDWs might be forced to settle because they do not have the resources to finance their own expenses while seeking a remedy. This last factor is exacerbated by governmental policy prohibiting employment while pursuing a claim.

In *ZN v Secretary of Justice*,<sup>817</sup> the government filed responses to the petitioners asserting that while Hong Kong lacked forced labour legislation, they did have relevant criminal laws that could be used to prosecute crimes like trafficking and forced labour. In rejecting this contention, the court found that the lack of a clear and applicable legislative scheme handicapped the government in meeting its responsibility to address forced labour.

As a practical matter, the lack of a legislative scheme puts the government of Hong Kong on the side lines when it comes to preventing and effectively addressing the crime of forced labour and all of the other related issues of concern. The institutional trickle-down effect is significant:

1. The practices of employment agencies, although regulated, are not closely scrutinised. Contracts that the MDWs sign and the terms of those contracts are rarely reviewed. Existing legislation that addresses recruitment fees has not stopped the pervasive practice of overcharging MDWs for seeking employment, creating a modern-day form of debt bondage. This recruitment practice ties MDWs to abusive situations for a minimum of 6 to 7 months, reducing their ability to leave an abusive employment situation.
2. Prospective employers are not properly vetted and cleared to hire a MDW. The primary criteria is their income and no physical inspection is done to ensure suitable accommodation or appropriate living and working environment. There is also no continued oversight of the employer once a MDW is hired to ensure compliance with applicable labour laws and adherence to the terms of the employment contract.

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<sup>817</sup> *ZN v Secretary of Justice and Others*, HCAL15B/2015

3. Immigration workers and police officers who interact with MDWs are not trained to recognise evidence of forced labour. Prosecutors in Hong Kong have not prosecuted a single case of forced labour in the last decade.
4. If a complaint is lodged, police officers are not trained adequately to handle the complaints, and not trained to provide assistance to victims while collecting evidence to support a potential prosecution case.

In addition to the lack of an appropriate legal framework, Hong Kong's policies regarding MDWs contribute significantly to creating the conditions for exploitation by employment agencies, employers in Hong Kong and, in some instances the government of Hong Kong. Two of the most egregious are outlined below:

Paramount among the policies is the 'live-in' requirement. This rule instantly creates an inequitable employer-employee relationship, handing over the control of almost all aspects of the daily lives of the MDW to the employer. One of the biggest issues of abuse this creates is that no distinction is made between work and time off. Domestic workers are not free to organise their time in any meaningful way, and are always at the disposal of the household to respond to possible needs. This stand-by duty in domestic work is not regulated, giving rise to misuse in the form of round-the-clock duty with no additional compensation or arrangements for compensatory time off. In addition to the unpredictability of the work hours, there is no adequate rest time, greatly affecting the quality of their lives. This routine practice also serves as an effective control mechanism for the employers, reducing MDWs' social interactions and isolating them from peers.

The two-week rule also undermines the ability of the MDWs to address issues related to their employment using established adjudication mechanisms. There is no provision in the rule for an objective examination of the reasons for the termination, or whether any contractual issues remain outstanding. Once a contract is terminated, even if for arbitrary reasons, the MDW must either resolve any outstanding issues within the 2 weeks allowed, or apply for an extension of their visa, which comes at cost. The minimum time frame for any formal adjudication via conciliation, MECAB or Labour Tribunal is calculated in months, not weeks, and each extension, with its attached costs, and the living expenses associated with a lengthy stay while not earning a salary make the use of any adjudication mechanisms prohibitive or at a

minimum, daunting. This rule creates an insurmountable financial penalty that cannot be recouped. It serves as a strong disincentive, and an almost coercive force on the MDW, to pursuing any legal claim, no matter how legitimate. This law also places more power in the hands of employment agencies and the employer, who fully realise that terminating a contract and ‘waiting out’ the MDW is a very viable option that carries no penalties.

Viewed as a whole, the policies in place are protectionist in nature, providing inexpensive labour for the citizens of Hong Kong with minimal regulatory oversight, while ensuring that any unwanted immigration is strictly regulated. With the employer allowed to hire a maximum of three MDWs per year, and a seemingly endless supply of cheap labour available to the employment agencies, the MDW becomes a disposable product with no legal rights and no legitimate recourse.

Hong Kong falls woefully short of its legal obligations on the protection of MDWs. Contrary to their binding agreements, no legal scheme is in place to serve as guarantor against the abuses of forced labour. The investigation and the criminal prosecution of employment agencies and individuals who commit forced labour, or may be committing other criminal acts in the recruitment and employment of MDWs, is not a priority for the government. This is evident from the lack any of regulatory scheme in place to oversee the health and welfare of the sizable MDW population in Hong Kong, and no institutional direction in any part of the government to proactively prevent the abuse of MDWs. This apparent institutional indifference, coupled with the lack of procedural protections of the informal adjudication mechanisms in place, effectively render them ineffective and legally insufficient.

### **Recommendations**

The following recommendations may be a starting point to address the shortcomings that have been identified:

1. Adoption of a comprehensive legislative framework that criminalises forced labour and all related criminal conduct;
2. Enactment of a regulatory scheme that oversees the recruitment and employment process, including all pre and post-contract issues, including

strict oversight of employers to ensure compliance with all health, welfare and labour laws and regulations;

3. Aggressive enforcement of national labour laws affecting MDWs;
4. Implementation of standard work hours regulations, with clearly articulated and achievable rest periods;
5. Implementation of a statutory minimum wage, with additional compensation for unscheduled work;
6. Prioritisation of the issues of forced labour and related criminal conduct related to employment abuses for investigation and enforcement with all relevant government agencies;
7. Elimination of conciliation as a settlement mechanism for all labour complaints, as the issue is payment for work already completed, and the result is the MDWs negotiating against themselves;
8. The expanded use of MECAB or Labour Tribunals to ensure application of Labour Ordinance for labour claims to include illegal recruitment agency fees;
9. The addition of interpreters and social workers to MECAB or Labour Tribunals to support MDWs when appropriate, particularly when filing claims;
10. The establishment of a government-supported Public Defender type of service for legal support of MDWs;
11. An increase in the enforcement power of the two mechanisms to ensure compliance with awards and penalties for non-compliance;
12. Criminal prosecution for forced labour offences;
13. Elimination of visa extension fees for MDWs with verified labour claims;  
and
14. Increased coordination with foreign governments to implement complementary rules and regulations to address issues such as consistency in the regulation of recruiters and employment agencies, pre-employment training, educating MDWs on their legal rights and issues related to repatriation for health or other reasons.

## **Opportunities for Future Research**

Two possible opportunities for future research are; the links between “Battered Woman Syndrome” and Domestic Workers and second, a doctrinal analysis to examine what exactly constitutes an widespread and systematic violation.

During the research many participants did not see themselves as victims. One interview in particular suggested a level of dissonance between the MDWs working conditions and their perception of autonomy. The participant indicated that they could set their own rest hours and decided what time to return home on her rest days. During the interview, the participant apparently became aware that her actions were in response to the fear of the reaction of her employer. She finally stated, ‘I guess I’m not as free as I thought.’ This interview bore similarities to “Battered Woman Syndrome” associated with domestic violence cases. The victim, through repeated coercive measures such as isolation and sporadic physical and psychological violence develops coping mechanisms to deal with the abusive conditions.

Second, a doctrinal analysis to examine the applicability of the widespread and systematic violation of forced labour standard, as articulated by the ILO<sup>818</sup> and attributed to a state and non-state actors, when the systemic and widespread abuse may be a result of actions of the citizens of that state, abetted by the negligence of the state in failure to adopt the necessary legislative, administrative and judicial framework to prevent, investigate, punish these violation.

‘A State which supports, instigates, accepts or tolerates forced labour on its territory commits a wrongful act and engages its responsibility for the violation of a peremptory norm in international law. Whatever may be the position in national law with regard to the exaction of forced or compulsory labour and the punishment of those responsible for it, any person who violates the prohibition of recourse to forced labour under the Convention is

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<sup>818</sup> International Labour Conference (96 Session) ‘Eradication of Forced Labour’ Report III (Part 1B) (2007) p.53

guilty of an international crime that is also, if committed in a widespread or systematic manner, a crime against humanity.<sup>819</sup>

This widespread and systematic use of forced labour paints a picture of large numbers of individuals forced to work involuntarily in harsh conditions and implemented by the State. Is there a difference between this vision and large numbers of individuals forced to work in harsh conditions in private homes without interference from the government? Is it the negligence of the government that qualifies or is it the number of persons subjected to the violation?

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<sup>819</sup> Ibid

# Appendices

## Appendix 1 – Indicators Screening Form

### Forced Labour Screening

DATE: \_\_\_\_\_

Terminated On: \_\_\_\_\_

MOBILE: \_\_\_\_\_

### ILO Indicators of Forced Labour

Abuse of Vulnerability Satisfied by any of the others (Dependency)	Deception Not What promised	Restriction of Movement	Isolation (Denial of Contact with others)	Education	Nationality			Years of Experience
					PH	IN	OTH	
	Wages - Underpayment	CCTV Cameras inside	Locked inside					Excessive overtime
	Abusive conditions	Guards to monitor	Seizure of Mobiles					Denial of work Breaks
	Poor Living Conditions	Excessive Phone Calls to monitor.	Comm. Devices					Denial of Rest days
	False Wages	Why is Camera there?	Denial of contact with others					24/7 on call
	Illegal Deployment	Rest Breaks Monitor						Excessive working Hours
	Contracted Employer							Work before/after rest
	Recruitment							Hours =
<b>Physical/Sexual Violence (to perform unwanted tasks)</b>	<b>Intimidation/Threats (other control mechanisms Psychological Coercion)</b>	<b>Retention of Identity Documents</b>	<b>Withholding of Wages (Deliberate to compel to remain?)</b>					<b>Abusive working Living Conditions</b>
Threats to family members	Threat of Termination	Seizure of Contracts	Illegal Deduction					Substandard Living Accommod
Forced drug/Alcohol	Forms of Punishment	Seizure of Passports	Failure to pay wages					Humiliating Work
Forced Prostitution	Insults/Demeaning	Seizure of ID's						Hazard no Protection
	Insufficient food							

(Highlight all that exists or add circumstances as necessary)

\*\*Restriction of Movement may be difficult to identify. Being free to enter and exit the workplace may not be feasible in residential employment (security/Safety concerns). Additionally, CCTV cameras may have legitimate use for monitoring small children in residence.

\*\*\*Isolation – in reference to the restriction of the use of communication devices during working hours, employer may have right to restrict?

\*\*\*\*Rest days – The Employment Ordinance defines as full 24 hours, however, MDW work prior to leaving the residence and are required back usually by a curfew 8:30pm. Again, security and safety concern. May be unrealistic to comply with the law.

## Appendix 2 – Information Sheet and Consent Form

### Centre for Applied Human Rights – Research Projects INFORMED CONSENT FORM FOR RESEARCH PARTICIPANTS

#### Information Sheet

**Purpose of the Study.** As part of the requirements for Doctor of Philosophy in Human Rights at the University of York, I am carrying out a research study that is concerned with whether the use of conciliation by the Labour Department in Hong Kong meets the international Human Rights standards of providing an effective remedy to Migrant workers for violations of human rights (forced labour).

**What will the study involve?** The study will involve the documentation of claims filed with the Labour Department for violations that are not consistent with international human rights law (claims may be a result of instances of forced labour). Documentation may involve **case studies, case file review, audio interviews and surveys**. If you participate in a case study, audio interview or survey, it is intended to gather information on: your perspective on the fairness of the claim process, the impact of time on your decision to settle, the amount claimed versus the amount settled and the level of confidence you had in presenting your case. Review of case files would reveal the perspective of the employer through any correspondence about your claim. It would also provide documentation on the circumstances of your claim as presented to the Labour Department in the form of statements and affidavits to determine if the contents clearly communicate the indicators of forced labour.

**Why have you been asked to take part?** You have been asked to participate in the study because you have a case or are planning to file a case with the Hong Kong Labour Department that can provide useful information in documenting the process used in resolving your case and identify any shortcomings in the resolution process. Additionally, based on the screening process completed \_\_\_ indicators of forced labour have been identified. There are 11 indicators of forced labour as identified by the International Labour Organization (See attached Document).

**Do you have to take part? The answer is no!** – Participation is strictly voluntary. The attached consent form states that you can withdraw from or refuse to participate in the study. Refusal will have no impact on the services offered by this (NGO)



office in assisting you with your case. You will get to keep this information sheet and a copy of the consent form. Where data are identifiable, (e.g. from interviews yielding qualitative data), it will be destroyed and not be used in the research.

**Will your participation in the study be kept confidential? Yes!** I will ensure that no clues to your identity appear in research or any future publication. Your name will not be used and any extracts from what you say that are quoted will be entirely anonymous and done only with your consent.

**What will happen to the information that you give?** All information you provide will be kept confidential from third parties (including workers' superiors, if relevant); the data will be kept confidential for the duration of the study. On completion of the thesis, the information will be retained for future reference or study. If it is not necessary or useful for further analysis, it will be destroyed.

**What will happen to the results?** The results will be presented in the dissertation. My supervisor will see them, and other University staff required to make assessments of my work. It may be read by future students and may be published in research journals and be publically available. It may also be presented to governmental institutions to effect needed changes in policies, laws and practices and also to NGOs as additional information for advocacy purposes.

**What are the possible disadvantages of taking part?** Depending on the circumstances surrounding your employment, recalling the circumstances may be distressing, however, the information you may give could be useful in identifying problems experienced by you and other Migrant Workers. If at any time you decide that you do not wish to continue taking part in any interview, you have the right to discontinue at any time. Your participation in this research or lack thereof will have no impact on any service offered by this (NGO) office.

**What if there is a problem?** At the end of the interview /process, I will discuss with you how you found the experience and how you are feeling. If you subsequently feel distressed, you should contact me (Reginald Frection) at 852-9680-6751 or my email at [rvf502@york.ac.uk](mailto:rvf502@york.ac.uk). You may also contact my Supervisor Marin Jones at +44 01904 325834 or email, [martin.jones@york.ac.uk](mailto:martin.jones@york.ac.uk).

**What if I decide later that I do not want my information or circumstances of my case included in this research?** If after the conclusion of your claim and interviews as part of your case, you decide that you no longer want your information or circumstances concerning your case included in the study, you will have 3 months from the date of the last interview to contact me and terminate your participation. Upon confirmation that you no longer desire to be a part of the study, all information collected from and about you will be destroyed and will not be included in any form as part of the study.

**Who has reviewed this study?** The Economics, Law, Management, Politics and Sociology (ELMPS) ethics sub-committee, part of the University's Ethics Committee must give approval before studies like this can take place.

**Any further queries?** If you need any further information, you can contact: Centre for Applied Human Rights, 6 Innovation Close Heslington, York, YO10 5ZF, UK work Tel: +44 (0)1904 325830.

If you agree to take part in the study, please sign the consent form overleaf.

# UNIVERSITY *of* York

## CONSENT FORM

Name of Researcher: Reginald V. Frection

Participant: \_\_\_\_\_

I.....agree to participate in the conciliation process research study.

**Please Check box.**

1. I confirm that I have read and understand the information sheet dated .....for the above study. I have had the opportunity to consider the information, ask questions and have had them answered satisfactorily.  YES  NO
2. I give permission for my interviews with **Reginald Frection** to be audio recorded.  YES  NO
3. I give permission to access my case file for review of correspondence from my employer, Labour Department and review of statements and affidavits.  YES  NO
4. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.  YES  NO
5. I understand that disguised extracts from my interview and other information given by me may be made publicly available and or be used in future reports, articles or presentations by the researcher.  YES  NO
6. I understand that my full name will not appear in any reports, articles or presentation.  YES  NO
7. I understand that I have up to 3 months from the date of my last interview to make contact with the researcher to withdraw from the study.  YES  NO
8. I agree to take part in the above study.  YES  NO

\_\_\_\_\_  
Name of Participant

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Researcher

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

**When completed, a copy will be given to the participant and the original to be kept in the file of the researcher.  
Participation in this study will have no effect on the provision of or access to NGO services.**

## Appendix 3 – Semi-Structured Interview Questionnaire

Forced Labour Questionnaire – Semi-Structured Interview

1

### Questions relating to the use of deception when recruiting adults

Deception can be considered a feature of involuntariness in all cases where, had the worker known the real working situation, he/she would not have accepted the job offer..

The first question seeks to assess the level of information that the worker received from the recruiter/employer and the promises made:

#### 1. For each of the following topics, can you tell me what level of information was given at the time of your recruitment?

	Not discussed with recruiter or employer	Promised/ agreed verbally	Written in contract	Not relevant
Living conditions				
Legal status				
Nature of the job				
Location of the job				
Employer's name/business				
Wages				
Volume of work (per day/week/ month/year)				

The term “recruiter” is used here to denote any third party (intermediary) who assists a child or adult worker, whether or not in return for a fee, to find or take up a job.

**2. As compared to the information you received beforehand, was the job you found on arrival as represented?”**

	Much worse	Worse	As promised/ agreed	Different but equally good or bad	Somewhat better	Much better
Living conditions						
Legal status						
Nature of the job						
Location of the job						
Employer’s name/business						
Wages						
Volume of work (per day/week/ month/year)						

**Questions relating to forced recruitment**

**3. Who took the decision that you should work?**

- myself
- a relative
- a third party
- the employer

4, Is the person who signed your contract the person that you perform work for? YES  NO

**5. Who chose the employer?**

- Myself alone or together with the employer
- a relative
- a third party
- the employer alone

**6. Were you free to refuse to work for this employer? Yes / No.**

**6(a). If No, what would you have risked in the case of refusal?**

- Nothing, but work opportunities are scarce
- The employer would have tried to prevent other employers in the area from hiring me
- Other people from my family would lose their job
- My family would have lost access to land or other productive assets
- Threats of violence against myself or my family
- Other

**Questions relating to working conditions of adults** The main aspects of exploitation that are taken into account are related to wages (amount and regularity of payments), hours of work (normal and overtime), days of weekly and annual leave, health hazards and protection, sick leave, social social security coverage and other benefits.

**Wages****7. According to your contract, when did your employment begin?**

- On arrival in Hong Kong
- On specific date
- Date Immigration Department approved your visa
- Unknown

**8. Have you been paid from the date specified in your contract?** YES  NO

**8(a). If no, when did your salary start to be paid and why the delay?**

9. Is your salary equal to or higher than the statutory minimum wage? YES  NO

10. Are illegal deductions from your salary made by the employer? YES  NO

11. Are you paid regularly on fixed dates? YES  NO

11(a). If no, why not?

12. **Are you provided receipts for wages?** YES  NO

13. **Are the receipts accurate?** YES  NO

14. Have you been provided with suitable and furnished accommodation? YES  NO

15. Are you provided with sufficient food? YES  NO

**Hours of Work**

16. How many hours do you usually work (per day/week)? \_\_\_\_\_  
 17. How many days of leave can you take per week? \_\_\_\_\_  
 18. How many hours are you actually off on your rest day? \_\_\_\_\_

**Questions relating to coercion, threats and penalties**

**19. In your job, does the employer force you to do any of the following?**

	Never	Sometimes	Regularly
Perform tasks that are not part of your contract or verbal agreement			
Perform hazardous tasks without adequate protection			
Perform work at a place other than the employer's residence?			
Provide sexual services for employer or associates			
Work for another employer without your consent			
Work for a longer period than agreed in order to be paid			
Commit illicit/criminal activities			

**20. What kind of force does the employer use against you?**

<ul style="list-style-type: none"> <li>• Physical violence</li> <li>• Non-payment of wages</li> <li>• Threats against myself</li> <li>• Threats against my family</li> <li>• Isolation, confinement or surveillance</li> <li>• Punishment (deprivation of food, sleep, etc.) Confiscation of identity papers or travel documents</li> </ul>	<ul style="list-style-type: none"> <li>• Threats of denunciation to the authorities or others</li> <li>• Outstanding debt or manipulation of the amount owed</li> <li>• Fines/financial penalties</li> <li>• Other, specify...</li> </ul>
---	---

**21. Can you leave your employer?**

- Yes, at any time, as long as the terms of the contract are respected (notice, etc.)
- No, because there are no jobs available locally
- No, the employer would not let me go [In this case, go to next question]
- I don't know

**22. What do you risk if you were to leave?**

- I would have no income
- I have to return to my home country and start all over
- The employer would get other employers from the area to boycott me or my family
- Violence to myself by the employer or recruiter
- Violence against my family
- Denunciation to authorities and possible deportation
- Other members of my family would be dismissed
- Loss of benefits for myself/members of my family

23. How much was your recruitment fee? \_\_\_\_\_

24. Did you have to borrow money for the recruitment fees? \_\_\_\_\_

25. Did you borrow from family members, money lender or loan company? \_\_\_\_\_

26. Why did you decide to stay? (for those remaining with employers and meet the criteria)



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